

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MOHAMED ARAFI,

Plaintiff,

v.

MANDARIN ORIENTAL,

Defendant.

Case No. 1:11-CV-01553 (HHK)

MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant Portal Hotel Site, LLC d/b/a Mandarin Oriental, Washington (the “Hotel”) (referred to as “Mandarin Oriental” in Plaintiff’s Complaint) moves to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

In support of this Motion, Defendant submits that:

1. Counts I and II, which allege unlawful discrimination and retaliation based on race in violation of 42 U.S.C. § 1981, should be dismissed because Plaintiff does not allege claims based on racial discrimination; rather, Plaintiff alleges claims based solely on religious discrimination.
2. Counts III and Count V, which allege unlawful discrimination based on race, color, religion, and national origin, in violation of 42 U.S.C. § 2000 (“Title VII”) and the District of Columbia Human Rights Act (“DCHRA”), should be dismissed for lack of subject matter jurisdiction because the Hotel is shielded from any liability pursuant to Title VII’s national security exemption. The Hotel was following a mandate from the federal government regarding a matter of national security and, as such, this event

cannot form the basis of Title VII liability. In addition, this Court lacks jurisdiction over Plaintiff's DCRHA claims because of Plaintiff's prior election of remedies. Counts III and Count V should also be dismissed for failure to state a claim upon which relief can be granted. Plaintiff has not alleged that he experienced an "adverse employment action" under Title VII or the DCHRA or that the Hotel treated him differently than similarly situated non-Muslim colleagues who were unable to secure a security clearance from the State Department.

3. Counts IV and Count VI, which allege unlawful retaliation in violation of Title VII and the DCHRA, should be dismissed, as Plaintiff has not asserted cognizable claims for retaliation. The Hotel is shielded from Title VII and DCHRA liability pursuant to Title VII's national security exemption. Furthermore, Plaintiff has failed to allege any statutorily protected activity in which he engaged.

WHEREFORE, Defendant respectfully requests that its motion be granted, and that the Complaint be dismissed in its entirety, with prejudice. A proposed order is attached.

Respectfully submitted,

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DATED: November 28, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendant's Motion to Dismiss was served on the 28th day of November, 2011 via electronic delivery upon the following:

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

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Defendant Portal Hotel Site, LLC d/b/a Mandarin Oriental, Washington (the “Hotel”) (referred to as “Mandarin Oriental” in Plaintiff’s Complaint) submits this Memorandum of Law in support of its Motion to Dismiss Plaintiff’s Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

I. PRELIMINARY STATEMENT

Plaintiff, a Laundry Valet Dry Cleaner currently employed by the Hotel, has failed to allege any facts suggesting that the Hotel discriminated against him based on his religion (Muslim) or any other legally protected status. Plaintiff brings this lawsuit as a result of the denial of a security clearance by the U.S. State Department (the “State Department”) and the Hotel’s subsequent enforcement of the State Department’s denial. In particular, prior to a two-day visit to the Hotel by the Israeli Defense Minister and his delegation (the “Israeli Delegation”), the State Department required the Hotel to provide a list of all colleagues¹ who could potentially have access to the Israeli Delegation for the State Department to conduct appropriate background checks. The State Department uncovered “irregularities” for several Hotel colleagues, including Plaintiff. The State Department instructed the Hotel to prohibit all of these colleagues, including Plaintiff, from having any access to the Israeli Delegation during its two-day stay at the Hotel. Plaintiff was only scheduled to work one shift during this visit.

As a result of the State Department’s directive, the Hotel instructed Plaintiff to refrain from servicing the two floors on which the Israeli Delegation was staying during his shift. This slight modification of Plaintiff’s job duties had absolutely no impact on his compensation, responsibilities, or employment status. Indeed, Plaintiff worked his entire shift as scheduled,

¹ The Hotel refers to its employees as “colleagues.”

was paid for all hours worked, and performed his regular duties as a Valet Dry Cleaner, without accessing the floors where the Israeli Delegation was staying. Even though the Hotel was required to abide by the State Department's directive, Plaintiff has alleged that the Hotel has discriminated against him by following this directive.

Plaintiff's Complaint should be dismissed in its entirety. *First*, even if Plaintiff had alleged violations pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and the D.C. Human Rights Act, D.C. Code § 2-1401.01, *et seq.* ("DCHRA"), the Hotel is shielded from any such liability pursuant to Title VII's national security exemption. Under this exemption, an employer following a mandate from the federal government regarding a matter of national security cannot form the basis of Title VII liability. Title VII's national security exemption applies to the Hotel's actions because the State Department specifically required Plaintiff to obtain a security clearance, yet the State Department did not grant him such clearance. Adjudicating Plaintiff's Title VII and DCHRA discrimination and retaliation claims necessarily would require this Court to evaluate the merits of the State Department's security clearance decision. This Court lacks jurisdiction to do so.

Second, this Court also lacks jurisdiction to adjudicate Plaintiff's DCHRA claims because he has chosen to first file a Charge of Discrimination ("Charge") with the U.S. Equal Employment Opportunity Commission ("EEOC") and the D.C. Office of Human Rights ("OHR"). Unlike its federal equivalent, the OHR provides a litigant with a choice of remedies. Where, as here, Plaintiff chose to pursue his Charge administratively to the conclusion of the OHR's investigation, he is necessarily precluded from bringing a subsequent lawsuit involving the same subject matter.

Third, Plaintiff has failed to state a claim upon which relief can be granted because he has failed to sufficiently allege at least two of the necessary elements of a *prima facie* case of religious discrimination. Specifically, Plaintiff's allegation that he was instructed not to service two floors of the Hotel during a single shift of employment does not constitute an "adverse employment action" under Title VII or the DCHRA. Further, Plaintiff has not asserted that the Hotel treated him differently than similarly situated non-Muslim colleagues who were unable to secure a security clearance from the State Department.

Fourth, Plaintiff did not exhaust his administrative remedies as to his claims based on race, color or national origin. Indeed, the Charge that Plaintiff filed with the EEOC alleged discrimination based only on religion. Plaintiff made no reference in his Charge to his race, color or national origin.

Fifth, Plaintiff has not asserted cognizable claims for retaliation under Title VII or the DCHRA, as the Hotel is shielded from any such liability pursuant to Title VII's national security exemption. Furthermore, Plaintiff has failed to allege any statutorily protected activity in which he engaged.

Finally, Plaintiff has failed to adequately plead claims for discrimination and retaliation based on race under 42 U.S.C. § 1981 ("Section 1981"). Plaintiff alleges claims based solely on religious discrimination. Even the most liberal reading of Plaintiff's allegations confirms that he is alleging that the Hotel discriminated against him solely because he is Muslim.

In short, there are no allegations in the Complaint that even suggest that the Hotel discriminated against Plaintiff based on his race, color, national origin or religion or retaliated against him. Although Plaintiff may have disliked the State Department's directive and disagreed with the Hotel's decision to carry out the State Department's directive, Plaintiff's

subjective beliefs are insufficient to plead an actionable cause of discrimination or retaliation. Consequently, the Complaint should be dismissed in its entirety.

II. ALLEGATIONS OF THE COMPLAINT

Background

Plaintiff alleges he is a Muslim born in Morocco, and is a citizen of the United States.² (Complaint ¶ 5, hereinafter referred to as Compl. ¶ _.) Defendant is an international hotel investment and management group with deluxe and first class hotels, resorts and residences in sought-after destinations around the world, including the Hotel located in Washington, D.C. which is the subject of this litigation. (*Id.* ¶¶ 5, 7.)

The Hotel has employed Plaintiff as a Valet Dry Cleaner since on or about November 11, 2009 and he continues to be employed in this position. (*Id.* ¶ 9.) As a Valet Dry Cleaner, Plaintiff's job duties require, *inter alia*, that he retrieve laundry from guests' rooms upon request, and deliver the laundered clothing back to the room. (*Id.* ¶ 9.)

Israeli Delegation Visit

The Israeli Delegation is a regular guest of the State Department. (*Id.* ¶ 16.) From December 10-12, 2010, the Israel Delegation stayed at the Hotel, on its 8th and 9th floors. (*Id.* ¶¶ 15, 17.)

Pursuant to the State Department's instructions, prior to the Israeli Delegation's visit, the Hotel provided the State Department with a list of Hotel colleagues scheduled to work who could potentially have access to the Israeli Delegation during its visit. (*Id.* ¶ 28.) The State Department conducted a background check on all such colleagues and the background checks

² While Defendant would dispute vigorously the facts alleged in the Complaint, including that he is a United States citizen, it takes them as true solely for the purpose of this motion.

revealed “irregularities” for several of them, including Plaintiff. (*Id.*) Accordingly, the State Department instructed the Hotel to prohibit those restricted colleagues from servicing guests on the 8th or 9th floors of the Hotel during the Israeli Delegation’s visit. (*Id.* ¶¶ 18, 26, 28.)

Pursuant to the State Department’s directive, on December 10, 2010, the Director of Housekeeping and Plaintiff’s direct supervisor, Ms. Elham Iskandar, instructed another colleague to retrieve the dry cleaning for Plaintiff from the floor on which the Israeli Delegation was staying. (*Id.* ¶ 17.) On or about December 11, 2010, Plaintiff spoke to a Hotel supervisor about this instruction. (*Id.* ¶ 17.) On or about December 13, 2011, Plaintiff also spoke to Ms. Iskandar about the Hotel’s decision to prohibit him from servicing guests on the 8th or 9th floors during the Israeli Delegation’s visit. (*Id.* ¶ 24.)

In response to Plaintiff’s concerns, Ms. Iskandar and the Director of Human Resources, Elizabeth Vita-Finzi, met with Plaintiff to discuss and explain the State Department’s directive. (*Id.* ¶ 28.) They informed Plaintiff that the Hotel had no information regarding the “irregularities” that the State Department uncovered. (*Id.* ¶ 29.) After Plaintiff’s meeting with Ms. Iskandar and Ms. Vita-Finzi, Plaintiff alleges that the Hotel reduced the number of hours that Plaintiff was scheduled to work in December and January during the typically low occupancy season. (*Id.* ¶ 30.) Plaintiff remains employed at the Hotel and his employment has not been restricted in any way. (*Id.* ¶ 29.)

In January 2011, Plaintiff filed a Charge with the EEOC and OHR alleging he had been discriminated against based on his religion and retaliated against in violation of Title VII and the DCHRA. (*Id.* ¶ 4); (Exhibit A).³ On May 17 2011, an EEOC investigator conducted a fact-

³ Plaintiff’s January 20, 2011 EEOC Charge is attached to Defendant’s Memorandum of Law in support of the Motion to Dismiss as Exhibit A. Plaintiff’s EEOC Charge is central to his claims and is referenced in the

finding conference which was attended by both parties. Following the fact-finding conference, the EEOC dismissed the Charge and issued a finding of no probable cause on May 31, 2011. (Exhibit B). Thereafter, Plaintiff filed this lawsuit.

III. STANDARDS FOR MOTION TO DISMISS

A. Standards Under Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for “lack of jurisdiction over the subject matter.” Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff’s case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Tabman v. FBI*, 718 F. Supp. 2d 98, 100 (D.D.C. 2010) (recognizing federal courts are of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so) (citing *Bethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 945 (D.C. Cir. 2005)); *Ibrahim v. Unisys Corp.*, 582 F. Supp. 2d 41, 44 (D.D.C. 2007) (“Federal courts are courts of limited jurisdiction and the law presumes that ‘a cause lies outside this limited jurisdiction.’”) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Because “subject-matter jurisdiction is an ‘Art[icle] III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.’” *Ibrahim*, 582 F. Supp. 2d at 44 (quoting *Akinseye v. D.C.*, 339 F.3d 970, 971 (D.C. Cir. 2003)).

Complaint. A court may consider documents incorporated into the complaint by reference without converting a motion to dismiss into one for summary judgment. *Colton v. Clinton*, No. 09-1772, 2010 U.S. Dist. LEXIS 101386, at **8-9 n.2 (D.D.C. Sept. 27, 2010) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

“On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction” by a preponderance of the evidence. *Westberg v. FDIC*, 759 F. Supp. 2d 38, 42 (D.D.C. 2011); *Roum v. Fenty*, 697 F. Supp. 2d 39, 42 (D.D.C. 2010). “The court, in turn, has an ‘affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.’” *Roum*, 697 F. Supp. 2d at 42 (quoting *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16, 17 (D.D.C. 2005)). “Because subject-matter jurisdiction focuses on the court’s power to hear the claim, however, the court must give the plaintiff’s factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion.” *Miller v. Insulation Constr., Inc.*, 608 F. Supp. 2d 97, 104 (D.D.C. 2009). Additionally, when considering a Rule 12(b)(1) motion, the Court “may consider materials outside of the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.” *Hamilton v. Geithner*, 743 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

B. Standards Under Federal Rule of Civil Procedure 12(b)(6)

“To survive a motion to dismiss under 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); accord *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009). Although detailed factual allegations are not required, the complaint must set forth “more than an unadorned, the-defendant-unlawfully-harmed-me accusation,” *Iqbal*, 129 S. Ct. at 1949, and may not merely state “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 544.

While the court “construes the complaint liberally in the plaintiff’s favor,” *City of Harper Woods Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009), a complaint must plead “factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. The court “need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,” nor must the court accept “legal conclusions cast in the form of factual allegations.” *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Indeed, a plaintiff must demonstrate more than just the “sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949 (2009). The court must therefore engage in a “common sense,” “context-specific” examination of the pleading to determine whether a complaint states a plausible claim for relief. *Id.* at 1950; *see also Twombly*, 550 U.S. at 557, 570. Where the well-pleaded facts set forth in the complaint do not permit a court to infer more than the “mere possibility of misconduct,” the complaint has not shown that the pleader is entitled to relief, and the claims in the complaint must be dismissed. *See id.* at 555; *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

As discussed below, the Court should grant Defendant’s Motion to Dismiss because there are no factual allegations set forth in the Complaint that would entitle Plaintiff to any relief against Defendant.

IV. ARGUMENT

A. PLAINTIFF'S CLAIMS OF UNLAWFUL DISCRIMINATION IN VIOLATION OF TITLE VII AND THE DCHRA SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.⁴

1. This Court Lacks Jurisdiction To Review The Circumstances Of The Hotel's Actions Because The Hotel Is Entitled To Title VII's National Security Exemption.

Under Title VII's national security exemption, employers are exempt from Title VII liability for actions taken pursuant to national security requirements. 42 U.S.C. § 2000e-2(g) (2011). Specifically, it is lawful for an employer to change terms of employment, terminate employment or fail to hire an individual if:

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and (2) such individual has not fulfilled or has ceased to fulfill that requirement.

Id. (emphasis added).

In *Dep't of Navy v. Egan*, the U.S. Supreme Court held that the Merit Systems Protection Board lacked statutory authority to review an agency's decision to deny a newly-hired employee a security clearance even though the employee then lost his job. 484 U.S. 518, 520 (1988). Acknowledging the general presumption favoring review of agency decisions, the Court nonetheless stated that this proposition "runs aground when it encounters concerns of national

⁴ Plaintiff's substantive claims under Title VII in Count III are identical to his claims under the DCHRA in Count V. Accordingly, the same arguments presented as to Plaintiff's failure to sufficiently allege discrimination under Title VII also apply to his claims under the DCHRA. See *Odeyale v. Aramark Mgmt. Servs. Ltd. P'ship*, 518 F. Supp. 2d 179, 183 n.6 (D.D.C. 2007) (courts look to federal cases interpreting Title VII in construing the DCHRA); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 887 (D.C. 2003) (same).

security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.” *Id.* at 527. Emphasizing that “no one has a ‘right’ to a security clearance” and that denial of clearance is meant only to assess whether an individual might someday compromise sensitive information rather than to “pass[] judgment upon an individual’s character,” the Court explained that the decision to grant or deny security clearance was essentially an act of “[p]redictive judgment” that “must be made by those with the necessary expertise in protecting classified information.” *Id.* at 528-29. By contrast, “it is not reasonably possible for an outside nonexpert body to review the substance” of the agency’s predictive judgment to determine “whether the agency should have been able to make the necessary affirmative prediction with confidence” or “what constitutes an acceptable margin of error in assessing the potential risk.” *Id.* at 529.

In *Ryan v. Reno*, the D.C. Circuit joined other federal circuits⁵ in holding that *Egan* applies to Title VII claims and bars judicial resolution of “a discrimination claim based on an adverse employment action resulting from an agency security clearance decision.” 168 F.3d 520, 523 (D.C. Cir. 1999). In reaching this conclusion, the court explained that adjudicating plaintiff’s Title VII claim would require the court to evaluate the merits of the agency’s security clearance decision. The *Ryan* court’s application of *Egan* follows inexorably from the manner in which the fact-finder resolves Title VII discrimination and retaliation claims pursuant to the three-step framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁵ See *El-Ganayni v. U.S. Dep’t of Energy*, 591 F.3d 176, 182 (3d Cir. 2010) (“Many courts, including this one, hold that *Egan* also forbids *judicial* review of the merits of clearance decisions”) (emphasis in original) (citing *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990); *Jamil v. Sec’y of the Dep’t of Def.*, 910 F.2d 1203, 1206 (4th Cir. 1990); *Hill v. Dep’t of the Air Force*, 844 F.2d 1407, 1409 (10th Cir. 1988)).

As the court recognized in *Ryan*, the problem for plaintiffs who allege the discriminatory denial or revocation of a security clearance under the *McDonnell Douglas* framework is that “a court cannot clear the second step of *McDonnell Douglas* without running smack up against *Egan*.” 168 F.3d at 524. Indeed, to determine whether the employer’s proffered nondiscriminatory reason for the adverse employment action—i.e., that the plaintiff’s clearance was denied or revoked on national security grounds—was in fact pretext for discrimination would require the fact-finder to evaluate the validity of the government’s security concerns. *Id.*

The D.C. Circuit reiterated *Ryan*’s holding in *Bennett v. Chertoff*, 425 F.3d 999 (D.C. Cir. 2005). In *Bennett*, the plaintiff alleged that the Transportation Security Administration’s (“TSA”) termination of her employment after she failed to receive the requisite security clearance was discriminatory and retaliatory, and that its asserted legitimate business reasons for her termination were pretextual. *Bennett*, 425 F.3d 999 at 1001. In finding the plaintiff’s claim nonjusticiable, the Court recognized that “under *Ryan*, a court cannot adjudicate the credibility of that claim” because asking the trier of fact to assess the authenticity of the agency’s reason would also require it “to evaluate the validity of the agency’s security determination.” *Id.* at 1003 (internal citation omitted).

Since *Bennett*, D.C. Circuit courts have repeatedly declined to review the merits of the security clearance decisions in Title VII cases. *See Ciralsky v. CIA*, 689 F. Supp. 2d 141, 151 (D.D.C. 2010) (“[T]he controlling law in this Circuit is that ‘an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII’”); *Cruz-Packer v. Chertoff*, 612 F. Supp. 2d 67, 71 (D.D.C. 2009) (granting a motion to dismiss for lack of jurisdiction “over claims implicating the merits of a decision to deny a security clearance”); *Rattigan v. Holder*, 636 F. Supp. 2d 89, 91 (D.D.C. 2009) (“*Egan* and its progeny thus command

that once the executive has determined that an individual is unworthy of a security clearance, the judiciary cannot probe the circumstances surrounding that determination for discriminatory or retaliatory animus.”); EEOC, *Policy Guidance on the use of national security exemption contained in § 703(g) of Title VII*, (1989), http://www.eeoc.gov/policy/docs/national_national_security_exemption.html (“[N]o member of a class protected by and suing under Title VII can receive substantive review of security clearance revocations or denials in federal court.”); EEOC, *Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs* (2005), <http://www.eeoc.gov/facts/backlash-employer.html> (“Security clearance determinations for positions subject to national security requirements under a federal statute or an Executive Order are not subject to review under the equal employment opportunity statutes.”).

The State Department’s Bureau of Diplomatic Security Service (“DSS”) has the statutory authority to “protect and perform protective functions directly related to maintaining the security and safety of . . . heads of a foreign state, official representatives of a foreign government, and other distinguished visitors to the United States, while in the United States.” 22 U.S.C. §§ 2709(a)(3)(A) and (D) (2011). Here, the DSS imposed certain security clearance requirements on the Hotel’s employees in order to maintain the Israeli Defense Minister’s security and safety, and DSS acted within its statutory authority in doing so. One such security clearance requirement was the successful completion of a background check prior to the Israeli Delegation’s visit. (Compl. ¶ 28.) The DSS, however, placed Plaintiff on a list with other colleagues potentially having access to the Israeli Delegation who had “irregularities” in their background checks. (*Id.*) Accordingly, DSS did not provide any of these employees with the requisite security clearance. (*Id.*)

Title VII's national security exemption applies to the Hotel's actions because, per its statutory authority, the DSS required Plaintiff to obtain a security clearance to access a part of the Hotel on December 10, 2010, and the DSS did not grant him such a clearance. (*Id.* ¶¶ 28, 29.) Without the necessary security clearance, Plaintiff did not fulfill the DSS' safety and security measures taken to protect the Israeli Delegation. Thus, the Hotel was required to follow the DSS's directive to prevent Plaintiff from servicing the guests on the 8th and 9th floors of the Hotel. Further, Plaintiff concedes in his Complaint that the restriction placed on him was predicated on security considerations. (Compl. ¶¶ 28, 29.) It is without question that such security considerations were fully related to, and intertwined with, the Hotel's decision to restrict Plaintiff's access to the 8th and 9th floors on December 10, 2010. Judicial review of such security decisions is precisely what *Ryan* and its progeny forbid. *See Ciralsky*, 689 F. Supp. 2d at 150-51.

Accordingly, this Court lacks jurisdiction to review the merits of the DSS's security clearance decision. *See Ryan*, 168 F.3d at 523; *Bennett*, 425 F.3d. at 1003; *Cruz-Packer*, 612 F. Supp. 2d at 71; *Rattigan v. Holder*, 636 F. Supp. 2d at 91. Plaintiff's purported adverse employment action based on the denial of a security clearance is not actionable under Title VII or the DCHRA, and those claims should be dismissed for lack of jurisdiction.

2. This Court Lacks Jurisdiction Over Plaintiff's DCHRA Claims Because Of Plaintiff's Prior Election of Remedies.

"The DCHRA's election of remedies provision states that a person seeking relief must choose between filing a complaint with the OHR and filing a complaint in court." *Ibrahim*, 582 F. Supp. 2d at 46 (quoting *Griffin v. Acacia Life Ins. Co.*, 925 A.2d 564, 572 (D.C. 2007)). Importantly, unlike Title VII, which prefers administrative remedies before resort to the courts, the OHR "provide[s] a choice of remedies—an administrative proceeding or a judicial

determination, but not both.” *Ibrahim*, 582 F. Supp. 2d at 46; *see also Brown v. Capitol Hill Club*, 425 A.2d 1309, 1311 (D.C. 1981) (finding that a plaintiff cannot seek redress with both the OHR and a court, as the “jurisdiction of the court and OHR are mutually exclusive in the first instance”); *Anderson v. U.S. Safe Deposit Co.*, 552 A.2d 859, 862-63 (D.C. 1989) (noting this “crucial distinction” between Title VII and the DCHRA and stating that the DCHRA “provides for an *ab initio* election of remedies”); D.C. Code § 2-1403.16(a) (“Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction ... *unless such person has filed a complaint hereunder*”) (emphasis added). Therefore, if a plaintiff chooses to pursue his complaint administratively all the way to the conclusion of the agency’s investigation, a court lacks jurisdiction over a subsequent lawsuit involving the same matter. *See Clifton v. Fed. Nat’l Mortgage Ass’n*, No. CIV. 97-2302, 1998 WL 419741, at *2 (D.D.C. Jan. 14, 1997) (“This court lacks jurisdiction to hear a claim that has already been submitted to the Department of Human Rights.”); *see also Moodie v. Federal Reserve Bank of N.Y.*, 58 F.3d 879 (2d Cir. 1995) (construing nearly identical election of remedies provision of Human Rights Law as creating subject matter jurisdictional bar to suit).⁶

Here, this case should be dismissed because the Court lacks jurisdiction over Plaintiff’s DCHRA claims based on his prior election of remedies. Plaintiff filed his claim administratively rather than going directly to court, thereby electing his remedy. Consequently, Plaintiff cannot now seek a redress from this Court. *See Ibrahim*, 582 F. Supp. 2d at 46.

Nor can Plaintiff assert that either of the two exceptions to the election of remedies doctrine is applicable here. The only two exceptions to the election of remedies doctrine are: (1)

⁶ *Brown v. Capitol Hill Club*, 425 A.2d at 1311 (“The New York Human Rights Law which the court found barred the subsequent judicial action is substantially the same as the District’s statute as it relates to election of remedies.”).

where the OHR has dismissed the complaint on the grounds of administrative convenience; or (2) where the claimant has voluntarily withdrawn the complaint. *Ibrahim*, 582 F. Supp. 2d at 46; *Lewis v. Owen Healthcare, Inc.*, No. Civ. A. 05-0689 GK, 2005 WL 3213962 at *3 (D.D.C. Oct. 11, 2005). Importantly, to satisfy either exception, the administrative complaint must be withdrawn or dismissed before the agency reaches a final decision on the merits. *Lewis*, 2005 WL 3213962, at *3.

Neither of these exceptions is applicable here. Addressing the second exception first, it is undisputed that Plaintiff never withdrew his complaint from either the EEOC or the OHR prior to the completion of the agency investigation which resulted in the no probable cause determination.⁷ Thus, Plaintiff cannot assert that the second exception applies.

Nor can Plaintiff legitimately assert that the first exception applies, as the EEOC's disposition here was on the merits and thus was not dismissed on the grounds of administrative convenience.⁸ Here, the EEOC conducted a full-scale investigation into Plaintiff's claims, which included a May 17, 2010 fact-finding conference that was attended by both parties. After considering all the information gathered during its investigation—including the Hotel's position statement and the fact-finding conference at which Plaintiff and the Hotel's witnesses were interviewed—the EEOC concluded its investigation, closed its file on Plaintiff's Charge, and

⁷ To be considered “withdrawn,” a complaint must be voluntarily withdrawn by the claimant prior to the completion of the agency's investigation. *See* D.C. Code § 2-1403.04(b) (“Complaints filed with the office under the provisions of this chapter may be voluntarily withdrawn at the request of the complainant at any time prior to the completion of the Office's investigation and findings[.]”); *Brown v. Capitol Hill Club*, 425 A.2d at 1312 (“The Code and regulations make clear that to preserve the right to bring the same action in court, withdrawal must occur prior to the agency's disposition.”).

⁸ At least as it relates to a claim under the DCHRA. While a “no cause” finding does not preclude a claimant from timely pursuing a Title VII claim, it does bar a claim under the DCHRA. *See Hogue v. Roach*, 967 F. Supp. 7, 9 (D.D.C. 1997) (dismissing DCHRA claims as barred by election of remedies doctrine).

issued its dismissal based on the evidence provided by the Hotel. *See* Exhibit B. Plainly, Plaintiff's charge was not "dismissed for administrative convenience" before a final agency determination. *Compare Brown v. Capitol Hill Club*, 425 A.2d at 1312 (finding that disposition letter stating that the "investigation of the complaint was completed," was not a dismissal for administrative convenience); *with Ibrahim*, 582 F. Supp. 2d at 46-47 (finding that the plaintiff's EEOC charge had been dismissed for administrative convenience).

Because Plaintiff never withdrew his complaint, and it was never administratively dismissed before the EEOC reached its no probable cause determination, the Court lacks jurisdiction over his claims and they should be dismissed under the election of remedies doctrine. *See e.g., Lewis*, 2005 WL 3213962, at *3 ("Having opted the administrative route, appellant was barred from bringing the same action in court."); *Parker v. Nat'l Corp. for Hous. P'ships*, 697 F.Supp. 5, 7 (D.D.C. 1998) (finding that where neither statutory exception is met, the "plaintiff is precluded from bringing her claim under the [DCHRA] in any court."); *Clifton*, 1998 WL 419741, at *2 ("This court lacks jurisdiction to hear a claim that has already been submitted to the Department of Human Rights."); *Weiss v. Int'l Bhd. of Elec. Workers*, 729 F. Supp. 144, 147 (D.D.C. 1990) (barring plaintiff's claim under the election of remedies doctrine). As stated by this Court:

Since plaintiff did file a complaint with the D.C. Office of Human Rights and the Office fully investigated the matter and reached a conclusion on the merits rather than dismissing it on grounds of administrative convenience, and since plaintiff never withdrew his complaint, plaintiff cannot bring an action in this or any other Court alleging violations of the D.C. Human Rights Act.

Hogue, 967 F. Supp. at 9.

Accordingly, this Court lacks subject matter jurisdiction and the Court should dismiss this action.

B. PLAINTIFF’S CLAIMS OF UNLAWFUL DISCRIMINATION IN VIOLATION OF TITLE VII AND THE DCHRA FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even assuming, *arguendo*, that this Court had jurisdiction over Plaintiff’s Title VII and DCHRA discrimination claims, those allegations should still be dismissed because Plaintiff has failed to allege sufficient facts to state a claim of unlawful discrimination based on his race, color, religion, and national origin under both Title VII and the DCHRA. Although a plaintiff need not plead each element of a *prima facie* case to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002), he still must allege facts that, if true, would support the elements of each claim. *Major v. Plumbers Local Union No. 5*, 370 F. Supp. 2d 118, 128-29 (D.D.C. 2005). Furthermore, courts “can . . . explore the plaintiff’s *prima facie* case at the dismissal stage to determine ‘whether the plaintiff can *ever* meet his initial burden to establish a *prima facie* case’ for Title VII [or DCHRA] discrimination.” *Rattigan v. Gonzales*, 503 F. Supp. 2d 56, 72 (D.D.C. 2007) (citations omitted).

1. Plaintiff Has Not Plead Facts Supporting A *Prima Facie* Case Of Discrimination.

Plaintiff has failed to plead facts supporting a *prima facie* case of discrimination based on race, color national origin or religion. To allege an actionable *prima facie* case of discrimination, Plaintiff must assert that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) he was treated differently than similarly situated employees who are not part of the protected class. *Kline v. Berry*, No. 09-5309, 2010 U.S. App. LEXIS 25991, at **2-3 (D.C. Cir. Dec. 21, 2010); *see also Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999); *Santa Cruz v. Snow*, 402 F. Supp. 2d 113, 120 (D.D.C. 2005). Here, Plaintiff has not asserted that he suffered an adverse employment action or that he was treated differently than similarly

situated colleagues who were not Muslim. Accordingly, the Complaint fails to state a claim upon which relief can be granted.

a. Plaintiff Fails To Assert That He Experienced An Adverse Employment Action.

It is well settled that an adverse employment action is a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *See Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). “An employment decision does not rise to the level of an actionable adverse action . . . unless there is a *tangible change* in the duties or working conditions constituting a material employment disadvantage.” *Stewart v. Evans*, 275 F.3d 1126, 1135 (D.C. Cir. 2002); *Walker v. Washington Metro. Area Transit Auth.*, 102 F. Supp. 2d 24, 29 (D.D.C. 2009) (emphasis added). As courts in the D.C. Circuit have made clear, not everything that makes an employee unhappy constitutes an actionable adverse employment action under Title VII or the DCHRA. *See Cheek v. Chertoff*, No. 04-251 (RMC), 2006 U.S. Dist. LEXIS 14341, at *28 (D.D.C. Mar. 17, 2006); *Crenshaw v. Georgetown Univ.*, 23 F. Supp. 2d 11, 16 (D.D.C. 1998).

The “typical” adverse action in employment discrimination claims are reductions in salary or benefits. *See Baloch v. Kempthorne*, 550 F.3d 1191, 1196 (D.C. Cir. 2008); *see also Dickerson v. SecTek, Inc.*, 238 F. Supp. 2d 66, 80 (D.D.C. 2003) (stating that economic harm is the typical injury flowing from an adverse employment action). The D.C. Circuit has found that a plaintiff who was not fired or denied a job or promotion, and did not suffer a reduction in salary or benefits, did not suffer an adverse employment action. *See Baloch*, 550 F.3d at 1197. Where an employee has not suffered a decrease in his pay or benefits, the employee must

establish that his employer took an action with “materially adverse consequences affecting the terms, conditions, or privileges of employment.” *Brown v. Brody*, 199 F. 3d at 457.

In *Brown v. Georgetown Univ. Hosp. Medstar Health*, the plaintiff claimed that she suffered an adverse employment action when the hospital changed her schedule, suspended her with pay, escorted her off the premises, and temporarily removed her from the schedule. No. 06-1417 (RWR), 2011 U.S. Dist. LEXIS 32949, at *12 (D.D.C. Mar. 29, 2011). The court found, however, that while the hospital’s actions may have embarrassed the plaintiff, such subjective inquiry is not an adverse action for purposes of Title VII and, consequently, none of the alleged actions amounted to an “adverse employment action.” *See id.*

Here, Plaintiff does not assert that he experienced any action by the Hotel resulting in a tangible change in his duties or working conditions constituting a material employment disadvantage. Plaintiff does not assert that he was fired or disciplined in any way, nor does he assert that he suffered any reduction in pay or benefits. He does not even allege, as did the plaintiff in *Brown*, that the Hotel changed his schedule. Rather, Plaintiff simply claims that he was instructed not to service two particular floors of the Hotel *during one single shift*. (Compl. ¶¶ 17, 18, 26.) All of Plaintiff’s duties and working conditions, including his pay, benefits, responsibilities, schedule and hours, remained identical. The Hotel’s directive to Plaintiff not to service two particular floors of the Hotel simply does not rise to the level of an adverse employment action under Title VII or the DCHRA. *See Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (finding that where substantive job responsibilities are not reduced, there are no materially adverse consequences for Title VII liability); *Russell v. Principi*, 257 F.3d 815, 818 (D.C. Cir. 2001) (“Minor and even trivial employment actions that ‘an irritable, chip-on-the-shoulder employee did not like would’ otherwise form the basis of a discrimination suit, if

‘everything that ma[de] an employee unhappy [was] an actionable adverse action’); *Lawson v. Pepco*, 721 F. Supp. 2d 1, 5 (D.D.C. 2010) (finding no adverse employment action when an employee was assigned to less desirable work within her job description); *Lester v. Natsios*, 290 F. Supp. 2d 11, 30-31 (D.D.C. 2003) (stating that “increases in workload or changes in responsibility are not adverse employment actions, but rather constitute only the ‘ordinary tribulations of the workplace,’ which employees should expect”).

Indeed, the purported adverse employment action suffered by Plaintiff is less than that suffered by the plaintiff in *Brown v. Georgetown Univ. Hosp. Medstar Health*. Accordingly, Plaintiff has failed to plead facts supporting his claim that he has suffered an adverse employment action. As such, he cannot demonstrate a *prima facie* case of discrimination under either Title VII or the DCHRA.

b. Plaintiff Has Not Alleged That He Was Treated Differently Than Similarly Situated Non-Muslim Employees.

Not only has Plaintiff failed to plead facts to support an adverse employment action, but he also has not alleged that he was treated differently than similarly situated non-Muslim employees. Courts in the D.C. Circuit consistently dismiss discrimination claims when the plaintiff fails to allege that he was treated differently than similarly situated individuals outside his protected class. *See Ramey v. Potomac Elec. Power Co.*, 468 F. Supp. 2d 51, 57 (D.D.C. 2006) (dismissing plaintiff’s race discrimination claim because he failed to allege that others who were similarly situated were treated more favorably); *Brady v. Livingood*, 360 F. Supp. 2d 94, 100 (D.D.C. 2004) (dismissing plaintiff’s discrimination claim because plaintiff failed to allege any statistical disparities between similarly situated employees).

Here, Plaintiff has not asserted (and cannot assert) that the Hotel treated him differently than similarly situated non-Muslim employees who were unable to secure a security clearance

from the State Department. Plaintiff concedes that the DSS placed his name on a list with other colleagues who had “irregularities” in their background checks. (Compl. ¶ 28.) None of these other colleagues, regardless of their religion, national origin, race, or gender, were permitted access to the Israeli Delegation during their stay. Plaintiff neither alleges nor identifies facts showing that the Hotel treated him differently than similarly situated non-Muslim employees whose background checks revealed irregularities. Because Plaintiff fails to allege that the Hotel treated him any differently than similarly situated, non-Muslim employees, he cannot establish this essential element of his *prima facie* case. See *Ramey*, 468 F. Supp. 2d at 57; *Brady*, 360 F. Supp. 2d at 100. For these reasons, Plaintiff’s Title VII and DCHRA claims should be dismissed.

2. Plaintiff Has Failed To Exhaust His Administrative Remedies.

Plaintiff’s claims alleging unlawful discrimination based on race, color and national origin should be dismissed because Plaintiff did not exhaust his administrative remedies as to those claims. Plaintiff, rather, has only exhausted his administrative remedies as to his claim for religious discrimination.

Under Title VII, a plaintiff must timely exhaust his administrative remedies before filing suit in federal court. *Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010). To do so, he must first file an administrative charge; only the claims contained in the charge or those that are “like or reasonably related to the allegations of the charge” can be raised in a Title VII lawsuit. *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (quotations omitted). “At a minimum, the Title VII claims must arise from ‘the administrative investigation that can reasonably be expected to follow the charge of discrimination.’” *Id.* (quoting *Chisholm v. USPS*, 665 F.2d 482, 491 (4th Cir. 1981)). The requirement that a plaintiff must present each discrete claim in an EEOC or state agency charge as a prerequisite to bringing suit serves the dual purposes of

ensuring the administrative agency has the opportunity to investigate and conciliate the claims and of providing notice to the charged party of the claims against it. *Park*, 71 F.3d at 907. This requirement further serves to narrow the issues for prompt adjudication. *Id.* Indeed, the remedial framework erected by Title VII relies heavily on the administrative component of the process. *Easton v. Snow*, No. 04-02038 (HHK), 2006 U.S. Dist. LEXIS 42909, at *6 (D.D.C. June 26, 2006).

Although the administrative charge requirement “should not be construed to place a heavy burden on ‘individuals untrained in negotiating procedural labyrinths, the requirement of some specificity in a charge is not a mere technicality.’” *Park*, 71 F.3d at 907 (quoting *Loe v. Heckler*, 768 F.2d 409, 417 (D.C. Cir. 1985)). “A court cannot allow liberal interpretation of an administrative charge to permit a litigant to bypass the Title VII administrative process.” *Park*, 71 F.3d at 907.

Courts in the D.C. Circuit have consistently dismissed allegations raised for the first time in the complaint, without first being raised in the underlying EEOC charge, for failure to exhaust administrative remedies. For example, in *Sisay v. Greyhound Lines*, 34 F. Supp. 2d 59 (D.D.C. 1998), the plaintiff alleged claims of national origin discrimination and retaliation in his complaint. In his EEOC charge, however, the plaintiff had only alleged claims for race discrimination and retaliation. *Sisay*, 34 F. Supp. 2d at 64. Absent from that charge was any indication of a claim of national origin discrimination, either in the form of express words or factual allegations that would support such a claim. *Id.* Nevertheless, the plaintiff contended that he had exhausted his administrative remedies as to his national origin claim because (i) the national origin and race claims were so closely related that the national origin claim could reasonably have been expected to grow out of the race discrimination charge; and (ii) the

defendants' investigation following notice of the EEOC charge should have covered national origin discrimination because the alleged incidents were carried out in the same manner. *Id.* The court, however, was not persuaded by the plaintiff's assertions.

According to the *Sisay* court, "the law recognizes that allegations of national origin discrimination are not so closely related to allegations of racial discrimination such that a conclusion about one could reasonably be expected to grow out of an investigation of the other. Indeed, Title VII recognizes that race and national origin are ideologically distinct." *Id.* (citing *Kun v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 949 F. Supp. 13, 19 (D.D.C. 1996)) (stating that allegations of race discrimination are not relevant to claims of national origin discrimination); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (defining national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came"); *Roach v. Dresser Indus. Valve and Instrument Div.*, 494 F. Supp. 215, 216 (W.D. La. 1980) (finding that the legislative history of Title VII precisely states that a person's national origin has nothing to do with race)). The court further explained that under Title VII, allegations of race discrimination may be wholly unrelated to a claimant's country of origin. *Sisay*, 34 F. Supp. 2d at 64; (citing *Kun*, 949 F. Supp. at 19). Accordingly, the court held that allegations of race discrimination do not properly put defendants on notice to investigate possible discrimination based on national origin and, consequently, the plaintiff's claim of national origin discrimination, raised for the first time in the complaint before this court, must be dismissed for failure to exhaust administrative remedies. *Id.*

The facts in *Sisay* are analogous to the facts here. Plaintiff purports to bring claims for unlawful discrimination based on race, color, national origin and religion. (Compl. ¶¶ 44-51, 57-62.) Plaintiff, however, did not assert claims of discrimination based on race, color or

national origin in the underlying Charge that he filed with the EEOC. Plaintiff's Charge only alleged discrimination based on religion. (*See* Exhibit A). Indeed, Plaintiff only checked off the "religion" box as the basis for his discrimination claims, even though "race," "color" and "national origin" boxes were all available. (*Id.*) Moreover, Plaintiff elaborated in writing the following claims: "I believe this restriction to be a direct result of my religion;" and "I believe that I have been discriminated against based on my religion (Muslim)." (*Id.*) Plaintiff made no reference whatsoever to his race, color or national origin.

Thus, Plaintiff's pleadings neither assert nor demonstrate factually that he exhausted his administrative remedies for his claims of discrimination based on race, color or national origin. Just as the *Sisay* court found allegations of race discrimination to be wholly unrelated to a claimant's country of origin, here, Plaintiff's allegations of religious discrimination are wholly unrelated to his claims of discrimination based on race, color, or national origin. Plaintiff's allegations of religious discrimination in his Charge did not properly put Defendant or the EEOC on notice to investigate possible discrimination based on race, color or national origin, and there is no reason to conclude that the EEOC investigated any such claims that Plaintiff failed to assert. *See Kun*, 949 F. Supp. at 19; *Sisay*, 34 F. Supp. 2d at 64. Therefore, Plaintiff's claims of discrimination based on based on race, color and national origin, raised for the first time in his Complaint, should be dismissed for failure to exhaust administrative remedies.

C. PLAINTIFF'S CLAIMS OF RETALIATION IN VIOLATION OF TITLE VII AND THE DCHRA SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. This Court Lacks Jurisdiction Over Plaintiff's Retaliation Claims Pursuant To Title VII's National Security Exemption.

Plaintiff's Title VII and DCHRA retaliation claims also fail based on Title VII's National Security Exemption. As explained in Section IV(A)(1), *supra*, under Title VII's national

security exemption, the Hotel is exempt from Title VII liability because its actions were taken pursuant to national security requirements. *See* U.S.C. § 2000e-2(g) (2011). That analysis applies fully to Plaintiff's Title VII and DCHRA retaliation claims. Therefore, Plaintiff is prohibited from bringing a Title VII or DCHRA retaliation claim against the Hotel.

In *Bennett v. Chertoff*, a former TSA employee appealed the dismissal of her claims of discrimination and retaliation under Title VII. 425 F.3d at 999. In affirming the dismissal of the complaint, the D.C. Circuit relied on *Ryan* and held that it was not permitted to adjudicate the credibility of the plaintiff's claims—either her discrimination or retaliation claim—under Title VII's national security exemption because to do so would require it to evaluate the validity of the agency's security determination. *Bennett*, 425 F.3d. at 1003; *see Ciralsky*, 689 F. Supp. 2d at 151 (discussing claim of retaliation in the context of Title VII's national security exemption).

For all of the reasons set forth above, this Court lacks jurisdiction to review the merits of the DSS's security clearance decision. *See e.g., Bennett*, 425 F.3d. at 1003; *Ryan*, 168 F.3d at 523; *Cruz-Packer*, 612 F. Supp. 2d at 71; *Rattigan v. Holder*, 636 F. Supp. 2d at 91. Therefore, Plaintiff's allegations of retaliation, based on the State Department's denial of a security clearance, is not actionable under Title VII or the DCHRA, and those claims should be dismissed.

2. Plaintiff's Title VII and DCHRA Retaliation Claims Should Be Dismissed For Failure to State A Claim Upon Which Relief Can Be Granted.

a. Plaintiff Has Not Alleged That He Engaged In Statutorily Protected Activity.

Even assuming that Title VII's National Security Exemption did not apply to Plaintiff's retaliation claims, those claims should still be dismissed because Plaintiff also has failed to

allege sufficient facts to state a claim of unlawful retaliation under both Title VII and the DCHRA.

To avoid dismissal of a retaliation claim, Plaintiff must allege facts establishing that: (i) he engaged in a statutorily protected activity; (ii) he suffered an adverse employment action; and (iii) there is a causal connection between the two. *See Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006); *Carter v. George Washington Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004); *Forkkio*, 306 F.3d at 1131. “[P]rotected activity” is defined as an “employee’s opposition to an unlawful employment practice or . . . an employee’s participation in a discrimination charge, investigation, or proceeding.” *Rattigan v. Gonzales*, 503 F. Supp. 2d at 77 (citing *Burton v. Batista*, 339 F. Supp. 2d 97, 114 (D.D.C. 2004)); *Lemmons v. Georgetown Univ. Hosp.*, 431 F. Supp. 2d 76, 91 (D.D.C. 2006) (stating that an activity is protected for the purposes of a retaliation claim only “if it involves opposing alleged discriminatory treatment by the employer or participating in legal efforts against the alleged treatment”). However, “not every complaint garners its author protection under Title VII.” *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2006). As the D.C. Circuit has explained, “[w]hile no ‘magic words’ are required” to mark an exchange as protected activity, “the complaint must in some way allege *unlawful discrimination*.” *Id.* (emphasis added); *see also Welzel v. Bernstein*, 436 F. Supp. 2d 110, 122 (D.D.C. 2006) (“plaintiff was not opposing civil rights violations. Rather, she was complaining about what she perceived to be unprofessional and abusive behavior by [her supervisor] and nothing more. Such activity is not protected under Title VII”); *see also Grosdidier v. Chairman, Broad. Bd. of Governors*, 774 F. Supp. 2d 76, 119-122 (D.D.C. 2011) (finding that plaintiff’s

complaints about her workplace were not protected activity, and thus she could not establish a *prima facie* case of retaliation).⁹

Here, although Plaintiff alleges that he complained to a supervisor about the December 10, 2010 events, the action about which he complained was not unlawful and, in fact, specifically is permitted by Title VII. Indeed, Plaintiff's complaints were based solely on the Hotel's carrying out of the DSS's directive to prohibit him from servicing the 8th and 9th floors of the Hotel during a single shift of employment. As explained above, the Hotel was required to follow the DSS's directive, and in any event, Title VII's national security exemption applies to the Hotel's actions. Any complaint made by Plaintiff about these facts, therefore, does not constitute a complaint about unlawful treatment under Title VII. Thus, Plaintiff cannot demonstrate that he opposed an unlawful employment practice, participated in a discrimination charge, investigation, or proceeding, or in any other way alleged an employment practice that is prohibited by the DCHRA or Title VII. *See Fowler v. D.C.*, 210 F. App'x 4, 5 (D.C. Cir. 2010) (finding that the plaintiff failed to establish a *prima facie* of retaliation because she alleged facts that, even if true, did not show that he "opposed any practice made an unlawful employment practice by Title VII"). Accordingly, Plaintiff's claims for retaliation under Title VII and the DCHRA are not actionable, and those claims should be dismissed.

⁹ Courts from other Circuits also have concluded that complaints about lawful conduct do not qualify as protected activity necessary to assert a retaliation claim. *See Fundukian v. United Blood Servs.*, 18 F. App'x 572, 576 (9th Cir. 2001) ("Generalized complaints about [the plaintiff's] job conditions . . . do not constitute protected opposition because they do not relate to conduct made unlawful by Title VII"); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 512 n.4 (3d Cir.1997) (general grievance about working conditions and questioning job security not protected where it did not contain any reference to conduct that is protected by Title VII); *cf. Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) ("[T]o be actionable under § 1981, the retaliation must have been in response to the claimant's assertion of rights that were protected by § 1981").

b. Plaintiff Has Not Alleged Sufficient Causal Connection.

To avoid dismissal on his retaliation claim, Plaintiff must also allege sufficient evidence of a causal connection between the protected activity and the adverse employment action, such as evidence of a retaliatory motive, intent, or purpose by the employer. *See Campbell v. Nat'l Educ. Ass'n*, No. 99-7122, 2000 U.S. LEXIS 26681, at *13 (D.C. Cir. Oct. 3, 2000) (affirming dismissal of retaliation claim because plaintiff provided no evidence to link negative letters and comments to the employer).

As demonstrated above, Plaintiff has not sufficiently alleged that he engaged in statutorily protected activity. As such, he cannot to assert any causal connection and thus cannot sufficiently allege a *prima facie* case of retaliation. Accordingly, Plaintiff's conclusory allegations of retaliation fail to state a claim for relief, and the Complaint should be dismissed.

D. PLAINTIFF'S CLAIM OF UNLAWFUL DISCRIMINATION BASED ON RACE IN VIOLATION OF 42 U.S.C. § 1981 FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

“Section 1981, as amended by the Civil Rights Act of 1991, prohibits racial discrimination in the ‘making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.’” *Pollard v. Quest Diagnostics*, 610 F. Supp. 2d 1, 18 (D.D.C. 2009) (quoting 42 U.S.C. § 1981). To state a claim for racial discrimination, a plaintiff must allege that (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 an activity enumerated in Section 1981. *Mazloun v. D.C. Metro Police Dep't*, 522 F. Supp. 2d 24, 37 (D.D.C. 2007).

To sufficiently plead intentional discrimination, a “plaintiff cannot merely invoke his race in the course of a claim's narrative and automatically be entitled to pursue relief. Rather, plaintiff must allege some facts that demonstrate that *race* was the reason for the defendant's

actions.” *Middlebrooks v. Godwin Corp.*, 722 F. Supp. 2d 82, 88 (D.D.C. 2010) (quoting *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990)) (emphasis added); *see also DuBerry v. D.C.*, 582 F. Supp. 2d 27, 40 (D.D.C. 2008) (“Section 1981 prohibits discrimination *on the basis of race* in making and enforcing contracts, including employment contracts”) (emphasis added).

Courts in the D.C. Circuit have consistently dismissed Section 1981 claims where the plaintiff did not adequately allege that he was discriminated against because of his race. *See Mekuria v. Bank of Am.*, No. 10-1325 (JEB), 2011 U.S. Dist. LEXIS 108649, at **10-13 (D.D.C. Sept. 23, 2011) (dismissing plaintiff’s Section 1981 claims because plaintiff made no factual allegations demonstrating that his race was the reason for any mistreatment he suffered); *Mesumbe v. Howard Univ.*, 706 F. Supp. 2d 86, 92 (D.D.C. 2010) (same); *Alexander v. Wash. Gas Light Co.*, 481 F. Supp. 2d 16, 31 (D.D.C. 2006) (dismissing a plaintiff’s Section 1981 claim for failure to plead intentional discrimination on the basis of race where plaintiff only stated that he was African-American, with no allegation of racial motivation); *Ramey*, 468 F. Supp. 2d at 57 (dismissing plaintiff’s Section 1981 claim because he did not allege that he was treated differently than others who were similarly situated because of his race).

Courts in the D.C. Circuit also have consistently dismissed claims where plaintiffs have attempted to disguise non-racial discrimination claims as Section 1981 claims. For example, in *Ndondji v. Interpark, Inc.*, the plaintiff, a black male from Angola, asserted claims of racial discrimination and retaliation in violation of Section 1981. 768 F. Supp. 2d 264, 269 (D.D.C. 2011). Although the essence of the plaintiff’s claims stemmed from national origin discrimination, he asserted that he had sufficiently alleged that he was discriminated against because of his race. *Id.* at 272-73. In rejecting the plaintiff’s argument and dismissing his Section 1981 claims, the court found that although he occasionally referred to his race in his

complaint and alleged that he was the victim of racial discrimination, the few references to his race did not change the fact that his claims were fundamentally about discrimination on the basis of national origin. *Id.* at 274-75. The court cautioned other courts against simply allowing a plaintiff to bootstrap a non-racial discrimination claim into a Section 1981 claim:

Where the question is whether vague allegations of race discrimination are sufficient when no other basis for discrimination is alleged, courts may be more lenient in allowing a *section 1981* claim to survive. (internal citation omitted). But when a plaintiff has unambiguously pled national origin as a distinct basis for discrimination, and the only question is whether the plaintiff has also pled racial discrimination, courts should not strain to find that passing references to race are sufficient to state a *section 1981* claim.

Id. at 275.

See also American Federation of State, County and Municipal Employees Local 2401 v. D.C., 09-01804 (HHK), 2011 U.S. Dist. LEXIS 74650, at **17-18 (D.D.C. July 12, 2011) (“[T]o the extent that plaintiffs allege an age-based impairment of their ability to make or enforce a contract, their § 1981 claim may not proceed”); *Kalantar v. Lufthansa German Airlines*, 402 F. Supp. 2d 130, 138 (D.D.C. 2005) (dismissing Section 1981 claim when plaintiff did not offer any evidence that he was singled out on the basis of race as opposed to citizenship); *Amiri v. Hilton Washington Hotel*, 360 F. Supp. 2d 38, 42-43 (D.D.C. 2003) (dismissing Section 1981 claim when plaintiff did not base his complaint on racial characteristics but rather based it solely on the fact that he was from Afghanistan); *Kidane v. Northwest Airlines, Inc.*, 41 F. Supp. 2d 12, 12 (D.D.C. 1999) (finding that discrimination claims based on plaintiff’s national origin were not cognizable under Section 1981); *Brown v. D.C.*, 251 F. Supp. 2d 151, 163 n.6 (D.D.C. 2003) (“[I]t is well established that 42 U.S.C. § 1981 does not provide a cause of action for sex discrimination”).

Here, none of Plaintiff's allegations relate to discrimination based on race or color (*i.e.*, the characteristics protected by Section 1981). Even the most liberal reading of Plaintiff's allegations, with all reasonable inferences drawn in his favor, confirms that he is alleging solely that the Hotel discriminated against him because he is Muslim. Plaintiff states repeatedly in the Complaint that the Hotel's purported discriminatory treatment of him was due to the fact that he is Muslim. (Compl. ¶¶ 17, 18, 21, 25.) By definition, the word "Muslim" means "a follower of the religion of Islam."¹⁰ Thus, it is a religion and not a race. Plaintiff confirmed this interpretation of the word "Muslim" in his EEOC Charge by stating: "I believe that I have been discriminated against based on my religion (Muslim)." (*See* Exhibit A.)

Plaintiff's EEOC charge further reinforces the conclusion that he believes he was discriminated against solely because of his Muslim religion and not his race. *See Ndongji*, 768 F. Supp. 2d at 273 (basing in part its decision to dismiss plaintiff's Section 1981 claim because the underlying EEOC charge referred only to national origin, and not to race). As explained above, Plaintiff checked off the "religion" box as the basis for his discrimination claims, even though a "race" box was available. (*See* Exhibit A.) He also stated that: "I believe this restriction to be a direct result of my religion." (*Id.*) Indeed, a reading of Plaintiff's Charge conclusively demonstrates that he never mentioned or even referred to his race as the basis for any discrimination claims he raised with the EEOC.

Although Plaintiff on occasion refers to his race in the Complaint in an attempt to invoke his race in the course of his claim's narrative, it is clear from his allegations that he is alleging discrimination based on religion, not race. *See Ndongji*, 768 F. Supp. 2d at 274; *Middlebrooks*,

¹⁰ *See* "the free online dictionary," (<http://www.thefreedictionary.com/Muslim>).

722 F. Supp. 2d at 88; *Mesumbe*, 706 F. Supp. 2d at 92. None of the supporting facts Plaintiff includes in the Complaint suggest that he is claiming that he was discriminated against on the basis of race. Plaintiff's claims at their core are based on religion, and mentioning race in the Complaint, without factual allegations demonstrating that any discrimination was racially-motivated, will not transform those claims into Section 1981 claims based on racial discrimination. *See Ndongji*, 768 F. Supp. 2d at 275. Religion and race are ideologically distinct categories. *See id.* at 273. The Court should not recognize Plaintiff's attempt to blur race and religion to make out a Section 1981 claim. Accordingly, Plaintiff's Section 1981 claim fails, and should be dismissed.

E. PLAINTIFF'S CLAIM OF RETALIATION IN VIOLATION OF 42 U.S.C. § 1981 FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

"[T]o be actionable under § 1981, the retaliation must have been in response to the claimant's assertion of rights that were protected by § 1981." *Jones v. The Washington Times*, 668 F. Supp. 2d 53, 59 (D.D.C. 2009) (quoting *Hawkins*, 163 F. 3d at 693). "An act of retaliation for engaging in activity protected by Title VII does not give rise to a claim for retaliation that is cognizable under § 1981, unless that activity was also protected by § 1981." *Id.*

Not every complaint by an employee entitles the employee to protection from retaliatory action under Section 1981. *See Broderick*, 437 F.3d at 1232. "While no 'magic words' are required, the complaint must in some way allege unlawful discrimination" --that is, discrimination on the basis of a protected characteristic. *Id.*; *see also Middlebrooks*, 722 F. Supp. 2d at 89 (citing *Hawkins* 163 F.3d at 693).

Here, Plaintiff cannot state a claim for retaliation under Section 1981 because he has not alleged that he engaged in protected activity triggering the protection of Section 1981. As explained above, none of Plaintiff's allegations include any suggestion that the Hotel's purported

discriminatory behavior was discriminatory on the basis of race and/or color. Plaintiff's retaliation claims stem solely from his belief that the Hotel retaliated against him as a result of his opposing unlawful discrimination based on *religion*. Plaintiff does not—and cannot—allege that he was retaliated against for making a complaint of discrimination based on his *race*. As such, even taking as true Plaintiff's conclusory allegations that Defendant took adverse action against him based on his complaints, Plaintiff has failed to state an actionable claim of retaliation under Section 1981. Accordingly, Plaintiff's claim of retaliation under Section 1981 fails to state a claim upon which relief can be granted, and should be dismissed. *See Middlebrooks*, 722 F. Supp. 2d at 90.

V. CONCLUSION

For the reasons set forth above, Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Plaintiff has failed to allege any facts necessary to support his claims. Plaintiff has simply alleged—without any factual basis—that the Hotel discriminated and retaliated against him by preventing him from accessing the 8th and 9th floors of the Hotel during a single shift of employment. While Plaintiff clearly is displeased that the State Department uncovered “irregularities” in his background check, there is nothing in the Complaint, aside from his subjective belief, suggesting that the Hotel engaged in discrimination or retaliation. In any event, the Hotel is shielded from liability under Title VII and the DCHRA pursuant to Title VII's national security exemption. Furthermore, Plaintiff has failed to adequately plead claims for discrimination and retaliation based on race under Section 1981.

Accordingly, Defendant Portal Hotel Site, LLC d/b/a Mandarin Oriental, Washington respectfully requests that this Court dismiss the case in its entirety, with prejudice.

EPSTEIN BECKER & GREEN, P.C.

/s/ Kara Maciel

Kara M. Maciel

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Attorneys for Defendant

Portal Hotel Site, LLC d/b/a Mandarin Oriental,
Washington

DATED: November 28, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendant's Motion to Dismiss and Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss was served on the 28th day of November, 2011 via electronic delivery upon the following:

Nadhira Al-Khalili, Esq.
453 New Jersey Avenue, S.E.
Washington, D.C. 20003

Counsel for Plaintiff

/s/ Kara Maciel _____

Kara Maciel

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MOHAMED ARAFI,

Plaintiff,

v.

MANDARIN ORIENTAL,

Defendant.

Case No. 1:11-CV-01553 (HHK)

ORDER

Having considered the Motion of Defendant Portal Hotel Site, LLC d/b/a Mandarin Oriental, Washington to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Plaintiff's response thereto and the record in this case, it is **HEREBY ORDERED**

That the Complaint be and hereby is **DISMISSED**.

United States District Judge

EEOC FORM 131 (11/09)

U.S. Equal Employment Opportunity Commission

<p>Human Resources Director MANDARIN ORIENTAL HOTEL 1330 Maryaldrn Ave., S.W. Washington, DC 20002</p>	<p>PERSON FILING CHARGE</p> <p style="text-align: center;">Mohamed F. Araf</p> <p>THIS PERSON (check one or both)</p> <p><input checked="" type="checkbox"/> Claims To Be Aggrieved</p> <p><input type="checkbox"/> Is Filing on Behalf of Other(s)</p> <hr/> <p>EEOC CHARGE NO. 570-2011-00555</p>
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NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

- Title VII of the Civil Rights Act (Title VII)
 The Equal Pay Act (EPA)
 The Americans with Disabilities Act (ADA)
- The Age Discrimination in Employment Act (ADEA)
 The Genetic Information Nondiscrimination Act (GINA)

The boxes checked below apply to our handling of this charge:

1. No action is required by you at this time.
2. Please call the EEOC Representative listed below concerning the further handling of this charge.
3. Please provide by **28-FEB-11** a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
4. Please respond fully by _____ to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
5. EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by _____ to _____
If you **DO NOT** wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

**Carol M. Allen,
Intake Specialist**

EEOC Representative

Telephone **(202) 419-0715**

**Washington Field Office
131 M Street, N.E.
Suite 4NW02F
Washington, DC 20507
Fax: (202) 419-0739**

Enclosure(s): Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

- Race
 Color
 Sex
 Religion
 National Origin
 Age
 Disability
 Retaliation
 Genetic Information
 Other

See enclosed copy of charge of discrimination.

<p>Date</p> <p>January 28, 2011</p>	<p>Name / Title of Authorized Official</p> <p>Mindy E. Weinstein, Acting Director</p>	<p>Signature</p>
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EEOC Form 161 (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: **Mohamed F. Arafi**
 4104 Piyers Mill
 Apt. 304
 Kensington, MD 20895

From: **Washington Field Office**
 131 M Street, N.E.
 Suite 4NW02F
 Washington, DC 20507

On behalf of person(s) aggrieved whose identity is
 CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
570-2011-00555	James S. Yao, Enforcement Supervisor	(202) 419-0742

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

- The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.
- Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
- The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
- Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge
- The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.
- The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.
- Other (briefly state)

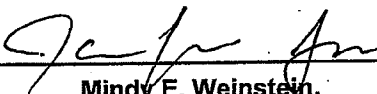
- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission



Mindy E. Weinstein,
 Acting Director

MAY 31 2011

(Date Mailed)

Enclosures(s)

cc: **Kara Maciel, Attorney**
 Epstein Becker & Green, P.C.
 1227 25th Street, NW, Suite 700
 Washington, DC 20037

Nadhira Al-Kalili, Esquire
 Council on American-Islamic Relations (CAIR)
 453 New Jersey Ave, S.E.
 Washington, DC 20003