IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-03204-REB

LORI FRANK,

Plaintiff,

v.

CITY OF FORT COLLINS, a municipality;
TERENCE F. JONES, former Interim Chief of Police, in his individual capacity; and
JEROME SCHIAGER, former Deputy Chief of Police, in his individual capacity,

Defendants.

MOTION TO DISMISS BY DEFENDANT JEROME SCHIAGER

Defendant JEROME SCHIAGER ("Schiager"), moves the Court under Fed. R. Civ. P. 12(b)(6) to dismiss the Eighth Claim for Relief in the Complaint and Jury Demand ("Complaint") (Doc. 2), the only claim asserted against Schiager. In support of this motion, Schiager states:

I. INTRODUCTION

1. Plaintiff, Lori Frank ("Plaintiff" or "Frank"), a "Crime Analyst" for the City of Fort Collins Police Services ("FCPS") alleges that for many years the City of Fort Collins ("City") and two individual defendants discriminated against her in various ways relating to her conditions of employment and pay. Schiager and the other individual Defendant, who at various times held management or supervisory positions with FCPS, are named only on the eighth claim brought under 42 U.S.C. § 1983 for a denial of equal protection under the

Fourteenth Amendment.

2. Schiager is alleged to have been previously assistant chief at FCPS, which included being Frank's direct supervisor from November 2015 until February 7, 2017. (Doc. 2 at ¶¶ 57 and 150.) It is alleged that Schiager was placed on administrative leave on February 7, 2017, and another individual became Frank's supervisor, and that Schiager was cleared and reinstated as a lieutenant, but not as Frank's supervisor, on July 27, 2017. (*Id.* at ¶¶ 150, 168 and 170.)

3. Schiager moves to dismiss the eighth claim for four independent reasons: (1) to the extent the claim accrued prior to December 14, 2016, it is barred by the two-year statute of limitations for §1983 actions, and no new constitutional claims are alleged against Schiager since December 14, 2016; (2) the eighth claim is barred by failing to allege personal participation by Schiager as to all events since February 7, 2017, when he ceased to be Plaintiff's supervisor; (3) the eighth claim is barred because it is a "class-of-one" equal protection claim which cannot be maintained in public employment cases; and (4) Schiager has qualified immunity from this claim.

II. THE PLAUSIBILITY STANDARD ON THE MOTION TO DISMISS

4. To survive this motion to dismiss, the complaint must state a plausible claim for relief against Schiager. The plausibility standard is well-established, as summarized in *Mocek v. City of Albuquerque*, 813 F.3d 912, 921 (10th Cir. 2015):

> To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

> inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). Thus, a plaintiff cannot rely on "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. We accordingly "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).

In addition, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

III. THE EIGHTH CLAIM AGAINST SCHIAGER IS BARRED BY THE STATUTE OF LIMITATIONS

A. The Law on the Statute of Limitations and Accrual of Claims.

5. Although the statute of limitations is an affirmative defense, "when the dates given in the Complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." *Gosselin v. Kaufman*, 656 Fed. A'ppx 916, 919 (10th Cir. 2016)(not selected for publication), *citing Aldrich v. McCulloch Properties, Inc.,* 627 F.2d 1036, 1041, n.4 (10th. Cir. 1980).

6. The law on the two-year statute of limitations for §1983 suits filed in Colorado and on when a claim accrues under federal law was summarized in *Gosselin,* at 919:

> The personal injury statute of the state in which the federal district court sits determines the limitation period for § 1983 suits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008). The general limitation for personal injury claims in Colorado is two years from when the action accrues. Colo. Rev. Stat. § 13–80–102. Federal law establishes when the claim accrues and when the limitations period begins to run. *Mondragon*, 519 F.3d at 1082. "A civil rights action accrues when facts that would support a cause of action are or should be apparent." *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995) (internal quotation marks and citation omitted).

7. In addition on the accrual issue, "a plaintiff need not have conclusive

evidence of the cause of the injury in order to trigger the statute of limitations," as the courts "focus on whether the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm." *Alexander v. Oklahoma*, 382 F. 3d 1206, 1216 (10th Cir. 2004), citing *Baker v. Board of Regents*, 991 F. 2d 628, 632 (10th Cir. 1992). "In this context, a plaintiff must use reasonable diligence in seeking to discover facts giving rise to a claim for relief." *Alexander*, 382 F. 3d at 1216.

B. Events prior to December 14, 2016.

8. The complaint (Doc. 2) in this case was filed on December 14, 2018, so to the extent the eighth claim is based on allegations of improper actions by Schiager before December 14, 2016, and if the claim accrued prior to that date, it is barred.

9. To determine if the claim accrued before December 14, 2016, we start by looking at what actions Schiager is alleged to have taken and the dates of those actions. In the eighth claim itself, the allegations are almost completely conclusory, and thus not plausible under *Iqbal,* with little information about dates. (*Id.* at ¶¶ 272 - 293.)

10. But, ¶ 271 in the eighth claim incorporates by reference the prior allegations of the complaint which include, in the chronological organization of the complaint, ¶¶ 57-134 for events alleged to have occurred prior to December 14, 2016. Schiager's alleged involvement in these events may be summarized in eight categories: (1) Schiager opposed Frank's proposed re-classification of her job that she began seeking in 2014 (*Id.* at ¶¶ 52, 81, 87 and 110); (2) he tried to take credit for her work (*Id*. at ¶ 60-61); (3) he exhibited a bad attitude towards her at work (*Id*. at ¶¶ 62, 65-66, 75-76 and 80); (4) he asked her to

conduct an improper investigation (*Id*. at ¶¶ 63-64); (5) he took away duties previously assigned to her (*Id*. at ¶¶ 67 and 77); (6) he gave her several bad performance reviews and put her on a performance improvement plan ("PIP") but did not treat a male employee, Erik Martin ("Martin"), a "Financial Analyst," in a similar manner (*Id*. at ¶¶ 82-84, 88,107, and 119-131); (7) he hired Martin in 2016 and paid him more money than Plaintiff (*Id*. at ¶¶ 88-96); and (8) he excluded Plaintiff from work events and "marginalized" her performance (*Id*. at ¶¶ 77 and 113).

11. Obviously, from these allegations of the complaint, Plaintiff was fully aware of these alleged wrongs by Schiager that occurred prior to December 14, 2016, or at least should have known under *Alexander,* because each of the events in the eight categories personally involved her at the time that it occurred, such as Schiager opposing her attempt to re-classify her job, taking away duties, giving poor performance reviews, etc.

12. Plaintiff's knowledge of this claim is also demonstrated by her allegations that prior to December 14, 2016, she complained about Schiager to the Chief of Police or the City numerous times: (1) in early 2014, she "formally complained" to the Chief about Schiager's "accusations" as to her (*id.* at ¶¶ 71-73); (2) on November 3, 2015, as soon as Schiager became her supervisor, Frank complained to the Chief about numerous issues involving Schiager, including his past treatment and retaliation against her, taking away her job duties, opposing her attempt to re-classify her position, etc. (*id.* at ¶¶ 76-81); (3) in May 2016, Plaintiff responded to criticisms by Schiager in her first quarter performance review (*id*. at ¶¶ 82-87); (4) on August 9, 2016, Plaintiff sent a memo to the Chief about Schiager's

behavior and treatment towards her (*id.* at ¶¶105-106); (5) in late August 2016, Frank responded to Schiager's negative comments that he made in her second quarter review (*id.* at ¶¶107-108); (6) in October 2016, Frank received a letter from the City's Human Resources investigator indicating that she had received Frank's complaints about Schiager and would be looking into "any violations" of City policies (*id.* at ¶¶106 and 111); and (7) on November 30, 2016, after Frank received a poor third quarter review and PIP, and learned that the City's investigation supported Schiager and not her, submitted a complaint to the City through her attorney regarding Schiager's treatment toward her including her performance reviews and PIP (*id.* at ¶¶ 116, 119, 123, and 132-134).

13. Therefore, because Plaintiff thoroughly knew (or should have known through reasonable diligence) about the events of alleged wrongdoing by Schiager prior to December 14, 2016, and showed her knowledge of an existing claim by complaining about Schiager repeatedly prior to that date, the eighth claim accrued prior to December 14, 2016, as to all eight categories of allegedly wrongful acts by Schiager (*see* ¶ 10 above) and is barred to that extent by the two-year statute of limitations.

C. Events from December 14, 2016, to February 7, 2017.

14. Plaintiff also makes some allegations about Schiager's actions in the 55-day period from December 14, 2016, to February 7, 2017, when Schiager ceased to be her supervisor. (Doc. 2 at ¶¶135-149.)[1] But, the factual allegations made about events in this

[1] Plaintiff alleges later in her complaint that her rights were also violated by events that occurred since February 7, 2017, but she makes no allegations that Schiager had any personal involvement so he has no liability for that period. *See,* Section IV below.

period merely provide additional information about the claim that had already accrued prior to December 14, 2016, as discussed above.

15. Plaintiff's allegations on Schiager's actions in the 55 days following December 14, 2016, may be analyzed in three categories, each of which was raised prior to December 14, 2016. First, Plaintiff alleges that Schiager imposed an unrealistic error rate on her work, but Martin (the male employee) made errors and was not given a negative evaluation or placed on a PIP. (*Id.* at ¶¶ 135-137.) However, these issues all arose prior to December 14, 2016, and Plaintiff knew about them as shown in earlier allegations in the complaint. (*Id.* at ¶¶107,124-127, and 130.)

16. Second, Plaintiff alleges that on January 1, 2017, she did not receive the pay raise that she would have received because Schiager had placed her on a PIP. (*Id.* at ¶¶139 and 142-143.) However, it is clear from prior allegations in the complaint that the PIP was imposed in November 2016 and Plaintiff knew then it would block her raise until it was resolved. (*Id*. at ¶¶119-120, 123-126, 133-134.) Third, Plaintiff alleges that Schiager held a staff meeting without her on January 12, 2017. (*Id*. at ¶¶140-141, 148-149.) However, Plaintiff alleged that previously Schiager had begun excluding her from work-related events and meetings and "marginalizing" her performance. (*Id*. at ¶113.)

17. In addition to the specific examples in the prior paragraph of these three issues being raised prior to December 14, 2016, it must be remembered that Plaintiff alleged eight categories of events that occurred prior to December 14, 2016 (*see* ¶ 10 above), that would have given her knowledge of the potential claim against Schiager well

before these three issues allegedly arose.

18. In summary, Plaintiff's allegations about the events in the 55 days following December 14, 2016, relate merely to additional facts about prior allegedly unconstitutional conduct by Schiager where the claim accrued prior to December 14, 2016, and raise no new constitutional claims. Therefore, the eighth claim is barred by the statute of limitations as to all of Schiager's actions that allegedly occurred both prior to December 14, 2016, and from that date to February 7, 2017, as discussed above.

IV. PLAINTIFF CANNOT PROCEED AGAINST SCHIAGER FOR ANY EVENTS SINCE FEBRUARY 7, 2017, BECAUSE THERE IS NO ALLEGATION THAT HE PERSONALLY PARTICIPATED IN SUCH EVENTS

19. It is settled law that "in § 1983 cases, a plaintiff must adequately allege the defendant's personal participation in a constitutional violation." *Pemberton v. Patton*, 673 F. App'x 860, 867 (10th Cir. 2016), *citing Iqbal* at 676.

20. In Plaintiff's complaint, she makes no allegation of any personal participation by Schiager as to any constitutional violation against her since February 7, 2017. (Doc. 2 at ¶150, *et seq.*) This is understandable because Plaintiff alleges that "on or about February 7, 2017, Schiager was placed on administrative leave and Greg Yeager became Frank's temporary supervisor." (*Id*. at ¶150.) Plaintiff later alleges that on July 27, 2017, the Chief concluded that Frank's complaints about Schiager were "unfounded" and reinstated him as a Lieutenant (*Id*. at ¶¶168, 170-173), but there is no allegation that Schiager ever served again as Plaintiff's supervisor or took any actions against her since that date.

21. Therefore, the eighth claim is barred against Schiager to the extent that it

alleges any constitutional violation by Frank since February 7, 2017. When this argument is combined with the argument on the accrual of the statute of limitations in Section III above, it covers all time periods alleged in the complaint against Schiager.

V. THE EIGHTH CLAIM IS BARRED BECAUSE IT IS AN IMPROPER "CLASS-OF-ONE" EQUAL PROTECTION CLAIM BY A PUBLIC EMPLOYEE

22. Plaintiff's eighth claim against Schiager for violation of her right to equal protection in her employment should also be completely dismissed because it is a "class-of-one" claim that cannot be maintained by a public employee under *Engquist v. Oregon Dep't of Agriculture,* 553 U.S. 591 (2008). There, Engquist worked for the Oregon Department of Agriculture (ODA) for about ten years but had problems with her supervisor and her job was eventually eliminated. *Id.* at 594-595. Engquist brought suit against the ODA and two managers on various theories. *Id.* at 595. In her equal protection claim, Engquist alleged that the defendants discriminated against her on the basis of race, sex, and national origin, but she also brought what is known as a "class-of-one" equal protection claim, alleging that she was fired not because she was a member of any identified class but simply for arbitrary, vindictive, and malicious reasons. *Id.* The jury found for Engquist on several of her claims, including the class-of-one equal protection claim, and against the ODA and the individual defendants, but the Court of Appeals reversed on the equal protection claim and the Supreme Court affirmed the Court of Appeals. *Id.* at 595-597.

23. The Supreme Court stated that it is "well settled that States do not escape the strictures of the Equal Protection Clause in their role as employers," but the Court's "traditional view of the core concern of the Equal Protection Clause as a shield against

arbitrary classifications, combined with unique considerations applicable when the government acts as employer as opposed to sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context." *Id.* at 597-598.

24. The Supreme Court reasoned that government as employer has far broader powers and that "government offices could not function if every employment decision became a constitutional matter." *Id.* at 598-599. The Court added that it is "no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized," which is a principle that "applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist* at 604. The Court concluded that the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, and that "public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them." *Id.* at 609.

25. *Engquist* was followed in *Pignanelli v. Pueblo School District No. 60,* 540 F.3d 1213 (10th Cir. 2008). There, a part-time teacher claimed, among other things, that her teaching position was not renewed in violation of her equal protection rights because she was treated differently than similarly-situated employees. *Id.* at 1218. The Court of Appeals held that Pignanelli's "equal protection claim against a public employer based on

allegations the employer treated her differently than others similarly situated . . . is not a legally cognizable cause of action" under *Engquist*. *Id.* at 1220. The Court added that the school board's decision to allow Pignanelli's contract to lapse rather than rehire her, even if not rationally related to a legitimate government purpose, "does not constitute a violation of equal protection" under *Engquist. Id.* at 1221.

26. Plaintiff may argue that *Engquist* is distinguishable because she did not expressly bring a class-of-one equal protection claim but instead alleged in the eighth claim that Schiager discriminated against female employees.

27. If Plaintiff makes that argument, Schiager contends that the vague and conclusory allegations in Plaintiff's complaint of discrimination against a class of female employees (Doc. 2 at ¶¶ 1-2, 18) are insufficient to avoid the rule from *Engquist*. As explained below, these allegations are not truly class based to be sufficient under *Iqbal* for a plausible equal protection claim, and do not show that a class was denied equal protection by Schiager on the issues raised by Plaintiff.

28. Plaintiff alleges that two or three women resigned or complained but the allegations are vague and unrelated to alleged discrimination against a class of female employees on Plaintiff's issues. (*Id.* at ¶¶ 15, 103-104.) Plaintiff allegedly quotes "fellow employee M.G." as complaining about Schiager for reasons that are not stated, but then claims in conclusory fashion that "M.G.'s concerns were related to the treatment of women at FCPS." (*Id.* at 177-179.) Plaintiff adds later that female employee M.J. resigned, and, "upon information and belief," also made an unspecified complaint about her treatment as

a woman inside the department. (*Id.* at 193-194.) Plaintiff cites as evidence of an inappropriate culture at FCPS a prior lawsuit brought against the department, but that the prior lawsuit was brought by two Hispanic male officers. (*Id*. at ¶¶ 7-9, 101,109, and 184.)

29. In contrast, virtually all of the substantive allegations about Schiager in Plaintiff's long complaint relate to his allegedly improper treatment of Frank on issues such as improper evaluations and the PIP, being the sole person held to an impossible-to-achieve error rate, having her duties taken away, not allowing her job to be reclassified prior to 2016, having a bad attitude towards her, etc. (*See* ¶ 10 above.) There are no plausible, factual allegations that these alleged actions of Schiager were applied to any other women at all.

30. Plaintiff alleges that Schiager gave Martin a higher salary and a lower standard on performance reviews than Frank (Doc. 2 at ¶¶ 88-96, 125), but there are no allegations that he did this as to any other "similarly-situated" female employee. It must also be noted that the complaint provides no plausible, factual allegations that Frank and Martin, a criminal analyst and a financial analyst, were similarly situated just because they both had job titles that included the word "analyst" and allegedly were equals on the organizational chart. (*Id.* at 89-92.) Frank alleged that she analyzed crime statistics, that Martin was hired without any law enforcement experience and was not qualified to do her job, and that each worked "in their respective areas of expertise." (*Id.* at ¶¶ 33-34, 88-91, 96, 162 and 175.) Martin has not been sufficiently alleged to be similarly situated.

31. Plaintiff does allege that the City initiated a reclassification of jobs in 2018

and that Frank and three other women who served as crime analysts or criminalists were placed in the "administrative" category, while the only positions that were placed in the "professional" category at FCPS were held by males. (*Id.* at ¶¶ 195-224.) But, even if that was sufficient to be a class-based violation, it is irrelevant as to Schiager because he is not alleged to have had any personal participation in improper events since February 7, 2017. (*See* section IV above).

32. This lack of class-based factual allegations puts Plaintiff's complaint on par with the one submitted by Engquist. It attempts to constitutionalize the personal complaints on the job that are unique to Frank, and do not apply to a class of female employees at FCPS. Proceeding with the eighth claim against Schiager will involve this Court in reviewing the employment decisions as to Frank that are necessarily subjective and individualized, as *Engquist* cautioned against. For these reasons, this Court should dismiss the eighth claim against Schiager because it is effectively a class-of-one equal protection claim that cannot be maintained under *Engquist*.

VI. THE EIGHTH CLAIM AGAINST SCHIAGER IS ALSO BARRED BY QUALIFIED IMMUNITY

33. Schiager also raises the defense of qualified immunity to the eighth claim. When defendant asserts a qualified immunity defense, plaintiff shoulders a heavy two-part burden to show: (1) that on the facts alleged, defendant violated her constitutional rights; and (2) that the law was clearly established as the time of the alleged unlawful activity. *Perry v. Durborow*, 892 F.3d 1116, 1120-1121 (10th Cir. 2018). Although Plaintiff has the burden, Schiager will briefly address these two elements.

34. As to the first element, Schiager denies that Plaintiff has stated a claim for equal protection against him, especially under *Engquist*. There are no allegations that he took any actions against other female employees on the substantive issues in the complaint, which are unique to Plaintiff. Schiager also maintains that numerous individual allegations do not rise to the level of a claim under the Equal Protection Clause, such as that Schiager had a bad attitude toward her, he tried to take credit for her work, and did not invite her to a meeting of his staff.

35. As to the second element, Schiager denies that there is any clearly-established law that would deprive him of the qualified immunity defense on the facts alleged here. Under *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 589-590 (2018), existing law must have placed the constitutionality of the defendant's conduct "beyond debate," the defense protects all but the plainly incompetent or those who knowingly violate the law, the legal principle must be "settled law" and not merely "suggested" by then-existing precedent, every reasonable official would know and understand the law, and the legal principle must clearly prohibit the officer's conduct in the "particular circumstances" before him, which requires a "high degree of specificity" (citations omitted). This defendant did not find any such clearly-established precedent governing these particular circumstances.

WHEREFORE, Defendant Schiager requests this Court to dismiss the eighth claim (and therefore the Complaint) against him, with prejudice.

Respectfully submitted,

Date: January 31, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that the foregoing was placed in the U.S. Mail, postage prepaid, and addressed to the following:

[none]

s/ David R. DeMuro
David R. DeMuro