IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03204-RBJ

LORI FRANK,

Plaintiff,

vs.

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,

Defendant.

DEFENDANTS CITY OF FORT COLLINS' AND TERENCE JONES'S MOTION TO PARTIALLY DISMISS THE COMPLAINT (DOC. # 2)

Defendants, City of Fort Collins and Terence F. Jones, by and through their attorneys Cathy Havener Greer, and Kathryn A. Starnella, of Wells, Anderson & Race, LLC, and Jenny Lopez Filkins, Senior Assistant Attorney, City of Fort Collins, and pursuant to Fed. R. Civ. P. 12(b)(1) and (6), respectfully submit the following Motion to Partially Dismiss Lori Frank's Complaint (Doc. # 2).

INTRODUCTION

For approximately 14 years, Plaintiff Lori Frank allegedly received high praise for the quality of her work as a Crime Analyst for the City of Fort Collins Police Department. *See* Complaint, Doc. # 2 at ¶ 37. As a Crime Analyst, Ms. Frank was required and expected to collect and analyze extensive data and to produce reports to assist the Police Department mitigate spikes

in crime and allocate resources. *Id*. at ¶ 54. In November 2015, Plaintiff Frank was assigned to a different supervisor, Defendant Jerome Schiager. *Id*. at ¶ 57. In his first performance review of Ms. Frank's work in May 2016, Defendant Schiager provided constructive criticism to help Ms. Frank improve the quality and accuracy of her work as a Crime Analyst. *Id*. at ¶ 82. Defendant Schiager observed that Ms. Frank's work "did not represent good analysis" and noted "room for improvement." *Id*. at ¶ 83. Defendant Schiager's observations of poor work quality, *i.e.*, consistent errors and lack of analysis, continued through November 2016, when he placed Ms. Frank on a performance improvement plan. *See id*., at ¶¶ 107, 117-19, 123, 124.

In the face of Defendant Schiager's constructive criticism, Ms. Frank declined to take stock of her shortcomings and to improve. Instead, she filed suit. In her suit, Ms. Frank latches onto a theory of retaliation (Claims 3 and 4), convinced that the negative evaluations and performance improvement plan resulted from a vendetta Defendant Schiager had because of a reprimand letter he received in May 2014—two years prior to his first performance evaluation of her—following a complaint she made to his supervisor. *Id*. at ¶¶ 70-74; *see also* ¶ 242-43. She further contends that the negative evaluations and performance plan are products of gender discrimination (Claims 1 and 2). *Id*. at ¶ 235.

Ms. Frank also theorizes that pay disparities between her male Financial Analyst colleague and her, a female Crime Analyst, are the product of intentional discrimination by the City rather than due to the City's methods for characterizing two distinguishable jobs (Claims 1, 2, and 7). *Id*. at ¶¶ 227-232, 266-269. She further contends that Defendant Schiager violated her equal protection rights by negatively evaluating her work and paying her, as a Crime Analyst, less than a male Financial Analyst. *Id*. at ¶¶ 274-80. Defendant Jones (who became Interim Chief of Police

in May 2017)[1] also allegedly violated Ms. Frank's equal protection rights by placing her job in the lower paying Administrative category while placing her male colleague's Financial Analyst job in the higher paying Professional category. *Id*. at ¶¶ 284-84. Finally, without any support beyond boilerplate allegations, Ms. Frank has tacked on federal and state law claims for age discrimination (Claims 5 and 6). *Id*. at ¶¶ 248-263.

As discussed below, Ms. Frank's Section 1983 claims are time-barred to the extent that they rest on allegations that occurred outside the applicable two-year statute of limitations, *i.e.*, December 14, 2016. Ms. Frank fails to state actionable age discrimination claims against the City or an actionable Equal Protection claim against Defendant Jones. Thus, those claims' dismissal is warranted. Additionally, Defendant Jones is entitled to qualified immunity.

STANDARDS OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. The existence of subject matter jurisdiction is a threshold question of law. *Madsen v. United States ex. rel. U.S. Army Corps of Eng'rs*, 841 F.2d 1011, 1012 (10th Cir. 1987). The plaintiff bears the burden of demonstrating that the court has subject matter jurisdiction over the complaint. *See Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 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, 1949 (2009) (citing *Bell*

[1] Complaint, Doc. # 2, at ¶ 159.

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

ARGUMENT

I. Ms. Frank's Section 1983 claims against the City are time-barred to the extent they rest on alleged events that occurred outside the applicable two-year statute of limitations.

Statute of limitations periods determine the time limitations on civil rights actions. *See Workman v. Jordan*, 32 F.3d 475, 482 (10th Cir. 1994) (applying Colorado's two-year limitations period for personal injury actions to § 1983 claim); *see also* C.R.S. §§ 13-80-102(1)(g) (articulating two-year statute of limitations for "[a]ll actions upon liability created by a federal statute where no period of limitation is provided in said federal statute"); C.R.S. § 13-80-102(1)(i) (articulating two-year statute of limitations for "[a]ll other actions of every kind for which no other period of limitation is provided").

The statute of limitations on § 1983 claims begins to run when the plaintiff knows or has reason to know of the injury that is the basis of his claims. *See Workman*, 32 F.3d at 482. In this case, the limitations period started no later than May 13, 2016, when Ms. Frank received her first performance review from Defendant Schiager. *See* Complaint, Doc. # 2 at ¶ 82. Therefore, Ms. Frank should have commenced this lawsuit in May 2018, about seven months earlier than she did. Because Ms. Frank did not file her suit till December 14, 2018, her Section 1983 claims[2] against

[2] Ms. Frank's Section 1983 claims are: Title VII gender discrimination (Claim 1); Title VII retaliation (Claim 3); discrimination under the Age Discrimination in Employment Act (Claim 5); and Equal Pay Act violation (Claim 7).

the City are time-barred to the extent the rest on alleged events that occurred before December 14, 2016.

II. Ms. Frank fails to state actionable claims for age discrimination under federal and state law (Claims 5 and 6).

Claims 5 and 6 concern the City's alleged violations of the Age Discrimination in Employment Act of 1967 (ADEA) and the Colorado Anti-Discrimination Act (CADA). Complaint, Doc. # 2 at 33-4. In support, Ms. Frank broadly alleges that the City paid her less than her younger, male colleague (Erik Martin) and the City subjected her, but not that male colleague, to negative performance evaluations and a performance plan because of her age. Complaint, Doc. # 2 at ¶¶ 249-54.

Under the ADEA, employers may not use age as a basis to "discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment." 29 U.S.C. § 623(a)(1). Likewise, under CADA, "it shall be discriminatory . . . for an employer to refuse to hire, or discharge, to promote, or demote or to discriminate in matters of compensation against any person otherwise qualified because of . . . age[.]" COLO. REV. STAT. § 24-34-402(1). The same legal standard applies to age discrimination claims brought under either the ADEA or CADA. *See Dunham v. Neat Capital, Inc.*, No. 18-cv-01210, 2018 U.S. Dist. LEXIS 181677, at *7 (D. Colo. Oct. 22, 2018) (unpublished) (citing *Bodaghi v. Dep't of Nat'l Res.*, 995 P.2d 288, 297-98 (Colo. 2000) (applying *McDonnell Douglas Corp. v. Green* framework to CADA claims)). To establish her disparate-treatment claim, Ms. Frank must plausibly allege "that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009). Age must be "the factor that made a

difference," but it need not be the sole motivating factor. *Jones v. Okla. Cty. Pub. Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010).

Ms. Frank's age discrimination claim rests on circumstantial allegations. Therefore, to withstand a motion to dismiss, she must plausibly allege a *prima facie* case of discrimination. *See Ash v. Aurora Pub. Sch.*, No. 18-cv-01280, 2019 U.S. Dist. LEXIS 4790, at **6-7 (D. Colo. Jan. 10, 2019) (unpublished). To state a *prima facie* age discrimination claim, Ms. Frank must plausibly allege that (1) she belongs to a protected class, *i.e.*, she was at least 40 years old; (2) she was qualified for her Crime Analyst job; (3) she suffered an adverse employment decision(s) (*i.e.*, imposition of a performance improvement plan and the classification of her job as administrative); and (4) the circumstances give rise to an inference of unlawful discrimination. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996) (applying the *McDonnell Douglas* framework and noting that ADEA's protections apply to individuals at least 40 years old); *Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997) (applying *McDonnell Douglas* framework to CADA claim); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). These elements of a *prima facie* claim help courts determine whether a plaintiff has set forth a plausible claim. *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012).

Defendant City of Fort Collins does not dispute that, at this pleadings stage, Ms. Frank satisfies the first element of a *prima facie* age discrimination claim: Ms. Frank was at least 40 years old at the time of the alleged discipline and administrative job classification. *See* Complaint, Doc. # 2, at ¶ 249. Ms. Frank, however, has not plausibly alleged that age was the "but-for" cause of the imposed performance improvement plan and the administrative (as opposed to professional) classification of her Crime Analyst job, which resulted in lower pay than Mr. Martin. For example,

Ms. Frank touts the quality work she produced *before* Defendant Schiager became her supervisor in November 2015, *see, e.g., id*., at ¶¶ 37-42, 47-48, 55-56, 128, but she does not allege any facts to substantiate her broad claims that Mr. Schiager's assessments of her work as "very poor quality," error-prone, and without good (or any) analysis were unwarranted, retaliatory, and discriminatory. *See, e.g., id*. at ¶ 82-83, 107, 124. At most, she alleges that she "present[ed] evidence that [the] criticisms of her performance were unfounded"—but she alleges no facts regarding that "evidence." *See id*. at ¶¶ 85, 108. Ms. Frank cannot rely on these conclusory statements regarding her satisfactory work product to withstand a motion to dismiss. *See, e.g.*, *Ash*, 2019 U.S. Dist. LEXIS 4790, at **8-10 (dismissing age discrimination claim that rested on conclusory statements of satisfactory job performance); *see also Khalik*, 671 F.3d at 1191 (disregarding conclusory statements in favor of the factual allegations that provided a plausible basis for liability).

As another example, throughout her Complaint, Ms. Frank ties the administrative (as opposed to professional) classification of her Crime Analyst job to an alleged "systemic culture of discrimination against women." *Id*. at ¶¶ 17, 18, 166; *see also* ¶ 255. She does not tie it to discrimination against people over 40 years of age until she gets to paragraph 258 of her complaint. In sum, Ms. Frank does not plausibly allege that her age was the "but for" cause of the City's alleged actions. Therefore, dismissal of Ms. Frank's age discrimination claims under state and federal law is warranted.

III. Ms. Frank fails to state an actionable Equal Protection claim and Defendant Jones is entitled to qualified immunity (Claim 8).

A. Failure to state an Equal Protection claim.

In Claim 8, Plaintiff Frank alleges that Defendant Jones, in his individual capacity as Interim Police Chief, violated her equal protection rights when he categorized her Crime Analyst job as an administrative position, while he categorized Erik Martin's Financial Analyst job as a professional position. Doc. # 2 at ¶¶ 272-73, 284-85. As a result of the differing job characterizations, Ms. Frank received less compensation than Mr. Martin. *Id*. at ¶ 285.

The Equal Protection Clause "prohibits state and local governments from treating similarly situated persons differently." *Rector v. City & Cnty. of Denver*, 348 F.3d 935, 949 (10th Cir. 2003). To state an actionable Equal Protection claim, Ms. Frank must plausibly allege that, at the time of the complained of conduct, she was similarly situated to Mr. Martin "in every material respect" and "no rational basis for the difference in treatment" existed. *Rocha v. Zavaras*, 443 F. App'x 316, 319 (10th Cir. 2011); *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (explaining an equal protection plaintiff's pleading burden). "[T]he showing that persons are similarly situated requires some specificity." *Green v. Taylor*, No. 2:15-cv-697, 2017 U.S. Dist. LEXIS 152776, at *26 (M.D. Ala. Sept. 20, 2017) (unpublished) (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006)). Courts must consider all the factors that account for the disparity. *See Morman v. Campbell Cnty. Mem. Hosp.*, 632 F. App'x 927, 935 (10th Cir. 2015) (noting relevance of circumstances in which different groups of surgeons became hospital employees, such as patient base, strength of reputation in the community, and equipment); *see also Green v. Taylor*, No. 2:15-cv-697, 2017 U.S. Dist. LEXIS 152776, at **23-24 (M.D. Ala. Sept.

20, 2017) (unpublished) (finding similarity between plaintiff investigators and comparator group of investigators because they performed the "same criminal investigatory work, homicide work, and special inquiries") .

Ms. Frank's allegations fail to plausibly allege that she was similarly situated to Mr. Martin in all material aspects. Mr. Martin is a Financial Analyst, while Ms. Frank is a Crime Analyst. Complaint, Doc. # 2, at ¶¶ 30, 88. Though both Mr. Martin and Ms. Frank hold "analyst" jobs, the context and nature of their jobs are very different. *Cf. id.*, at ¶ 175 (alleging that Mr. Martin was "unqualified to perform [Ms.] Frank's job responsibilities"). One job concerns financial and budget matters, while the other job concerns crime data and statistics. Ms. Frank implausibly alleges a similarity between the two jobs: "Martin and Frank were the only two analyst[s] supervised by [Deputy Chief] Schiager," they "were equals on the organizational chart," and they "performed substantially the same type of analytical work in their respective areas of expertise." *Id*. at ¶¶ 89-91. Ms. Frank alleges no facts to plausibly demonstrate that financial analysis is "substantially the same" as crime analysis or that Mr. Martin and Ms. Frank have similar professional and educational backgrounds. She also does not substantiate her claim that she and Mr. Martin were "equals on the organizational chart." These "threadbare recitals" of similarity are insufficient to withstand Defendants' motion to dismiss. *See Iqbal*, 129 S. Ct. at 1949.

Ms. Frank's Equal Protection claim also fails to the extent it rests on a "class of one" theory. In *Engquist v. Oregon Department of Agriculture*, the Supreme Court held that the class-of-one theory does not apply in the public employment context. 553 U.S. 591, 605 (2008) (noting that a governmental employer's differential treatment of employees is the product of "the broad discretion that typically characterizes the employer-employee relationship"). The Tenth Circuit

applied this principle in *Pignanelli v. Pueblo School District No. 60*, 540 F.3d 1213, 1220-22 (10th Cir. 2008) (finding that *Engguist* barred the plaintiff's claim arising from her school board election loss and job loss). Based on controlling precedent, Ms. Frank's Equal Protection claim cannot survive.

B. Entitlement to qualified immunity.

Government officials performing discretionary functions are protected from individual liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A constitutional right is clearly established in one of two ways: (1) by an on-point Supreme Court or published Tenth Circuit decision; or (2) by "the clearly established weight of authority from other courts [that has] found the law to be as plaintiff maintains." *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015). Qualified immunity exists as long as reasonable officials in the same situation could disagree on the appropriate course of action to follow. *Malley v. Briggs*, 475 U.S. 335, 336 (1986). Ms. Frank "cannot simply identify a clearly established right in the abstract and allege that [Defendant Jones has] violated it." *Hilliard v. City and Cnty. of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991). She need not, however, identify a perfectly on-point case. *Quinn*, 780 F.3d at 1005.

To defeat a qualified immunity defense, Ms. Frank must satisfy two steps: first, establish that the defendant violated a constitutional or statutory right; and second, demonstrate that the right was clearly established at the time of the violation. *PETA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1207 (10th Cir. 2002). The court may exercise its discretion

in determining which prong of the qualified immunity test to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Under both steps of the analysis, Defendant Jones is entitled to qualified immunity. First, because Ms. Frank fails to plausibly allege that she and Mr. Martin are similarly situated.

Second, Ms. Frank relies on a clearly established right in the abstract: the right to be free from gender discrimination in the workplace. This general, abstract right, however, is insufficient to defeat Defendant Jones' qualified immunity defense. *See Morman*, 632 F. App'x at 936-37 (holding that defendants were entitled to qualified immunity liability for gender discrimination because no law clearly established that employers must hire a medical practice group on the same terms as an individual medical professional); *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (stating, "if the test of 'clearly established law' were to be [generally] applied . . . it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of [qualified immunity'"); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality"). For these reasons, Defendant Jones is entitled to qualified immunity.

CONCLUSION

Defendants the City of Fort Collins and Terence Jones respectfully request dismissal of the Age Discrimination claim (Claims 5 and 6) and the Equal Protection claim (Claim 8) against them, respectively. In sum, Plaintiff Frank's 42 U.S.C. § 1983 claims are time-barred to the extent they concern alleged events that occurred more than two years ago; Ms. Frank fails to state an actionable age discrimination claim against the City under federal or state law; she fails to state an actionable

Equal Protection claim against Mr. Jones in his individual capacity; and Mr. Jones is entitled to qualified immunity from personal liability for damages.

Dated this 31st day of January 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2019, a true and correct copy of the above and foregoing **DEFENDANTS CITY OF FORT COLLINS' AND TERENCE JONES'S MOTION TO PARTIALLY DISMISS THE COMPLAINT (DOC. # 2)** was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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