IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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.

PLAINTIFF'S RESPONSE TO DEFENDANT JEROME SCHIAGER'S MOTION DISMISS

Plaintiff Lori Frank, through her undersigned attorney, Jennifer Robinson, hereby responds to Defendant Jerome Schiager's Motion to Dismiss as follows:

RESPONSE TO ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE STATUTE OF LIMITATIONS IS AN AFFIRMATIVE DEFENSE AND MS. FRANK IS NOT REQUIRED TO ANTICIPATE DEFENDANT'S AFFIRMATIVE DEFENSE IN HER COMPLAINT.

In *Fernandez v. Clean House, LLC*, 883 F.3d 1296 (10th Cir. 2018) the 10th Circuit reversed a dismissal of a complaint on statute of limitations grounds holding that:

> . . . At the pleading stage of litigation it is not the plaintiff, but the defendant, who must raise the issue. Federal Rule of Civil Procedure 8(c)(1) states: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense...." A plaintiff need not anticipate in the complaint an affirmative defense that may be raised by the defendant; it is the defendant's burden to plead an affirmative defense. *See Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) ("[T]he burden of pleading [affirmative defenses] rests with the defendant."); *Ghailani v. Sessions*, 859 F.3d 1295, 1306

> (10th Cir. 2017) (the complaint need not anticipate affirmative defenses); *Levin v. Miller*, 763 F.3d 667, 671 (7th Cir. 2014) ("The [Supreme] Court held in *Gomez* ... that complaints need not anticipate affirmative defenses; neither *Iqbal* nor *Twombly* suggests otherwise."). And there can be no question that a limitations issue is an affirmative defense; Rule 8(c)(1) explicitly lists "statute of limitations" as such. Further, even after the defendant has pleaded an affirmative defense, the federal rules impose on the plaintiff no obligation to file a responsive pleading. Absent a counterclaim or cross-claim, pleading under the Federal Rules stops with the answer. See Fed.R.Civ.P. 7(a)(7) (reply to answer is permitted only if ordered by court); *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1076 (10th Cir. 2009) ("Rule 8(c)'s ultimate purpose is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it." (internal quotations marks omitted)).
>
> To be sure, on occasion it is proper to dismiss a claim on the pleadings based on an affirmative defense. But that is only when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements. *See Xechem, Inc. v. Bristol-Myers Squibb Co.,* 372 F.3d 899, 901 (7th Cir. 2004) ("Only when the plaintiff pleads itself out of court - that is, admits all the ingredients of an impenetrable defense - may a complaint that otherwise states a claim be dismissed under Rule 12(b)(6)."); *Miller v. Shell Oil Co*., 345 F.2d 891, 893 (10th Cir. 1965) ("If the defense appears plainly on the face of the complaint itself, the motion [to dismiss for failure to state a claim] may be disposed of under [Rule 12(b)].").
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> Under that standard, this is not an appropriate case to dismiss on statute-of-limitations grounds. The Complaint hardly contains an admission that the alleged FLSA violations were not willful. On the contrary, it asserts willfulness.

Like the 10th Circuit found in *Fernandez*, the Complaint in this case hardly contains an admission that Ms. Frank knew or should have known of facts that would put a reasonable person on notice that wrongful conduct caused the harm. And according to *Fernandez*, she was not required to anticipate Defendant's affirmative defense and support her claims with sufficiently specific facts regarding when her claims accrued. For example, one of Ms. Frank's Equal Protection claims relates to the pay differential between Ms. Frank and Martin. Martin was hired on June 6, 2016 and Ms. Frank alleges that he was paid $69,035.00 per year while she was paid $67,558.00 per year. (ECF No. 2 ¶¶ 88 – 95.) In this case the statute of limitations

would not begin to run until Ms. Frank knew or reasonably should have known what Martin's salary was. Not the date he was hired. The basis of an Equal Protection claim lies in the knowledge that someone outside the protected class was treated more favorably. It appears that Defendant assumes that Ms. Frank knew at the time Martin was hired what his salary was. However, nothing in the Complaint conclusively establishes when this claim accrued and Ms. Frank was not required to plead this information in her Complaint. Accordingly, dismissal is unwarranted.

Similarly, Ms. Frank alleges that on December 22, 2016 (within the statutory time period) Schiager acknowledged to Ms. Frank the disparate standards that Frank was held to, telling Frank that others had made errors but he had not lost confidence in their performance. (ECF No. 2 ¶ 135.) Accordingly, Equal Protection claims related to Ms. Frank's performance did not accrue at the time she was evaluated negatively and placed on a PIP, but when she knew or reasonably should have known that others were treated more favorably. She was not required to anticipate Defendant's affirmative defense and allege this information in her Complaint. Accordingly, dismissal of claims related to Ms. Frank's performance is also unwarranted. Claims related to Ms. Frank's pay raise are also not time barred. Ms. Frank alleges that on January 6, 2017 Schiager met with her and told her that her raise would not be effective until the PIP was resolved on February 15, 2015. (ECF No. 2 ¶ 139.) This is well within the statutory time period. Defendant's Motion to Dismiss based on the Statute of Limitations must be denied.

II. DEFENDANT'S RESIDUAL ARGUMENTS SHOULD BE DENIED AS MOOT.

As to Defendant's argument that Schiager did not personally participate in any events after being placed on administrative leave, the Motion to Dismiss on this ground should be

denied as moot because the Complaint does not allege that Schiager personally participated in any events after being placed on administrative leave. Similarly, as to Defendant's argument that Ms. Frank's Equal Protection claim should be dismissed because "it is effectively a class-of-one equal protection claim" the Motion to Dismiss on this ground must be denied as moot because Ms. Frank is not pursuing her equal protection claim as a "class-of-one" equal protection claim.

III. DEFENDANT'S MOTION TO DISMISS ON QUALIFIED IMMUNITY GROUNDS MUST BE DENIED.

Finally, Defendant argues that he is entitled to qualified immunity because there are no facts alleged that defendant violated her constitutional rights and the law was not clearly established at the time of the alleged unlawful activity. As to the first argument, in her Eighth Claim for Relief, Ms. Frank basis her claim on the pay differential between her and Martin as well as the disciplinary actions against her and denied pay raise as compared to Martin. (ECF No. 2 ¶ 271-283.) The allegations in the complaint related to Schiager's attitude toward Ms. Frank, his taking credit for her work and not inviting her to staff meetings are more background information and not the basis of her equal protection claim.

As to the second argument, like the statute of limitations affirmative defense discussed above, qualified immunity is also an affirmative defense. In *Gomez v. Toledo*, 446 U.S. 635, 639-641 our Supreme Court held that qualified immunity is an affirmative defense and that "the burden of pleading it rests with the defendant." The 10th Circuit cited *Gomez* with approval in *Fernandez*. Accordingly, Ms. Frank was not required to plead facts that would negate Defendant's affirmative defense.

Even if she was, the right to be free from gender discrimination in the workplace is statutorily embodied in Title VII, the Equal Protection Clause, the Equal Pay Act as well as 10th

Circuit case law. For example in *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1265-66 (10th Cir. 2013) the 10th Circuit held "[a]s for the Equal Protection Clause, it 'commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.' *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (quoting the Clause). The Clause's protections extend to disparate treatment based on race and **gender**. *See id.* at 440-41, 105 S.Ct. 3249."

Accordingly, it is the right to be free from discrimination in the workplace that must be analyzed in deciding whether the law was clearly established. *English v. Colorado Department of Corrections*, 248 F.3d 1002 (10th Cir. 2001) and *Salguero v. City of Clovis*, 366 F.3d 116[8] (10th Cir. 2004), both stand for this proposition. In addition, the 10th Circuit's decision in *Ramirez v. Department of Corrections*, 222 F.3d 1238 (10th Cir. 2000) also stands for this proposition. Relying on *Poolaw v. City of Anadarko*, 660, F.2d 459 (10th Cir. 1981) the *Ramirez* court held, "[t]he protection afforded by § 1983 includes relief from discriminatory employment practices of public employees. Accordingly, the law underlying Plaintiff's § 1983 equal protection claim was clearly established a the time of [Defendant's] actions." *Ramirez* at 1244. The *Ramirez* court went on to hold "[i]n addition, the law upon which Plaintiffs base their 1981 claims was clearly established at the time of Defendant's alleged actions. *See Manzanares v. Safeway Stores, Inc*., 593 F.2d 968, 97-72 (10th Cir. 1979) (allegation that employer discriminated against plaintiff based on his Mexican-American descent was sufficient to state cause of action under § 1981); *Skinner v Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white employee who claimed he was fired in retaliation for assisting a black co-

employee with co-employee's EEOC claim state § 1981 action against former employer)." *Ramirez* at 1244. These cases stand for the proposition that at the time of Ms. Franks' allegations there was a clearly established right to be free from discriminatory employment practices.

CONCLUSION

For the reasons set forth above, this Court should deny Defendant's Motion to Dismiss.

Respectfully submitted this 20th day of February 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 20, 2019 a true and correct copy of the foregoing was electronically served by e-mail to the following:

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