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 DEFENDANTS CITY OF FORT COLLINS' AND TERENCE JONES'S MOTION TO PARTIALLY DISMISS THE COMPLAINT

Plaintiff Lori Frank, through her undersigned attorney, Jennifer Robinson, hereby responds to Defendants City of Fort Collins' and Terence Jones's Motion to Partially Dismiss the Complaint as follows:

RESPONSE TO ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS THE SECTION 1983 CLAIM AGAINST THE CITY SHOULD BE DENIED AS MOOT BECAUSE MS. FRANK DOES NOT HAVE A SECTION 1983 CLAIM AGAINST THE CITY.

Defendants first argue that Ms. Frank's Section 1983 claim **against the City** are time-barred to the extent they rest on alleged events that occurred outside the applicable two-year statute of limitations. (ECF Doc. No. 22, pg. 4, Section I.) Defendants then go on to state in a footnote that Ms. Frank's Section 1983 claims are: Claim 1 for Title VII gender discrimination, Claim 3 for Title VII retaliation, Claim 5 for Age Discrimination in Employment and Claim 7 for Equal Pay Act violation. (ECF Doc. No. 22, pg. 4, FN. 2.) Clearly, none of these claims are

Section 1983 claims against the City. Ms. Frank's Section 1983 claim is set forth in her Eighth Claim for Relief and it is not against the City. Accordingly, Defendants' Motion to Dismiss the Section 1983 claim against the City should be denied as moot.[1]

II. DEFENDANTS' MOTION TO DISMISS MS. FRANK'S AGE DISCRIMINATION CLAIM SHOULD BE DENIED BECAUSE MS. FRANK HAS PLAUSIBLY ALLEGED AN AGE DISCRIMINATION CLAIM.

Defendants next argue that Ms. Frank's age discrimination claim should be dismissed because Ms. Frank 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. (ECF No. 22, pg. 6.) However, the elements of a prima facie case of age discrimination as Defendants identify, are that Ms. Frank must plausibly allege that (1) she belongs to a protected class; (2) she was qualified for the Crime Analyst job; (3) she suffered an adverse employment decision (4) the circumstances give rise to an inference of unlawful discrimination. (ECF No. 22, pg. 6.) Defendants challenge none of these elements. Moreover, there is no requirement that Ms. Frank must allege that age was the "but-for" cause in order to survive a Motion to Dismiss.

The Supreme Court's decision cited by Defendants, *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 177-78 (2009) is taken out of context and misquoted. *Gross* was a case dealing with proper jury instructions in an age discrimination case. Nowhere does it state, is Defendants contend, that "to establish her disparate treatment claim, Ms. Frank must plausibly allege that age was the but-for cause of the employer's decision." Whether Ms. Frank's age was the "but-

[1] Defendants do not argue that the statute of limitations bars Jones' 1983 claim. Accordingly, Plaintiff will not address that issue. To the extent there is a section 1983 claim against the City Plaintiff incorporates by reference her arguments as set forth in her Response to Defendant Schiager's Motion to Dismiss based on statute of limitations grounds. (See ECF. No. 23, pgs. 1-3.)

for" cause of any adverse action is the ultimate issue that must be decided by the jury. It is not one of the elements of a prima facie case. Accordingly, the Motion to Dismiss the age discrimination claim must be denied.

III. DEFENDANTS' MOTION TO DISMISS MS. FRANK'S EQUAL PROTECTION CLAIM MUST BE DENIED BECAUSE THE COMPLAINT PLAUSIBLY ALLEGES THAT MS. FRANK AND MR. MARTIN WERE "SIMILARLY SITUATED".

Defendants' next argument is that Ms. Frank's eighth claim for relief, the Equal Protection claim, must be dismissed because the Complaint does not plausibly allege that Ms. Frank and Mr. Martin were similarly situated in all material respects. "Similarly situated in all relevant respects means that the male employees that [the plaintiff] has identified must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances. We no not, however, require the plaintiff to produce evidence of a clone. This means that [the plaintiff] need only establish that . . . she was treated differently than other employees whose violations were of comparable seriousness." *Fatemi v. White*, 775 F.3d 1022, 1042 (8th Cir. 2015). Ms. Frank's Complaint meets this standard. (See ECF Doc. No. 2 ¶¶ 88-96; 130-138, 142-144, 148-149, 180-181, 196-225, 271-293.)

Specifically, Ms. Frank has alleged that she and Martin (1) were the only two analyst supervised by Schiager (ECF Doc NO. 2, ¶ 89) ; (2) were equals on the organizational chart (ECF Doc NO. 2, ¶ 90); (3) performed substantially the same type of analytical work in their respective areas of expertise; (ECF Doc NO. 2, ¶ 91); (4) were subject to the same performance, evaluation and disciplinary standards; (ECF Doc NO. 2, ¶ 92); (5) Ms. Frank's PIP imposed an error free standard on her that was not imposed on any of Schiager's male direct reports,

including Martin, who were all subject to the same standard as Ms. Frank (ECF Doc NO. 2, ¶ 125); Schiager also interfered with Frank's work performance, writing her up for minor incidents while turning a blind eye to similar behavior of males under his supervision, including Martin. (ECF Doc NO. 2, ¶ 127); Ms. Frank's co-workers that were also supervised by Schiager and held to the same standards as Frank had errors in their work product and were not disciplined and Martin also had errors in his work product that were of comparable seriousness as those alleged to have been made by Frank (ECF Doc NO. 2, ¶ 130, 136); Martin was approved training for leadership opportunities while Frank was denied such training (ECF Doc NO. 2, ¶ 138); Martin's raise went into effect on January 1, 2017 adjusting his annual salary to $70,762.00 while Frank, who had more seniority and was in fact more senior was still being paid $67,558.00 (ECF Doc NO. 2, ¶ 144-145); Schiager continued to have meetings with his direct reports, excluding only Frank (ECF Doc NO. 2, ¶ 149); Frank's position of Crime Analyst was placed into the "administrative" category while Martin's was placed in the "professional" category, including allegations related to the similarity in the two analyst positions. (ECF Doc NO. 2, ¶ 202-224); These allegations are sufficient to allege a plausible claim under the Equal Protect Act. Finally, Ms. Franks' Equal Protection Claim does not rely on a "class-of-one theory." Accordingly, the Court should deny Defendants' Motion to Dismiss the Equal Protection Claim.

IV. DEFENDANTS' MOTION TO DISMISS MS. FRANK'S EQUAL PROTECTION CLAIM MUST BE DENIED BECAUSE MS. FRANK IS NOT REQUIRED TO ANTICIPATE DEFENDANTS' AFFIRMATIVE DEFENSES IN HER COMPLAINT AND BECAUSE JONES IS NOT ENTITLED TO QUALIFIED IMMUNITY.

Defendants first argue that Jones is entitled to qualified immunity because "Ms. Frank fails to plausibly allege that she and Mr. Martin are similarly situated." (ECF No. 22, pg. 11.)

As discussed more fully above, the Complaint plausibly alleges "similarly situated." However, Defendants cite no authority whatsoever for the proposition that being "similarly situated" is an element of proof in the qualified immunity analysis. The undersigned has found none. Moreover, even if being similarly situated was an element of proof in determining whether the defendant is entitled to qualified immunity, qualified immunity is an affirmative defense and the plaintiff need not anticipate in the complaint an affirmative defense that may be raised by the defense. In *Gomez v. Toledo*, 446 U.S. 635, 639-641 (1980) 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 recently cited Gomez with approval in *Fernandez v. Clean House, LLC*, 883 F.3d 1296 (10th Cir. 2018) reversing the dismissal of a complaint based on failure to allege facts supporting an affirmative defense 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)].").
>
> 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 and Mr. Martin were not similarly situated. On the contrary, as discussed more fully above and as discussed in *Fernandez*, the Complaint asserts that Ms. Frank and Martin were similarly situated. Accordingly, even if Plaintiff was required to have alleged "similarly situated" to defeat an affirmative defense of qualified immunity, the Motion to Dismiss based on qualified immunity must be denied.

Defendants finally argue that the right to be free from gender discrimination in the workplace is "only a clearly established right in the abstract" which is "insufficient to defeat defendants Jones' qualified immunity defense." (ECF No. 22, pg. 11.) However, 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 Defendants' 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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