IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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 REPLY IN SUPPORT OF THEIR MOTION TO PARTIALLY DISMISS THE COMPLAINT (DOC. # 22)

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, respectfully submit the following Reply in Support of their Motion to Partially Dismiss the Complaint (Doc. # 22).

ARGUMENT

I. Ms. Frank's Age Discrimination Claim (Claim 5) is time-barred to the extent it rests on alleged events that occurred outside the applicable two-year statute of limitations.

A claim brought under the Age Discrimination in Employment Act must be commenced "within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

Woods v. Denver Dep't of Revenue, Treasury Div., 818 F. Supp. 316, 318 (D. Colo. 1993). An ADEA cause of action accrues "on the date the employee is notified of an adverse employment decision." *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994). "Generally, an employee is notified of an adverse employment decision when a particular event or decision is announced by the employer." *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988).

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 until December 14, 2018, her ADEA claim against the City is time-barred to the extent it rests on alleged events that occurred before December 14, 2016.

II. The plain language of the federal and state age discrimination statutes requires a plausibly alleged inference that age was the "but for" cause of the employer's adverse action.

To avoid dismissal, Plaintiff Frank must plausibly allege that age was the factor that made a difference in the City of Fort Collins' decisions to: (a) pay her less than her younger, male colleague; and (b) subject her, but not that male colleague, to negative performance evaluations and a performance plan. *See* 29 U.S.C. § 623(a)(1) (expressly prohibiting employers from "discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, *because of* [1]such individual's age"); COLO. REV. STAT. § 24-34-402(1) (prohibiting employers from taking adverse employment actions because of age).

[1] "Because of" means "by reason of: on account of." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-77 (2009) (citing 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966). And "by reason of" requires at least a showing of "but for" causation. *See Bridge v. Phoenix*

Age must be the "'but-for' cause of the employer's adverse decision[.]" *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177-78 (2009). Put differently, age must be "the factor that made a difference," but it need not be the sole motivating factor. *Jones v. Okla. City Public Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010); *see also Steele v. Stallion Rockies, Ltd.*, 106 F. Supp. 3d 1205, 1210 (D. Colo. 2015) (noting that *Jones* "did not abrogate a 'but-for' causation requirement"). Ms. Frank cannot simply rely on her "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" of age discrimination. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Ms. Frank's federal and state age discrimination claims (Claims 5 and 6) contain two key defects: they rest on conclusory allegations and they fail to plausibly allege satisfactory job performance at the time of the adverse action. These defects mirror the defects in claims dismissed on Fed. R. Civ. P. 12(b)(6) motions. *See, e.g., Hartley v. Dep't of Agric.*, No. 10-cv-0323, 2010 U.S. Dist. LEXIS 141829 (D. Colo. Nov. 29, 2010) (unpublished) (dismissing the septuagenarian plaintiff's ADEA claim premised on formulaic allegations, namely a "feel[ing]" that she was the victim of age discrimination. 2010 U.S. Dist. LEXIS 141829, at **14-16, *aff'd and adopted by* 2011 U.S. Dist. LEXIS 17496 (D. Colo. Feb. 23, 2011) (unpublished); *Johnston v. Hunter Douglas Window Fashions, Inc.*, No. 15-cv-00852, 2016 U.S. Dist. LEXIS 193111, at ** 10-11 (D. Colo. June 9, 2016) (unpublished) (dismissing ADEA claim where the plaintiff's conclusory assertions of satisfactory job performance at the time of the adverse employment action were belied by allegations elsewhere in the complaint.)

Bond & Indem. Co., 553 U.S. 639, 653-654 (2008) (construing "by reason of" in context of RICO claim).

As with the deficient claims in *Hartley* and *Johnson*, Ms. Frank fails to plausibly allege 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. Therefore, dismissal of Ms. Frank's federal and state age discrimination claims (Claims 5 and 6) is warranted.

III. Ms. Frank's Equal Protection claim (Claim 8) fails, irrespective of whether it rests on a "class of one" theory.

Regardless of whether Ms. Frank brings her equal protection claim as a member of a class or as a "class of one," she fails to plausibly allege that she and Mr. Martin are similarly situated. "[T]he degree to which others are viewed as similarly situated depends substantially on the facts and context of the case." *Jennings v. Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004). "When multiple variables are in play, however, the difference in treatment can be the product of a number of considerations, conscious or otherwise, many of them legitimate." *Id*.

In the employment discrimination context, "[i]ndividuals are considered 'similarly-situated' when they (1) have dealt with the same supervisor; (2) were subjected to the same work standards; and (3) had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or their employer's treatment of them for it." *Buhendwa v. Univ. of Colo. at Boulder*, 214 F. App'x 823, 828 (10th Cir. 2007) (internal modifications omitted)); *cf. LaTrieste Restaurant v. Village of Port Chester*, 188 F.3d 65, 69 (2d Cir. 1999) (applying a "similarly situated" analysis from a Title VII case to an equal protection case).

Ms. Frank contends that she and Mr. Martin are similarly situated because they: (1) "were the only two analyst[s] supervised by [Defendant] Schiager"; (2) "were equals on the

organizational chart"; (3) "performed substantially the same type of analytical work in *their respective areas of expertise*"; and (4) "were subject to the same performance, evaluation and disciplinary standards." Response to Motion to Dismiss, Doc. # 24, at 3 (emphasis added) (citing Complaint, Doc. # 2, at ¶¶ 89, 90, 91, 92). Ms. Frank's and Mr. Martin's unique areas of expertise distinguishes their jobs and renders the two dissimilarly situated, however. This alone is fatal to her Equal Protection claim. *See LeViness v. Bannon*, No. 3:99cv01647, 2001 U.S. Dist. LEXIS 20593, at **7-8 (D. Conn. Dec. 7, 2001) (unpublished) (dismissing claim for reasons that included the absence of allegations that the comparator group had job duties similar to the plaintiff's). Therefore, dismissal of Ms. Frank's equal protection claim is warranted.

Dismissal is also warranted because Defendant Jones is entitled to qualified immunity. The Equal Protection claim against Defendant Jones rests on his decision to categorize two different positions differently: Plaintiff Frank's Crime Analyst position as an administrative position and Mr. Martin's Financial Analyst position as a professional position. As alleged, the jobs were categorized "based on the core knowledge, skills, abilities, and experience required to perform each job group" and were "examined . . . to ensure similarly situated jobs were leveled in the same way." Complaint, Doc. # 2, at ¶¶ 196, 197. Plaintiff Frank has failed to demonstrate the clearly-established unconstitutionality of a supervisor's decision to categorize two different positions—which require different areas of expertise—in different ways. Because Ms. Frank has failed to identify an on-point Supreme Court or published Tenth Circuit decision, *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 20105), Defendant Jones is entitled to qualified immunity.

Dated this 6th day of March 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 6, 2019, a true and correct copy of the above and foregoing **DEFENDANTS CITY OF FORT COLLINS' AND TERENCE JONES'S REPLY IN SUPPORT OF THEIR MOTION TO PARTIALLY DISMISS THE COMPLAINT (DOC. # 22)** 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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