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.

Defendant Schiager 's Reply in Support of Motion to Dismiss

Defendant Jerome Schiager ("Schiager") submits this Reply to Plaintiff's Response (Doc. 23) to Schiager's Motion to Dismiss (Doc. 20).

1. Schiager's first argument in his motion was that the only claim against him, the eighth claim, was barred by the two-year statute of limitations because the allegations in the Complaint show that Plaintiff knew about the eight categories of events that occurred prior to December 14, 2016, and are the subject of the eighth claim. (Doc. 20, pp. 3-8.)

2. In her response, Plaintiff cites *Fernandez v. Clean House, LLC,* 883 F. 3d 1296 (10th Cir. 2018), for the proposition that the statute of limitations is an affirmative defense that Plaintiff need not anticipate in her Complaint. (Doc. 23, pp. 1-2.) But, *Fernandez* also recognized that "on occasion it is proper to dismiss a claim on the pleadings based on an affirmative defense" when the complaint itself admits the elements of the defense. *Id.,* at 1299. In addition, for a claim to accrue, a plaintiff need not have

conclusive evidence of the cause of the injury, and must use reasonable diligence in seeking to discover the facts. (Doc. 20, pp. 3-4.) *Fernandez* is distinguishable on the facts because the issue there was "willfullness," which was supported by an allegation that the defendants had knowledge that their conduct violated the FLSA. *Id.,* at 1300.

3. Here, Plaintiff argues that only two of the eight categories identified by Schiager lack allegations to support the defense. First, as to the allegations about hiring Erik Martin as a financial analyst on June 6, 2016, at a salary of $69,035 per year (Doc. 2, ¶¶ 88-95), Plaintiff argues that she did not expressly admit when she learned of his salary so "nothing in the complaint conclusively establishes when this claim acrued." (Doc. 23, p. 3.) This technical argument ignores the chronological allegations of the Complaint, her knowledge of the exact salary, and Plaintiff's duty to discover the facts. This is not a valid equal protection issue anyway because Plaintiff failed to allege that then-Deputy Chief Schiager had authority to decide the salary the City paid Martin, and she failed to make any non-conclusory allegations as to why Martin, her only alleged comparator, was one at all when Plaintiff admitted that they performed "work in their respective areas of expertise" and that "Martin was unqualified to perform Frank's job responsibilities." (Doc. 2, ¶¶ 91, 175.)

4. Plaintiff also argues that "claims related to Ms. Frank's pay raise are also not time-barred," suggesting that she did not learn until Schiager told her on January 6, 2017, of the City's policy that the November 2016 PIP delayed her annual raise. (Doc. 23, p. 3.) But, that argument goes to the amount of her alleged delay damages of $1,102 (Doc. 2, ¶146), not liability for an equal protection claim that had already accrued.

5. Second, Plaintiff contends that her equal protection claim based on allegedly having a different error standard did not accrue until a short conversation with Schiager on December 22, 2016. (Doc. 23, ¶135.) But, she alleged that Schiager gave her three reviews between May and November 2016 where he criticized her errors and the quality of her work, and that the November 2016 "PIP imposed an error free standard on Frank that was not imposed on any of Schiager's male direct reports." (Doc. 2, ¶¶ 83, 107, 123-125.) Plaintiff also alleged that, on November 30, 2016, she complained to the City about her performance review and PIP. (Doc. 2, ¶¶ 133-134.) Plaintiff clearly had knowledge before December 2016 about Schiager's allegedly unfair performance standard.

6. Schiager's second argument was that he could not be liable for any constitutional violation since February 7, 2017, because there was no allegation of his personal participation since that date. (Doc. 20, pp. 8-9.) Plaintiff agrees. (Doc. 23, pp. 3-4.)

7. Schiager's third argument was that the eighth claim is effectively a "class-of-one" claim that cannot be maintained under *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008). (Doc. 20, pp. 9-13.) Plaintiff's response is limited to one sentence, stating that she is not pursuing a "class-of-one" equal protection claim. (Doc. 23, p. 4.)

8. The plaintiff in *Engquist* brought an equal protection claim alleging that the defendant discriminated against her on the basis of sex, but also that she was fired for arbitrary, vindictive, or malicious reasons. *Id.,* at 595. Similarly, Plaintiff here claims in conclusory fashion that she was denied equal protection, but the substance of the claim against Schiager is a long-running personal dispute between co-employees that goes back

to at least 2011 when Schiager allegedly tried to take credit for her work but she "refused to be silent," which led Schiager to begin to treat her with "disdain." (Doc. 2, ¶¶ 58-62.) Plaintiff alleges numerous subsequent clashes between them, including her complaint in 2014 that caused the Chief to issue a letter of reprimand to Schiager which caused Schiager to retaliate against her, and her complaint on November 3, 2015 (at the time Schiager became her supervisor), about his past "retaliatory, malevolent, and depreciatory behavior towards her." (*Id*., ¶¶ 63-81, 86-87.) Plaintiff admits that she continued to complain before December 2016 about Schiager's alleged "harassment, targeting and retaliation" which included her performance evaluations. (*Id*., ¶¶ 82-85,105-108, 110-113, 116-127, and 132-134.) This personal dispute and alleged retaliation is the basis of the claim against Schiager, not equal protection.

9. The Complaint contains some conclusory allegations that Schiager treated women differently, but there are no plausible, fact-based allegations that Schiager treated any other woman as he allegedly treated Plaintiff. There are no allegations that Schiager gave any other female employee a bad review or placed her on a PIP, treated her with disdain, excluded her from meetings, etc. The eighth claim is simply about the allegedly improper personal and retaliatory treatment that Schiager imposed on Plaintiff, which bars it under *Engquist*, regardless of the conclusory allegations on equal protection.

10. Schiager's fourth argument was that the eighth claim is barred by the defense of qualified immunity, which gives Plaintiff a heavy two-part burden to show that (1) Defendant violated her constitutional rights and (2) the law was clearly-established at the time of the alleged unlawful activity, which requires a high degree of specificity. (Doc. 20,

pp. 13-14.) Plaintiff argues that qualified immunity is an affirmative defense like statute of limitations so the burden rests on the defendant. (Doc. 23, p. 4.) This is an incorrect statement of the law on qualified immunity which places the burden on Plaintiff.

11. As to the first issue on qualified immunity, Plaintiff states that her eighth claim is limited to "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." (Doc. 23, p. 4.) This judicial admission narrows the claim, but does not help Plaintiff because she does not allege in the Complaint that Schiager personally set the pay, imposed "discipline" or denied (should be delayed) a pay raise. Schiager stands by his argument that Plaintiff has not plead an equal protection claim, as discussed above and in his motion.

12. Plaintiff then argues that equal protection is clearly established. (Doc. 23, pp. 4-6.) In the early case she cites on this issue, *Ramirez v. Department of Corrections*, 222 F. 3d 1238, 1244-45 (10th Cir. 2000), however, the defendant conceded "the general notion" that one cannot discriminate on the basis of race or national origin. Plaintiff fails to meet her burden under the current test as to whether the law is clearly established as to the particular actions of this defendant. (Doc. 20, p.14.) Plaintiff cites no case that would put Schiager on notice that his actions as a co-employee, and his later actions as a supervisor, primarily for giving critical performance reviews to one female employee, give rise to a viable equal protection claim.

Wherefore, the Complaint should be dismissed as to Schiager.

Respectfully submitted,

Date: March 6, 2019

s/ David R. DeMuro
David R. DeMuro
VAUGHAN & DeMURO
720 South Colorado Boulevard
Penthouse, North Tower
Denver, CO 80246
303-837-9200 (phone)
ddemuro@vaughandemuro.com (e-mail)
ATTORNEY FOR DEFENDANT SCHIAGER

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 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:

Jennifer Robinson
jrobinson@raemployment.com

Cathy Havener Greer
cgreer@warllc.com; bmccall@warllc.com; pcallies@warllc.com

Kathryn Anne Starnella
kstarnella@warllc.com

Sara Ludke Cook
scook@vaughandemuro.com; vnd@vaughandemuro.com

Jenny Lopez Filkins
jlopezfilkins@fcgov.com

s/ David R. DeMuro
David R. DeMuro