

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

HARVEY N. LEVIN,)	
)	
Plaintiff,)	
)	
v.)	No. 07 C 4765
)	
LISA MADIGAN, ILLINOIS ATTORNEY)	Hon. David H. Coar,
GENERAL, OFFICE OF THE ILLINOIS)	Judge Presiding
ATTORNEY GENERAL, and THE STATE)	
OF ILLINOIS,)	
)	
Defendants.)	

**DEFENDANTS’ MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS**

NOW COME the Defendants, LISA MADIGAN, Illinois Attorney General, the OFFICE OF THE ATTORNEY GENERAL, and the STATE OF ILLINOIS, by and through their attorney, LISA MADIGAN, Attorney General of Illinois, and for their Memorandum in support of their Motion to Dismiss Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), state as follows:

I. INTRODUCTION

Harvey Levin (“Plaintiff”), a former Assistant Attorney General, filed a two-count Complaint against the Office of the Attorney General, Lisa Madigan and the State of Illinois alleging that his employment as an Assistant Attorney General was “terminated” due to his age and gender. *See* Plaintiff’s Complaint attached hereto as Exhibit “A” at ¶ 9. Plaintiff’s Complaint pleads claims under the ADEA and Title VII. *See* Exhibit A. In both counts of his Complaint against these three Defendants, Plaintiff alleges that he is entitled to punitive damages. *See* Exhibit A.

Although Plaintiff is a white male over the age of forty, the Seventh Circuit has held, as a matter of law, that Assistant, or Deputy, Attorneys General are not employees within the purview

of either Title VII or the ADEA. *See e.g. Americanos v. Carter, et al.*, 74 F.3d 138 (7th Cir. 1995). Plaintiff's Complaint, therefore, must be dismissed in its entirety against all Defendants. Plaintiff's claims against the State of Illinois should alternatively be dismissed because the Office of the Attorney General, and not the State, was Plaintiff's employer. Plaintiff's claims against Lisa Madigan, Illinois Attorney General, should alternatively be dismissed because they are redundant to the claims against the Office of the Attorney General. Finally, Plaintiff's claims for punitive damages should be dismissed because the Defendants, as government entities and public officials, are exempt from liability for punitive damages under 42 U.S.C. § 1981a(b)(1).

II. LEGAL STANDARD

When considering a Motion to Dismiss under Rule 12(b)(6) the Court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Pickrel v. City of Springfield*, 45 F.3d 1115 (7th Cir. 1995). The Court will dismiss a Complaint under Rule 12(b)(6) if it appears the plaintiff has not alleged facts that would entitle him to relief. *See Conley v. Gibson*, 335 U.S. 41 (1957).

The Supreme Court has recently commented on the pleading standard in Federal Courts, stating that while “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,... a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment]’ to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (*quoting Papasan v. Allain*, 478 U.S. 265 (1986) (citation omitted)).

III. ARGUMENT

A. Plaintiff Was Not An “Employee” Under Title VII Or The ADEA. Therefore His Claims Under Those Statutes Must Be Dismissed.

An employee may bring an action against his employer for alleged unlawful employment practices. 42 U.S.C. § 2000(e) *et seq.*; 29 U.S.C. § 621 *et seq.* However, to bring an action for alleged unlawful employment actions, the plaintiff must be an “employee” as that term is defined by the statutes. Both Title VII and the ADEA define an employee as:

an individual employed by an employer, **except** that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e(f); 29 U.S.C. § 630(f) (emphasis added). Plaintiff falls within the exemption to both Title VII and the ADEA’s definition of employee and, as such, he cannot bring this action for employment discrimination.¹

The Seventh Circuit has been squarely presented with the question of whether an Assistant Attorney General is an employee under Title VII and/or the ADEA. The Court held, as a matter of law, that an Assistant (or Deputy) Attorney General is not an employee under either statute. *Americanos v. Carter, et al.*, 74 F.3d 138, 143- 44 (7th Cir. 1996). In *Americanos*, the plaintiff was terminated from his position as a Deputy Attorney General in the Indiana Attorney General’s Office following the election of a new Attorney General. The Plaintiff filed suit in District Court claiming

¹Assistant Attorneys General are exempt from the civil service laws of Illinois. 20 ILCS 415/4c(2).

that he was discharged because he was affiliated with the Republican Party, because he was a white male of Greek origin, and because he was fifty-two years old. Plaintiff sought relief pursuant to Title VII, the ADEA, 42 U.S.C. § 1983 and the First and Fourteenth Amendments. The District Court dismissed Plaintiff's action and the Appellate Court affirmed the dismissal.

In reaching its decision, the Seventh Circuit examined the powers inherent in the plaintiff's office, noting that a Deputy Assistant Attorney General has the potential to give meaningful input into governmental decision-making. *Id.* at 141. Plaintiff argued that his position was non-political and afforded him no opportunity to influence or define policy for the Office, but the Court disagreed, saying:

each [Deputy Attorney General] may be authorized to 'perform in behalf of . . . the state *any and all of the rights, powers or duties now or hereafter conferred by law or laws upon the attorney general.*' [A]s such . . . a [Deputy Attorney General] could *potentially* be called upon to perform any of the enumerated duties of the AG, such as 'prosecuting and defending suits by or against the state and state officers, defending suits against state governmental officials or employees or teachers, advising state officials through opinions, advising state agencies, [and] collecting outstanding debts owed to the state.'

Id. (citation omitted) (emphasis in original). Given the fact that a Deputy Attorney General might be called upon to perform any of these duties in the Attorney General's absence, and the fact that a Deputy Attorney General was likely providing research and opinions to his superiors, the Seventh Circuit held that Deputy Attorneys General were policy-making employees exempt from the protections of Title VII and the ADEA, subject to dismissal for any reason, including political affiliation. *Id.* at 141- 44.

The Illinois Attorney General is the legal officer of this State. *Illinois Constitution, Art. V,*

§ 15. Her duties include:

(1) representing the people of the State of Illinois before the Supreme Court, (2) instituting and prosecuting all actions and proceedings in favor of or for the use of the State, (3) defending all actions and proceedings against State officers, (4) consulting with and advising the State's State's Attorneys (including assisting them in the trial of any party accused of crime), (5) investigating alleged violations of the laws, (6) consulting with and advising the governor and other state officers, (7) to prepare contracts and other writings relating to subjects in which the State is interested, (8) to give written opinions upon constitutional or legal questions, (9) to enforce the proper application of funds appropriated to the public institutions of the State and prosecute breaches of trust in the administration of such funds, (10) to keep a register of all cases prosecuted or defended and deliver such register to her successor, (11) to keep on file the official opinions issued by the attorney general and deliver such opinions to her successor, (12) to pay into the State treasury all monies received by her for the use of the State, (13) to attend to and perform any other duty required of her by law, and (14) to present evidence to and prosecute indictments returned by the Statewide Grand Jury.

15 ILCS 205. To assist her in carrying out her duties, the Illinois Attorney General has the power to appoint Assistant Attorneys General who act on her behalf. *Saxby v. Sonnemann*, 318 Ill.600, 607, 149 N.E. 526 (1925).

Plaintiff was appointed an Assistant Attorney General pursuant to the Attorney General's power to appoint assistants. *See* Exhibit A, ¶ 5. Upon his appointment to his position, Plaintiff had the inherent power to act on behalf of the Attorney General and the potential ability to have "meaningful input" into policy-making decisions. *Americanos*, 74 F.3d at 141 - 42; *Saxby*, 318 Ill. At 607. As such, pursuant to Seventh Circuit precedent directly on point, Plaintiff was a policy-making employee exempt from the protections of Title VII and the ADEA. *See Americanos*, 74 F.3d at 144. His action must thus be dismissed.

The reasons for dismissal of Plaintiff's action in this case are even more compelling than the reasons for dismissal of the plaintiff's action in *Americanos*. In *Americanos*, the plaintiff was a Deputy Attorney General, the lowest level appointee. Here, however, Plaintiff was a Senior Assistant Attorney General, a position above Assistant Attorney General. See Exhibit A, ¶ 6. Plaintiff, then, had more responsibility and more potential input into Office decisions than the position which the *Americanos* court found to be policy-making. In fact, Plaintiff here was responsible for conducting complex legal research and representing the Attorney General in legal proceedings as assigned. Further, Plaintiff, as a Senior Assistant Attorney General was charged with **independently [making] prosecutorial and other litigation decisions**. See Exhibit B, a copy of the job description for Senior Assistant Attorney General (emphasis added).² There can be no doubt, then, that pursuant to the Seventh Circuit's holding, Plaintiff was an employee exempt from Title VII and the ADEA.

Courts in the Seventh Circuit have universally found that assistant attorneys appointed by State and County legal officials are not Title VII or ADEA employees and may be terminated by the official whenever such official loses confidence in the assistant "for whatever reason." *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) (holding that Assistant State's Attorney, as a policy-maker, could be dismissed for political considerations). See e.g., *Bibbs v. Newman*, 997 F.Supp. 1174, 1183-85 (S.D.Ind. 1998) (holding that a Deputy Prosecutor was not an employee within the meaning

²Without converting a motion to dismiss to one for summary judgment, judicial notice may be taken of historical documents, documents contained in the public record, and reports, decisions and regulations of administrative bodies. *Anderson*, 217 F.3d 472, 474-75 (7th Cir. 2000). Job descriptions written and updated by the Illinois Department of Central Management Services are public documents and should be used by the Court to "determine whether the duties bring the job into the circle within which elected officials are entitled to demand political loyalty." *Riley v. Blagojevich*, 425 F.3d 357, 361-62 (7th Cir.)

of Title VII); *Newcomb v. Brennan*, 558 F.2d 825, 839 (7th Cir. 1997) (upholding dismissal of Deputy City Attorney). Indeed, the Seventh Circuit has even found non-legal positions in county legal offices to subject to dismissal for political or other policy-making considerations. *Hernandez v. O'Malley*, 98 F.3d 293, 294-96 (7th Cir. 1996) (upholding dismissal of stenographer who functioned in the position of paralegal in the State's Attorneys Office). For these reasons, Defendants respectfully request that Plaintiff's Complaint be dismissed, with prejudice.

B. The State of Illinois Should Be Dismissed Because The Office Of The Attorney General, And Not It, Was Plaintiff's Employer.

Plaintiff alleges in one conclusory, unsupported sentence that all three Defendants were his employer. See Exhibit A at ¶ 5. The Seventh Circuit, however, has analyzed the issue of who is the "employer" when a State is named as a defendant in an employment discrimination case and determined that the employer is generally the particular state or local agency. See generally *Salvato v. Illinois Dept. Of Human Rights*, 155 F.3d 922 (7th Cir. 1998); *Hearne v. Board of Educ. Of City of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000).

In *Hearne*, the Seventh Circuit held, "In suits against state entities, the term 'employer' is understood to mean the particular agency or part of the state apparatus that has actual hiring and firing responsibility." 185 F.3d at 777. The *Hearne* court dismissed the Governor's office, the State of Illinois, and the Illinois Labor Relations Board from the suit, holding that the defendants were not the plaintiffs' "employer" under Title VII because they did not possess actual hiring and firing responsibility. *Id.* At least one court in the Northern District has said "it is doubtful that the State of Illinois is an 'employment agency' within the meaning of Title VII." *Marciniak v. Illinois Dept. Of Public Aid*, 2000 WL 1508237 at *1 (N.D.Ill. Oct. 10, 2000). Indeed, the State's power to hire

and fire employees is especially doubtful in cases involving the Office of the Attorney General because the Office of the Attorney General is a separate constitutional office, headed by the Attorney General. *Illinois Constitution, Art. V*. The State of Illinois, then, has no power to hire and fire Assistant Attorneys General such as Plaintiff. Such responsibility lies solely with the Office of the Attorney General, who also pays Assistant Attorneys General's salaries. Plaintiff's claims, therefore, against the State of Illinois should be dismissed.

The identity of the employer in such Title VII cases is so clear that the Seventh Circuit has decided the issue *sua sponte* without the parties' briefing. In *Holman*, the plaintiffs, employees of the Indiana Department of Transportation (IDOT), brought suit against both the State of Indiana and IDOT. In that case, the Seventh Circuit noted that "IDOT, and not the State of Indiana generally, has 'actual hiring and firing responsibility'" as to the plaintiffs. 211 F.3d at 401, FN 1. As in *Hearne*, the Seventh Circuit held that the *Holman* plaintiffs could not maintain Title VII claims against the State, since the State was not plaintiffs' employer. The State of Illinois thus respectfully requests that Plaintiff's claims against it be dismissed, with prejudice.

C. Plaintiff's Claims Against Lisa Madigan, Illinois Attorney General, Should Additionally Be Dismissed Because They Are Redundant To Plaintiff's Claims Against The Office Of The Attorney General.

The Complaint does not state whether Lisa Madigan is sued in her official or individual capacity. In the absence of specification, Plaintiff's claim is considered an official capacity suit. *Stevens v. Unstead*, 131 F.3d 699, 706 (7th Cir. 1997). A suit against an individual in her official capacity is actually a suit against the governmental entity. *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985). Such suits are redundant in that they allow a plaintiff to sue a governmental entity twice

on the same set of allegations. *See Jungels v. Pierce*, 825 F.2d 1127, 1129 (7th Cir. 1987) (claims against the city and its mayor, in his official capacity, are the equivalent of suing only the city); *Tabor v. City of Chicago*, 10 F.Supp.2d 988, 991 (N.D.Ill.1998) (dismissing the plaintiff's official capacity claims against individual defendants under Title VII and § 1983 as being redundant to the plaintiff's claims against the city).

Here, Plaintiff asserts the very same Title VII and ADEA claims against Lisa Madigan in her official capacity as Attorney General as he does against the Office of the Attorney General. Indeed, Plaintiff does not even separate the claims. The claims against both Lisa Madigan as Attorney General and the claims against the Office of the Attorney General are plead in the same counts and the same paragraphs. Clearly, then, the claims against Lisa Madigan as Attorney General are redundant to the claims against the Office of the Attorney General and should be dismissed. *See Hale v. Renee-Baker*, 2002 WL 1613765 at *1 (N.D.Ill. July 19, 2002); *Berry v. Illinois Dept. Of Human Services*, 2001 WL 111035 at *8 (N.D.Ill. Feb. 2, 2001).

D. Plaintiff's Claims For Punitive Damages Are Barred By 42 U.S.C. §1981a(b)(1).

Government entities are specifically exempted from liability for punitive damages under the express language of § 1981a(b)(1), which states in pertinent part:

A complaining party may recover punitive damages under this section against a respondent (**other than a government, government agency, or political subdivision**) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis added). In enacting § 1981a(b)(1), Congress exempted all government agencies from Title VII's punitive damage provision, with no articulated exceptions.

Baker v. Runyon, 114 F.3d 668, 669 (7th Cir. 1997). In *Baker*, the plaintiff brought a sexual harassment claim against the U.S. Postal Service under Title VII and sought both compensatory and punitive damages. The Postal Service moved to strike plaintiff's punitive damages claims pursuant to the blanket exemption for government entities found in § 1981a(b)(1). After considering the plain language of § 1981a(b)(1) and the legislative history behind its enactment, the Seventh Circuit concluded that Title VII creates a clear exemption from punitive damages for governmental entities. *Id.* at 671-72. The Seventh Circuit further stated that punitive damages awards against governmental entities do not serve their intended purpose. *Id.* at 672. "An award of punitive damages against a [government agency] 'punishes' only the taxpayers, who took no part in the commission of the tort." *Id.* (Citations omitted).

In the instant case, Plaintiff is barred from recovering punitive damages from the Defendants pursuant to the express language of § 1981a(b)(1). As governmental entities, the Office of the Attorney General and the State of Illinois fall directly within the exemption from punitive damages under Title VII. *See Baker*, 114 F.3d at 669. As a government official sued in her official capacity, Lisa Madigan is also exempt from liability for punitive damages. *Hill v. Shelander*, 924 F.2d 1370, 1373 (7th Cir. 1991). Accordingly, Plaintiff's claims for punitive damages against the Defendants must fail. Defendants therefore respectfully request this Court to strike all claims for punitive damages pursuant to Fed. R. Civ. P. 12(b)(6).

IV. CONCLUSION

WHEREFORE, Defendants, LISA MADIGAN, Illinois Attorney General, the OFFICE OF THE ATTORNEY GENERAL, and THE STATE OF ILLINOIS, pray that this Court enter an Order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing with prejudice Plaintiff's claims against them.

Respectfully submitted,

**LISA MADIGAN, Illinois Attorney General,
the OFFICE OF THE ATTORNEY GENERAL,
and THE STATE OF ILLINOIS,**

LISA MADIGAN
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s/ Deborah J. Allen _____
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