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, Individually and as Illinois Attorney General, OFFICE OF THE ILLINOIS ATTORNEY GENERAL, THE STATE OF ILLINOIS, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER P. FLAHAVEN, individually and DEBORAH HAGAN, individually,	)	**Hon. David H. Coar, Judge Presiding**
	)	
Defendants.	)	

MEMORANDUM OF LAW BY DEFENDANTS
LISA MADIGAN, ILLINOIS ATTORNEY GENERAL,
the OFFICE OF THE ATTORNEY GENERAL and the STATE OF ILLINOIS
IN SUPPORT OF THEIR MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

NOW COME 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 Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), state as follows:

I. INTRODUCTION

Harvey Levin ("Plaintiff"), a former Senior Assistant Attorney General, filed a four-count Amended Complaint against the Office of the Attorney General, Lisa Madigan, individually and in her official capacity as Attorney General, the State of Illinois, and four senior members of the Office of the Attorney General, in their individual capacities, alleging that his employment as an Assistant

Attorney General was "terminated"[1] due to his age and gender. *See* Plaintiff's Amended Complaint attached hereto as Exhibit "A" at ¶ 9. Plaintiff's Amended Complaint pleads claims under the ADEA, Title VII and the Equal Protection Clause. *See* Exhibit A.

Plaintiff previously filed a Complaint naming only Lisa Madigan, Illinois Attorney General, the Office of the Attorney General, and the State of Illinois as Defendants. *See* Plaintiff's original Complaint attached hereto as Exhibit B. The original Complaint pleaded only claims under the ADEA and Title VII. Relying on Seventh Circuit precedent holding, as a matter of law, that Assistant Attorneys General are not employees covered under either act, Defendants moved to dismiss Plaintiff's Complaint. Plaintiff responded to Defendant's motion by amending his Complaint to add four senior members of the Office of the Attorney General (as well as the Attorney General herself) as defendants and pleading that each individual willfully and intentionally ended Plaintiff's employment simply because Plaintiff is a male over the age of forty. *See* Exhibit A, Counts III and IV. Plaintiff also added a lengthy, additional paragraph to Counts I and II which attempts to plead around the Seventh Circuit's dispositive holding. *See* Exhibit A, Counts I and II, ¶ 25. This additional paragraph, taken as true for purposes of this motion, pleads that Plaintiff, as a Senior Assistant Attorney General with more than thirty years of legal experience, never exercised independent judgment, never acted unless directed to do so and once directed to perform even the most menial task, would not act unless his words and actions were scripted by others. *Id.* Despite his attempt, Plaintiff's Amended Complaint does not cure the defects in his original Complaint and does not plead any claims for which Defendants can be liable in this forum.

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[1]In fact, Plaintiff resigned and the Office of the Attorney General's records reflect a resignation by Plaintiff.

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). Counts I and II of Plaintiff's Amended Complaint, therefore, must be dismissed in their 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.

Plaintiff's claims for sex and age discrimination in Counts III and IV against Defendants Lisa Madigan, Illinois Attorney General, the Office of the Attorney General, and the State of Illinois should be dismissed because they are not "persons" subject to suit under § 1983 and because the Eleventh Amendment bars Plaintiff's claim for monetary damages. Plaintiff's status as a former employee precludes his request for injunctive relief. Alternatively, Plaintiff's Amended Complaint should be dismissed in its entirety because Plaintiff fails to plead the *prima facie* elements for any claim. If his pleadings are deemed sufficient, Plaintiff pleads facts which demonstrate he is not entitled to relief. For these reasons, Defendants respectfully request that Plaintiff's Amended Complaint be dismissed with prejudice.

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.[2]

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 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 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 (the lowest level attorney in the Indiana Attorney General's Office) 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,

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

> 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. *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. *See also Office of the Cook County State's Attorney v. Ill. Local Labor Relations Board*, 166 Ill.2d 296, 304, 652 N.E.2d 301, 303 (1995) (assistant attorneys are "surrogates" for the State's Attorney in carrying out the office's duties and possess the power of the State's Attorney "in the same manner and to the same effect" as the State's Attorney). 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, three positions above Assistant Attorney General. *See* Exhibit A, ¶ 6.[3] 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 D, a copy of

[3]In his Amended Complaint, Plaintiff pleads that Senior Assistant Attorney General was the second lowest attorney position. *See* Exhibit A, ¶6. In fact, there are three levels of assistant attorneys general below Plaintiff's position of Senior Assistant Attorney General. *See* Exhibit C, position descriptions for Assistant Attorney General I (the lowest level position), Assistant Attorney General II, and Assistant Attorney General III.

the job description for Senior Assistant Attorney General (emphasis added).[4] 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.

After reading Defendants' Motion to Dismiss, Plaintiff must have agreed with this conclusion. The amendments to his Complaint are clearly an attempt to plead around the Court's holding in *Americanos*. *See* Exhibit A, ¶ 25 (a) - (n).[5] Plaintiff's attempted amendment, however, is for naught because the Seventh Circuit held **as a matter of law** that the position of Assistant (or, in the case of the Indiana Attorney General's Office, Deputy) Attorney General is a policy-making position. *Americanos*, 74 F.3d at 144.

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 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

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[4]Without 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.)

[5]Compare the Amended Complaint to Exhibit B, Plaintiff's Original Complaint.

legal offices 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 Counts I and II of Plaintiff's Amended 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 in Counts I and II 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 in Counts I and II 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.

Counts I and II of the Amended Complaint seek relief against Lisa Madigan in her official capacity as Illinois Attorney General. 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 pleaded 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 Claim For Emotional Damages In Count I Should Be Stricken Because Compensation For Emotional Distress Is Not Available Under the ADEA.

Plaintiff's prayer for emotional damages in Count I should be stricken because the ADEA does not provide for such a remedy. 29 U.S.C.A. ¶ 626(b). *See also Franzoni v. Hartmarx Corp.,* 300 F.3d 767, 773 (7th Cir. 2002); *Pfeiffer v. Essex Wire Corp.,* 682 F.2d 684, 687-88 (7th Cir. 1982).

E. Plaintiff's Claim For Damages In Excess Of Three Hundred Thousand Dollars In Count II Should Be Stricken Because Title VII Imposes A Cap On The Amount Of Damages Plaintiff Can Recover.

Plaintiff's prayer for damages in excess of three hundred thousand dollars ($300,000) in Count II should be stricken because damages for violations of Title VII are capped at three hundred thousand dollars ($300,000). 42 U.S.C. 1981a(b)(3)(D). *See also Smith v. Chicago School Reform*

Bd. Of Trustees, 165 F.3d 1142 (7th Cir. 1999).

F. Plaintiff's Claims For Sex And Age Discrimination In Counts III and IV against Lisa Madigan, Illinois Attorney General, the Office of the Attorney General, And The State of Illinois Should Be Dismissed Because The Eleventh Amendment Bars Plaintiff's Claim For Monetary Damages And Plaintiff's Status As A Former Employee Precludes His Request For Injunctive Relief.

Under the Eleventh Amendment, the state, its agencies and officials are immune from private damage actions or suits for injunctive relief in federal court unless the state, by unequivocal language, waives the protections of the Eleventh Amendment or Congress unequivocally abrogates the state's Eleventh Amendment immunity. *Kroll v. Board of Trustees of the Univ. Of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991). The State of Illinois has not waived its Eleventh Amendment immunity. *See* 745 ILCS 5/1 (West 2003). Although Congress has abrogated immunity for Title VII claims, Section 1983 claims are still subject to the Eleventh Amendment. *Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 67 (1989). Therefore, claims brought pursuant to 42 U.S.C. Section 1983 against the State, its agencies and officials, such as those in Counts III and IV of the Amended Complaint, are barred by the Eleventh Amendment.[6]

Plaintiff brings the Amended Complaint against the State, the Office of the Attorney General and Lisa Madigan in her official capacity for, among other things, matters concerning injunctive and declaratory relief. "[T]he basic requisites of the issuance of equitable relief . . . [includes] the likelihood of substantial and immediate reparable injury, . . . " *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (citation omitted). Plaintiff concedes that he no longer works for the Defendants. *See* Exhibit A, ¶ 9. Therefore, no plausible inference can arise that Plaintiff is likely to be the victim

[6]In *Will*, the Supreme Court also held that states, their agencies and officials were not "persons" subject to suit under Section 1983. 491 U.S. at 70-71.

of Defendants' alleged misconduct in the future. As such, his prayers for declaratory and injunctive relief, in Counts III and IV, as well as in Counts I and II, should be stricken.[7]

G. Alternatively, Plaintiff's Amended Complaint Should Be Dismissed Because Plaintiff Fails To Plead The *Prima Facie* Elements For Any Claim. If His Pleadings Are Deemed Sufficient, Plaintiff Pleads Facts Which Demonstrate He Is Not Entitled To Relief.

To prevail on his claims of discrimination, Plaintiff must either provide direct evidence of discrimination or provide a *prima facie* showing that: (1) he belongs to a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) his employer treated similarly-situated employees outside his protected class more favorably. *Hughes v. Brown*, 20 F.3d 745, 746 (7th Cir. 1994). In pleading his claims, the Federal Rules of Civil Procedure require Plaintiff to provide a "short and plain statement of the claim" showing [he] "is entitled to relief." Fed.R.Civ.Pro. 8(a)(2). The claim must be supported with enough facts, taken as true, that plausibly suggest that the plaintiff is entitled to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. ____, 127 S.Ct. 1955, 1965 (2007). Plaintiff does not need to plead detailed factual allegations, but his "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." *Id.* at 1964-65.

The Honorable Judge Shadur recently found unsupported references to "racial targeting" and "race discrimination" and "maliciously & racially" to be "skeletal and purely conclusory characterizations" insufficient to demonstrate the jurisdiction of the Court and the Complaint's

[7] *Ex parte Young*, 209 U.S. 123 (1908), allows Plaintiff to pursue his claim for reinstatement, as that is a prospective remedy.

viability. *Jackson v. Casey*, 07 C 5348 (N.D.Ill. Sept. 25, 2007) A copy of the Opinion is attached as Exhibit E. Plaintiff's Amended Complaint here suffers the same defects.

Plaintiff liberally tosses out allegations of "intentional[] discriminat[ion]," that "Plaintiff's age or sex was a motivating factor in defendants' decision" and "maliciously and intentionally." *See e.g.* Exhibit A, Counts I and II, ¶ 9, 14, 15. Plaintiff fails to make any direct allegations of such discrimination and the only "fact"(rather than conclusions) he pleads to support his claim is the alleged dismissal of two other male Assistant Attorneys General over the age of forty. *See e.g.,* Exhibit A, Counts I and II, ¶ 12.

The Office of the Attorney General, according to the Plaintiff's Amended Complaint, has in excess of five hundred (500) employees. *See* Exhibit A, Counts I and II, ¶ 4. Plaintiff's bare mention of two male Assistant Attorneys General, out of more than five hundred other persons, does not suggest discrimination as Plaintiff would have this Court believe. Nor does that minuscule number hint at a pattern or practice by the Defendants. Plaintiff simply has nothing more than his conclusory statements and such are not sufficient to continue his claim in this Court.[8]

Plaintiff's Amended Complaint should be dismissed for an additional reason. In pleading his claim, a plaintiff can plead himself out of court by alleging facts which show he has no claim. *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995). If plaintiff "pleads facts that show his suit is time-barred or otherwise without merit, he has pleaded himself out of court." *Tregenza v. Great Am. Commc'ns Co.*, 12 F.3d 717, 718 (7th Cir. 1993). Here, in attempting to plead around Defendants' original Motion to Dismiss, Plaintiff has pleaded himself out of court.

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[8]Plaintiff's claims are equally doomed because he fails to provide any fact, hint or tidbit as to any similarly situated employee outside his protected class who was treated more favorably, as is his burden.

In Count I of his Amended Complaint, Plaintiff pleads, in great detail, alleged "facts"about his performance of his duties as a Senior Assistant Attorney General. These facts, taken as true for purposes of this motion, amount to judicial admissions, *see Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1993), and show that Plaintiff, a Senior Assistant Attorney General, had to be told which cases to file, prosecute, defend and settle. *See* Exhibit A, at Count I, ¶ 25 (e). The Amended Complaint shows that Plaintiff, a Senior Assistant Attorney General with more than thirty years of legal experience, had to be told what words, sentences and phrases to use in a lawsuit or the resolution of a lawsuit. *See* Exhibit A, at Count I ¶ 25 (f). The Amended Complaint also shows that Plaintiff, a Senior Assistant Attorney General, would not use his independent judgment to make prosecutorial and other litigation decisions. *See* Exhibit A, at Count I ¶ 25 (m).

The Amended Complaint demonstrates that Plaintiff was not satisfactorily performing his job. These facts show that Plaintiff was not performing his job at all and that others were having to make the Plaintiff's decisions for him and script his actions. Common sense and the Plaintiff's own pleadings, then, demonstrate that Plaintiff was not meeting his employer's legitimate expectations and his "termination" was justified based on his non-performance of his job duties. Thus, at best, even if the conclusory allegations in Plaintiff's Amended Complaint are to be given any weight, Plaintiff's claims fail because he cannot prove that Defendants' actions were taken because of his age and sex, instead of his failure to perform his job satisfactorily.

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,

s/ Deborah J. Allen

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