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.	)	

THE INDIVIDUAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

NOW COME Defendants, LISA MADIGAN, Individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGAN, individually, 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, 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.

Count III of Plaintiff's Amended Complaint, brought pursuant to 42 U.S.C. § 1983, alleges that the individual Defendants discriminated against Plaintiff on the basis of gender in violation of the Equal Protection Clause. Count IV, also brought pursuant to 42 U.S.C. § 1983, alleges that the individual Defendants discriminated against Plaintiff on the basis of age in violation of the Equal Protection Clause. Plaintiff's Equal Protection claim for age discrimination should be dismissed because the ADEA is the exclusive federal remedy for claims of age discrimination. In addition, Plaintiff's Equal Protection damages claims for age and gender discrimination should be dismissed because, based upon the allegations, Defendants are entitled to qualified immunity. Further, Plaintiff's Amended Complaint should be dismissed because Plaintiff fails to plead the *prima facie* elements for any claim and, if his pleadings are deemed sufficient, Plaintiff pleads facts which demonstrate he is not entitled to relief. Plaintiff's status as a former employee, moreover, precludes his request for injunctive relief.

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's Equal Protection Claim For Age Discrimination In Count IV Should Be Dismissed Because The ADEA Is The Exclusive Federal Remedy For Age Discrimination.

Count IV of Plaintiff's Amended Complaint alleges age discrimination in violation of 42 U.S.C. § 1983. Count IV, however, should be dismissed because claims of age discrimination may not be brought pursuant to § 1983. Every Circuit Court that has directly considered this issue has concluded that the ADEA is the exclusive federal remedy for age discrimination.[2] *See Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1368-70 (4th Cir. 1989); *Migneault v. Peck*, 158 F.3d 1131, 1140 (10th Cir. 1998), *abrogated on other grounds by Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Lafleur v. Texas Dept. Of Correctional Services*, 126 F.3d 758, 760 (5th Cir. 1997).

A §1983 action may be precluded when the remedial devices of a particular statute are sufficiently comprehensive so as to demonstrate congressional intent to preclude such a remedy. *Middlesex County Sewerage Auth. v. Natl. Sea Clammers Assn.*, 453 U.S. 1, 20 (1981). In a detailed analysis, the Fourth Circuit examined the ADEA and determined that it provides "a comprehensive statutory scheme to prohibit discrimination in employment on the basis of age." *Zombro*, 868 F.2d at 1366.

Zombro brought a § 1983 and § 1985 suit against his employer and the Baltimore City Police Commissioner following an involuntary transfer. Zombro was a police officer with the Baltimore

[2]The Seventh Circuit has not ruled on the question, but one court in the Northern District has held that "Congress intended the ADEA to be the exclusive remedy for age discrimination in federal employment." *Christie v. Marston*, 451 F.Supp. 1142, 1145 (N.D.Ill. 1978).

City Police Department. He was assigned to the Inner Harbor Tactical Division until March, 1986 when he was involuntarily transferred to another unit. Zombro alleged the transfer was the result of impermissible age discrimination and conspiracy. Zombro's supervisor said Zombro was transferred because of his poor attitude and "harsh demeanor" with visitors and merchants. *Id.* at 1365. Zombro did not pursue his rights under the ADEA. Instead, he elected to pursue individual liability against the Police Commissioner for violation of the Equal Protection Clause. The District Court granted judgment in favor of defendants as a matter of law.

The Fourth Circuit Court of Appeals affirmed, but for reasons different than those relied upon by the District Court. In its review, the Fourth Circuit *sua sponte* considered, and decided, whether age discrimination claims brought pursuant to § 1983 are preempted by the ADEA. The Fourth Circuit found preemption because the remedial devices of the ADEA were sufficiently comprehensive so as to demonstrate congressional intent to preclude such a remedy. *Id.* at 1366-1370.

The ADEA has a comprehensive remedial scheme structured to "facilitate and encourage compliance through an informal process of conciliation and mediation." *Id.* at 1366. It requires administrative charges and notice to the EEOC, deadlines, fact-finding, hearings and conciliation mechanisms. 29 U.S.C. §§ 201-219 (1994). It empowers the fact-finding agency to investigate and collect data, to inspect workplaces and question employees. 29 U.S.C. § 211. And it provides the EEOC, which administers the ADEA, the opportunity to file suit if it believes a violation exists. 29 U.S.C. § 626 (c).

If a plaintiff were allowed to proceed directly with a § 1983 claim, "the congressional scheme behind ADEA enforcement could easily be undermined, if not destroyed." *Zombro*, 868 F.2d at

1367. Indeed, one must assume that is why a plaintiff proceeds under § 1983, to bypass an unfavorable result required by the ADEA. *Id.*

Here, as demonstrated in Co-Defendants' Motion to Dismiss, Plaintiff is not an "employee" entitled to the ADEA's protection. Because of that, he is foreclosed from bringing suit under the ADEA. Once that result became apparent to him, Plaintiff filed this Amended Complaint, attempting a §1983 claim against the five individual defendants. Simply because the ADEA provides him no relief, however, does not mean that Plaintiff must be allowed to pursue an Equal Protection Claim. "[T]he comprehensiveness of the ADEA, or of any enactment, is not diminished by the fact that the scheme may not provide every imaginable remedy or create a basis for every imaginable claim." "Alone in its Field: Judicial Trend[3] to Hold That the ADEA Preempts § 1983 in Age Discrimination in Employment Cases," 29 Stetson L.Rev. 573, 588 (2000), a copy of which is attached as Exhibit "C." For these reasons, Defendants request that Count IV be dismissed.

B. 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 disparate treatment claims under the Equal Protection Clause, Plaintiff must demonstrate: (1) that he is a member of a protected class; (2) that he is similarly situated to members of the protected class; (3) that he suffered an adverse employment action; (4) that he was treated differently from members of the unprotected class; and (5) that his employer acted with discriminatory intent. *McPhaul v. Board of Commissioners of Madison County*, 226 F.3d 558, 564

[3]The trend holding that the ADEA is the exclusive federal remedy for age discrimination claims is continuing. *See e.g., Barlieb v. Kutztown Univ. Of the Penn. State System of Higher Education, et al.,* 2003 WL 22858575 (E.D.Pa. December 1, 2003); *Marr v. Anderson*, 2007 WL 2363116 (D.Nev. August 15, 2007), copies of which are attached as Exhibit "D."

(7th Cir. 2000). To show that a supervisor acted with discriminatory intent, Plaintiff must show that the supervisor acted or failed to act with a "nefarious discriminatory purpose," and discriminated against him because of his membership in a definable class. *Id.* 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 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.

In his Amended Complaint Plaintiff repeatedly contends that the individual Defendants "intentionally" or "knowingly and intentionally" or "maliciously and intentionally" terminated Plaintiff's employment "because of his sex and age." *See e.g.* Exhibit A, Counts III and IV, ¶ 17, 19, 21, 25. Plaintiff makes no direct allegations of such discrimination and the only "fact"(rather than conclusions) he pleads to support his claims is the alleged dismissal of two other male Assistant Attorneys General over the age of forty. *See e.g.,* Exhibit A, Counts III and IV, ¶ 17.

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.[4]

Plaintiff is also improperly attempting to impute *respondeat superior* liability on the other individual supervisory defendants based upon the allegations against Defendant Hagan. Counts III and IV plead that Defendant Hagan preferred that all Assistant Attorneys General be young women, that Hagan refused to even read resumes from male applicants and that Hagan urged the individual Defendants to terminate Plaintiff's employment simply because Plaintiff is a male over the age of forty. *See* Exhibit A, Counts III and IV, ¶ 14-17. There is, however, no *respondeat superior* liability under § 1983. *Whitman v. Nesic*, 368 F.3d 931, 935 fn. 2 (7th Cir. 2004).

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 Co-Defendants' original Motion to Dismiss, Plaintiff has pleaded himself out of court.

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[4]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. The facts show that Plaintiff was not performing his job at all and 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.

C. Plaintiff's Equal Protection Damages Claims For Age And Gender Discrimination Should Be Dismissed Because The Defendants Are Entitled To Qualified Immunity.

Plaintiff seeks, among other things, more than five hundred thousand dollars ($500,000) from each individual Defendant in compensatory and punitive damages. *See* Exhibit A, pages 20 and 23. Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Behrens v. Pelletier*, 516 U.S. 299, 304 (1996). The burden is on the plaintiff to prove , not the defendant official to disprove, the existence of a clearly established right. *Davis v. Sherer*, 468 U.S. 183, 197 (1984); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1176 (7th Cir. 1994). A plaintiff can meet this burden only by citing "closely analogous cases" decided prior to the defendants' challenged actions which clearly and consistently recognize the right forming the basis of the cause of action. *Upton*, 930 F.2d 1209, 1212 (7th Cir. 1991) *citing Rakovich v. Wade,* 850 F.2d 1180, 1205 (7th Cir. 1988).

In determining whether a right is clearly established, the Supreme Court has admonished that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [I]n light of the pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[T]he test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987).

Once a defendant asserts qualified immunity, plaintiff has the burden of showing that the law was clearly established at the time of the challenged conduct. *Perry v. Sheehan*, 222 F.3d 309, 315

(7th Cir. 2000). It is not enough to cite a constitutional right at a high level of generality, for example, by saying that the plaintiff has the right to equal treatment or the right to be free from vindictive treatment. The right must be sufficiently particularized, based on existing cases. Closely analogous cases are required to find that a constitutional right is clearly established. *Rakovich*, 850 F.2d 1209.

Here, as demonstrated in section A above, Defendants are entitled to qualified immunity because Plaintiff has not alleged and cannot establish that, at the time of his separation from the Office of the Attorney General, age discrimination in employment was a cognizable claim under the Equal Protection Clause. See e.g., *Migneault v. Peck*, 158 F.3d 1131, 1140 (10th Cir. 1998), *abrogated on other grounds by Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). Indeed, the majority of case law holds that there is no such right.

Nor has Plaintiff established a cognizable claim for either age discrimination or gender discrimination under the Equal Protection Clause because he pleads that he is not performing his job to his employer's legitimate expectations - indeed, where he pleads he is not even performing his job at all. *See* section B, above. Certainly Plaintiff cannot claim a constitutional right to be free from termination for failing to satisfactorily perform his job duties. And since no such argument can be made, and no such right can be shown to exist, Defendants are immune from such a claim.

Finally, the novelty of Plaintiff's § 1983 claims becomes more apparent in Plaintiff's attempt to impute *respondeat superior* liability on the other supervisory individual Defendants, based on the allegations against Defendant Hagan. Counts III and IV plead that Defendant Hagan preferred that all Assistant Attorneys General be young women, that Hagan refused to even read resumes from male applicants and that Hagan urged the individual Defendants to terminate Plaintiff's employment

simply because Plaintiff is a male over the age of forty. *See* Exhibit A, Counts III and IV, ¶ 14-17. Such conclusory, and unsupported, contentions fail to meet Plaintiff's burden under § 1983. *Mateau-Anderegg v. School Dist. Of Whitefish Bay,* 304 F.3d 618, 623 (7th Cir. 2002). Defendants thus respectfully request that Plaintiff's Amended Complaint be dismissed.

D. Plaintiff's Status As A Former Employee Precludes His Request For Injunctive Relief.

Plaintiff brings the Amended Complaint 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 of Defendants' alleged misconduct in the future. As such, his prayers for declaratory and injunctive relief should be stricken.[5]

[5]*Ex parte Young*, 209 U.S. 123 (1908), allows Plaintiff to pursue his claim for reinstatement, as that is a prospective remedy. However, Plaintiff cannot even pursue that remedy against the individual Defendants for none of them, as individuals, would have the authority to reinstate Plaintiff. Any reinstatement would have to be made by the Office of the Attorney General or the Attorney General, in her official capacity. Thus, injunctive relief against the individual Defendants is not a proper request.

IV. CONCLUSION

WHEREFORE, Defendants, LISA MADIGAN, Individually, ANN SPILLANE, individually, ALAN ROSEN, individually, ROGER FLAHAVEN, individually, and DEBORAH HAGAN, individually, 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, Individually, ANN SPILLANE, Individually, ALAN ROSEN, Individually, ROGER P. FLAHAVEN, Individually, and DEBORAH HAGAN, Individually,

s/ Deborah J. Allen

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