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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

TAMMY CALLAHAN,

Plaintiff,

3:15-CV-0200-LRH-WGC

v.

WASHOE COUNTY SCHOOL DISTRICT;  
et al.,

Defendants.

ORDER

Before the court is Defendants Washoe County School District, a political subdivision of the state of Nevada (“WCSD”); and Tom Strauss; Rick Borba; Heath Morrison; Melissa Thoroughman; Lynn Rauh; Richard Swanberg; Kelly Keane; Jenni Anderson; and Ruth Williams’, all of whom are either present or former employees of WCSD sued in their individual and official capacities (collectively “Defendants”), motion to dismiss the first amended complaint. ECF No. 39. Plaintiff Tammy Callahan (“Callahan”) filed an opposition (ECF No. 42) to which Defendants replied (ECF No. 43).

**I. Facts and Procedural History**

Plaintiff Callahan was employed as an elementary school teacher with WCSD from 1987 until 2010. For the 2008-2009 school year Callahan was asked by her elementary school principal, defendant Kelly Keane, to take over and teach a third grade class for the year rather than her normal second grade class. Callahan accepted the position with the understanding that she would be placed back in the second grade the following year.

1           Ultimately, Callahan was not returned to her second grade classroom and began  
2 to apply for other elementary teaching positions within the school district. However,  
3 Callahan was unable to find a position within WCSD because, as she alleges, the only  
4 positions available were for first year teachers or one year contracts, rather than normal  
5 tenured teaching positions. Callahan then applied to retire in June 2010 so that she  
6 could take advantage of WCSD's early retirement incentive with the understanding that  
7 she could rescind her application if she found another teaching position during the  
8 month. However, Callahan alleges that when she tried to rescind her application prior to  
9 the June 30, 2010 deadline, her request was denied by WCSD administration and she  
10 was forced into retirement. At the time of her retirement, Callahan was over fifty years  
11 old and had been with WCSD for 23 years.

12           In August 2011, Callahan filed complaints with the Nevada Equal Rights  
13 Commission ("NERC") and the Equal Employment Opportunity Commission ("EEOC")  
14 alleging age discrimination. Callahan received a "right to sue" letter on January 18,  
15 2015. Subsequently, on April 6, 2015, Callahan filed a complaint against defendants  
16 alleging five causes of action: (1) hostile work environment under the Age  
17 Discrimination in Employment Act ("ADEA"); (2) violation of the Equal Protection Clause  
18 pursuant to 42 U.S.C. § 1983; (3) federal conspiracy claim under 42 U.S.C. § 1985; (4)  
19 negligent infliction of emotional distress; and (5) intentional infliction of emotional  
20 distress. ECF No. 1. Callahan's initial complaint was dismissed with leave to file an  
21 amended complaint alleging an ADEA discrimination claim and an ADEA retaliation  
22 claim. ECF No. 35.

23           On December 21, 2015, Callahan filed an amended complaint against  
24 defendants alleging five causes of action: (1) age discrimination under the ADEA; (2)  
25 violation of the Equal Protection Clause pursuant to 42 U.S.C. § 1983; (3) federal  
26 conspiracy under 42 U.S.C. § 1985; (4) negligent infliction of emotional distress; and (5)  
27 intentional infliction of emotional distress. ECF No. 36. Thereafter, defendants filed the  
28 present motion to dismiss. ECF No. 39.

1     **II.     Legal Standard**

2             Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6)  
3 for failure to state a claim upon which relief can be granted. To survive a motion to  
4 dismiss for failure to state a claim, a complaint must satisfy the Federal Rule of Civil  
5 Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med.*  
6 *Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain “a short and  
7 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
8 8(a)(2). The Rule 8(a)(2) pleading standard does not require detailed factual allegations;  
9 however, a pleading that offers “‘labels and conclusions’ or ‘a formulaic recitation of the  
10 elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949  
11 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

12             Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual  
13 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at  
14 1949 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the  
15 pleaded factual content allows the court to draw the reasonable inference, based on the  
16 court’s judicial experience and common sense, that the defendant is liable for the  
17 misconduct alleged. *See Id.* at 1949-50. “The plausibility standard is not akin to a  
18 probability requirement, but it asks for more than a sheer possibility that a defendant  
19 has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
20 defendant’s liability, it stops short of the line between possibility and plausibility of  
21 entitlement to relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

22             In reviewing a motion to dismiss, the court accepts the facts alleged in the  
23 complaint as true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a  
24 formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption  
25 of truth.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*,  
26 129 S. Ct. at 1951) (brackets in original) (internal quotation marks omitted). The court  
27 discounts these allegations because “they do nothing more than state a legal  
28 conclusion—even if that conclusion is cast in the form of a factual allegation.” *Id.* (citing

1 *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to dismiss, the  
2 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
3 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 4 **III. Discussion**

#### 5 **A. Age Discrimination**

6 In order to establish a *prima facie* case for age discrimination under the ADEA, a  
7 plaintiff must establish (1) membership in a protected class [age 40-70]; (2) that plaintiff  
8 was satisfactorily performing his or her job or was otherwise qualified for hire; (3) that  
9 plaintiff suffered an adverse employment action; and (4) that plaintiff was replaced by a  
10 substantially younger person with equal or inferior qualifications. *Nidds v. Schindler*  
11 *Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996). The fourth element of a *prima facie*  
12 case is treated with some flexibility so long as a plaintiff can show the circumstances  
13 surrounding an adverse employment action give rise to an inference of age  
14 discrimination. *Id.* Additionally, in Nevada, a charge alleging unlawful discrimination  
15 must be filed within 300 days after the alleged unlawful practice occurred. 29 U.S.C. §  
16 626(d)(1)(B); *Laguaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir.  
17 1999).

18 In their motion, defendants contend Callahan did not timely file her age  
19 discrimination charge with NERC and EEOC within the 300 day time period after her  
20 alleged forced retirement and thus her claim is time barred. In opposition, Callahan  
21 argues that after her forced retirement she continued to apply and interview for  
22 numerous positions up to December 2010, and because WCSD’s continued refusal to  
23 hire her during this time relates to her age discrimination charge, the entire time period  
24 constitutes a continuing violation that did not trigger the filing period until December  
25 2010. Thus, she argues, the NERC and EEOC complaints are timely because the intake  
26 paperwork was filed on August 5, 2011, within 300 days of December 2010. This court  
27 disagrees.

28 ///

1           The continuing violations doctrine allows courts to consider discrimination claims  
2 that would ordinarily be time barred as long as the untimely acts of discrimination are  
3 part of an ongoing unlawful employment practice. See, e.g., *Anderson v. Reno*, 190  
4 F.3d 930, 936 (9th Cir. 1999); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107  
5 (9th Cir. 1998). To assert the continuing violations doctrine, a plaintiff must show that  
6 the untimely incidents were: (1) part of an ongoing pattern of related acts; and (2) that  
7 the defendant continued this pattern into the relevant limitations period. *Green v. L.A.*  
8 *Cnty. Superintendent of Sch.*, 888 F.2d 1472, 1480 (9th Cir. 1989); see also *Bauer v.*  
9 *Bd. of Supervisors*, 44 F. App'x 194 (9th Cir. 2002) (citing *Sosa v. Hiraoka*, 920 F.2d  
10 1451, 1456 (9th Cir. 1990)). However, “[d]iscrete discriminatory acts are not actionable  
11 if time barred, even when they are related to acts alleged in timely filed charges.”  
12 *AMTRAK v. Morgan*, 536 U.S. 101, 113 (2002). Rather, “[e]ach discrete discriminatory  
13 act starts a new clock for filing charges alleging that act. The charge, therefore, must be  
14 filed within the... 300-day time period after the discrete discriminatory act occurred.” *Id.*  
15 The time to file a claim based on refusal to hire starts when a discrete act happens, i.e.  
16 when the plaintiff is not hired for a particular position, not when the plaintiff stops  
17 applying for positions. *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044 (9th Cir. 2008).  
18 Although a discriminatory practice may extend over time through a series of related  
19 acts, if the acts remain divisible into a set of discrete acts, each must be brought within  
20 the statutory limitations period. *Raas v. Fairbanks N. Star Borough*, 323 F.3d 1185,  
21 1192 (9th Cir. 2003) (holding that the school district’s refusal to hire for Raas for a full-  
22 time teaching position in July of 1992 for the '92-'93 school year was time barred  
23 because the Equal Employment Opportunity charge was filed on September 16, 1993  
24 and was governed by a 300 day limitations period).

25           Here, Callahan’s effective retirement date was on August 31, 2010, and thus her  
26 age discrimination claim arising from her alleged forced retirement had to be filed with  
27 NERC and EEOC before June 27, 2011. Although NERC received Callahan’s charge on  
28 August 17, 2011, Callahan contends that she filed her complaint with NERC and EEOC

1 on August 5, 2011. Even when using the earliest possible date of August 5, 2011, any  
2 incident that happened prior to October 9, 2010, including Callahan's forced retirement,  
3 is barred. Further, in contrast to Callahan's argument, defendants' refusal to re-hire  
4 Callahan after her forced retirement is not a continuing violation. Rather, each failure to  
5 hire constitutes a separate, actionable incident. *Morgan*, 536 U.S. at 114. Thus, each  
6 time WCSD failed to rehire Callahan for a position she applied for, that act constituted a  
7 separate, actionable 'unlawful employment practice' and triggered a new time period to  
8 file a charge of discrimination. As such, this court finds that Callahan has failed to allege  
9 any ongoing pattern of related acts sufficient for application of the continuing violations  
10 doctrine. Therefore, the court finds that Callahan's age discrimination claim based upon  
11 her forced retirement was untimely and thus, she is barred from bringing this claim.

12 Additionally, the court notes that Callahan's allegations related to applying for  
13 new job positions are not in her complaint. Rather, she raised them for the first time in  
14 her opposition to the motion to dismiss. As such, the court cannot review these  
15 allegations in addressing the defendants' motion to dismiss as they are not part of the  
16 operative complaint. Moreover, even when using the date Callahan insists begins the  
17 time period for her claims, August 5, 2011, any refusal to hire that happened prior to  
18 October 9, 2010, is not actionable. In the first amended complaint, Callahan does not  
19 allege that she applied for any jobs after October 9, 2010, only that she generally  
20 "applied and interviewed for more than 70 positions for which she was qualified and was  
21 denied." ECF No. 36 at ¶21. Thus, based on the allegations in her complaint, Callahan  
22 has not alleged any timely violation of the ADEA for refusal to hire.

### 23 **B. Equal Protection and Conspiracy Claims**

24 In their motion to dismiss, defendants contend that the ADEA is the exclusive  
25 enforcement mechanism for claims of age discrimination. This court agrees.

26 As a matter of law, plaintiff cannot state a § 1983 equal protection claim arising  
27 from age discrimination in employment. *Cummins v. City of Yuma*, 410 F. App'x 72 (9th  
28 Cir. 2011) (citing *Almeyer v. Nev. Sys. Of Higher Educ.*, 555 F.3d 1051, 1060-61 (9th

1 Cir. 2009)). Instead, a plaintiff may allege a Section 1983 equal protection claim at the  
2 same time as a claim under the ADEA, but the plaintiff must allege that defendants  
3 “violated some federally secured right other than those already protected by the ADEA.”  
4 *Morgan v. Humboldt Cnty. Sch. Dist.*, 623 F. Supp. 440 (D. Nev. 1985).

5 Here, Callahan does not allege any violation of her right to equal protection that  
6 does not arise from her employment. The constitutional right that Callahan alleges has  
7 been violated is her “right to be treated in the same manner as her fellow employees  
8 under similar circumstances.” ECF No. 36 at ¶¶41. Specifically, Callahan alleges that she  
9 was singled out for asking for clarification of district policies. ECF No. 36 at ¶42.  
10 Additionally she alleges that defendants created a hostile work environment and that  
11 defendants acted with deliberate indifference to her work environment by failing to  
12 investigate her complaints. *Id.* at ¶¶43-45. However, these allegations solely have to do  
13 with her employment with WCSD, and are thus pre-empted by the ADEA.

14 Similar to Callahan’s Equal Protection claim, a deprivation of a right created by  
15 Title VII cannot be the basis for a civil conspiracy claim under § 1985(3). *Great Am.*  
16 *Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 378 (1979). To state a claim under  
17 Section 1985(3), a plaintiff must allege that defendants: (1) conspired; (2) for the  
18 purpose of depriving any person or class of persons of equal protection or equal  
19 privileges and immunities under the laws; (3) an act done by one of the conspirators in  
20 furtherance of the conspiracy; and (4) a personal injury, property damage, or deprivation  
21 of any right or privilege of a citizen of the United States. *Gillespie v. Civiletti*, 629 F.2d  
22 637, 641 (9th Cir. 1980); *see also Sever v. Alaska Pulp Corp.*, 978 D.2d 1529, 1536 (9th  
23 Cir. 1992).

24 Like Callahan’s allegations regarding her equal protection claim, she has failed to  
25 allege anything in her conspiracy claim outside the context of her employment with  
26 WCSD. Her allegations for civil conspiracy have to do with a hostile work environment,  
27 a claim which this court already dismissed. ECF No. 36 at ¶¶48-53; ECF No. 35.  
28 Further, what Callahan alleges defendants conspired to deprive her of was her right to a

1 “safe, fair, and non-hostile work environment” by singling her out, treating her different  
2 from other employees, humiliating and embarrassing her, and investigating her upon  
3 her requesting that she be treated fairly. ECF No. 36 at ¶¶48-52. These allegations arise  
4 solely from her employment and are pre-empted by her ADEA claim. Therefore, this  
5 court shall grant defendants’ motion to dismiss these claims.

6 **C. State Tort Claims**

7 In her complaint, Callahan alleges two remaining claims arising under Nevada  
8 state law. Pursuant to 28 U.S.C. § 1367(a), a district court may exercise supplemental  
9 jurisdiction over state law claims that are part of the same case or controversy as  
10 plaintiff’s federal claims. However, the court may decline to exercise supplemental  
11 jurisdiction over state law claims if the court determines that federal claims warrant  
12 dismissal. 28 U.S.C. § 1367(c)(3). The exercise of supplemental jurisdiction is entirely  
13 within the court’s discretion. *United Mine Workers of America v. Gibbs*, 383 U.S. 715,  
14 716 (1966).

15 Because the court finds that Callahan’s federal claims warrant dismissal against  
16 all defendants, the court declines to exercise supplemental jurisdiction over her  
17 remaining state law claims. Accordingly, the court shall dismiss these claims without  
18 prejudice.

19  
20 IT IS THEREFORE ORDERED that defendant’s motion to dismiss (ECF No. 39)  
21 is GRANTED in accordance with this order. Callahan’s complaint (ECF No. 36) is  
22 DISMISSED in its entirety.

23 IT IS SO ORDERED.

24 DATED 24th day of August, 2016.

25   
26 LARRY R. HICKS  
27 UNITED STATES DISTRICT JUDGE  
28