

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

No. 7:15-CV-19-F

THOMAS J. RUSH,

Plaintiff,

v.

KENNETH RUST ENTERPRISES d/b/a  
McDONALDS, DOUGLAS HUMPRIES,  
MICHELLE NOBLES-EVANS, and  
ADAM LEWIS,

Defendants.

ORDER

This matter is before the court on the Memorandum and Recommendation (“M&R”) [DE-3] of United States Magistrate Judge Robert B. Jones, Jr.

In the M&R, Judge Jones construed the proposed complaint filed by *pro se* Plaintiff Thomas J. Rush as attempting to assert claims pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), the Equal Pay Act of 1963 (“Equal Pay Act”), and the Age Discrimination in Employment Act (“ADEA”). *See* M&R [DE-3] at 3. Judge Jones recommended that any claims asserted by Plaintiff under Title VII and ADEA against Defendants Humpries, Noble-Evans, and Lewis be dismissed because supervisors are not liable in their individual capacities under either Title VII or the ADEA. *Id.* at 4. He also recommended that any Equal Pay Act claim be dismissed for failure to state a claim. *Id.* at 4-5. Accordingly, Judge Jones recommended that “any Equal Pay Act claim be dismissed, that Defendants Humpries, Michelle Nobles-Evans, and Adam Lewis be dismissed, and that Plaintiff’s Title VII and any ADEA claim against Defendant Kenneth Rust Enterprises, d/b/a McDonalds be allowed to proceed at this time.” *Id.* at 5.

Plaintiff did not file an objection to the M&R, but he did file what appears to be an Amended Complaint [DE-7]. The Amended Complaint omits Humpries, Noble-Evans and Lewis as defendants. *See* Amended Compl. [DE-7] ¶ 2. The Amended Complaint also no longer lists Plaintiff's age as a basis for the alleged discrimination, nor does it contain allegations that a defendant failed to promote him. *Id.* ¶¶ 4, 6. The Amended Complaint continues to contain allegations, however, referencing the Equal Pay Act. *Id.* ¶ 4.

The court has conducted an independent and thorough review of the M&R [DE-3] and the record as a whole, and concludes that the M&R is correct and in accordance with the law. Accordingly, the court hereby adopts the M&R [DE-3], and Plaintiff's claims against Defendants Defendants Humpries, Michelle Nobles-Evans, and Adam Lewis are DISMISSED. Additionally, any claim under the Equal Pay Act is DISMISSED.

To the extent that Plaintiff has attempted to amend his complaint, Federal Rule of Civil Procedure 15(a)(1)(B) provides that a plaintiff may amend his complaint once as a matter of course within 21 days after the earlier of (1) service of a responsive pleading or (2) service of a motion under Rule 12(b), (e), or (f). No defendant has been served in this action, and therefore no responsive pleading or applicable motion has been filed. Accordingly, the court will deem the Amended Complaint [DE-7] to be the operative pleading in this action, except to the extent that Plaintiff attempts to assert an Equal Pay Act claim. As Judge Jones already explained, the Equal Pay Act prohibits employers from paying employees of opposite sex disparate pay for equal work. M&R [DE-3] at 4 (citing *Ramirez-Rodriguez v. Wal-Mart Stores E. L.P.*, No. 5:12-CV-595, 2013 WL 3356566, at \*2 (E.D.N.C. July 3, 2013)). Plaintiff still has failed to allege that he received lower pay than a female employee performing substantially similar work under similar conditions, and thus has

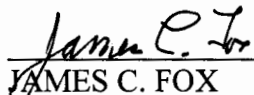
failed to state an Equal Pay Act claim.

CONCLUSION

For the foregoing reasons, the court hereby adopts the M&R [DE-3], and Plaintiff's claims against Defendants Humpries, Michelle Nobles-Evans, and Adam Lewis are DISMISSED. Additionally, any claim under the Equal Pay Act is DISMISSED. To the extent that Plaintiff moves to amend his complaint, such motion is ALLOWED, and the Amended Complaint [DE-7] is now the operative pleading in this action. Any Equal Pay Act Claim asserted in the Amended Complaint [DE-7], however, is DISMISSED.

SO ORDERED.

This the 3<sup>rd</sup> day of March, 2015.

  
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JAMES C. FOX  
Senior United States District Judge