UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ALLEN HOWELL, Plaintiff v. MILLERSVILLE UNIVERSITY OF PENNSYLVANIA; MICHEAL HOULAHAN; PHILLIP TACKA; N. KEITH WILEY; CHRISTY BANKS; and DIANE UMBLE, Defendants	: : : : : : : : : : : : :	No. 5:17-cv-00075

O P I N I O N

Defendant's Motion to Dismiss, ECF No. 9 – Granted in Part and Denied in Part

Joseph F. Leeson, Jr. **July 27, 2017**
United States District Judge

I. Introduction

Allen Howell is an associate professor in the music department at Millersville University of Pennsylvania, a public university that is part of the Pennsylvania State System of Higher Education. He joined Millersville in August 2014, after his position as professor of music at another Pennsylvania university was eliminated. He claims that a number of faculty members at Millersville were not pleased about the prospect of bringing on an older faculty member from another institution and that they and the University have harassed him and discriminated against him because of his age. He also claims that they retaliated against him for critical comments he has made about the University and for alerting the University to gender-based harassment that was occurring in one of his classes.

The University and the faculty members have moved to dismiss each of Howell's claims. They contend that Howell's age discrimination claims are barred by sovereign immunity and that his retaliation claims both fail to plausibly allege a causal link between the protected conduct he engaged in and the retaliation he claims to have suffered. They are correct about Howell's retaliation claims, but sovereign immunity does not bar his age discrimination claims.

II. Background

According to Howell, the mistreatment he suffered began immediately after he started at Millersville. He claims that he was hired specifically to be Millersville's "Director of Choral Activities" (according to Howell, "his letter of appointment indicated that he was to be given the position"), but was never given that title or assigned those duties. Am. Compl. ¶¶ 39-40, 45. Then, in the fall of 2015, approximately a year after he started, he applied for a full professor position (to restore him to the full professor position he held at his prior university), but he was informed in July 2016 that his application had been denied—ostensibly because of his "performance ranking." *Id.* ¶¶ 49, 59. He claims that was simply a pretext for age discrimination.

Howell also claims that he was retailiated against for speaking critically about the University. He forthrightly acknowledges that he "has been highly critical of the governance of Millersville in general and of the Music Department in particular" in comments he has made, "primarily in the form of 'blogs' or electronically made and disseminated statements." *Id.* ¶¶ 62-63. He claims that he was retaliated against for making those comments—retaliation that "includ[ed], but [was] not limited to, the denial of [the] promotion [he sought] and the failure to acknowledge his appointment as Director of Choral Activities." *Id.* ¶ 149.

Finally, Howell claims that during the spring 2017 semester, while teaching a class called "Love Songs Through the Ages: Sex Positive Themes in Vocal Music," three male students—the only male students who enrolled in the class—harassed one or more of the female students in the class. *Id.* ¶¶ 36, 64-67. Howell claims that he asked the University to conduct a "Title IX Investigation" into the harassment, but was retaliated against for bringing the harassment to the University's attention. *Id.* ¶¶ 68, 142. The retaliation he claims to have suffered is the same retaliation he claims to have suffered for making critical comments about the University—retaliation that "includ[ed], but [was] not limited to, the denial of [the] promotion [he sought] and the failure to acknowledge his appointment as Director of Choral Activities." *Id.* ¶ 141.

Howell's complaint contains four claims. Three of them—discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), hostile work environment under the ADEA, and retaliation in violation of the First Amendment—he levies against five University faculty members. The fourth claim—retaliation in violation of Title IX of the Education Amendments of 1972—he brings against the University.[1] The University and the faculty members have moved to dismiss all four claims.[2]

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[1] He also included two claims under the Pennsylvania Human Relations Act, but later voluntarily dismissed those claims. ECF No. 22.

[2] The undersigned's policies and procedures permit surreply briefs to be filed only with the permission of the Court, and only if they do not exceed five pages. Joseph F. Leeson, Jr., *Policies and Procedures* § II(F)(3), http://www.paed.uscourts.gov/documents/procedures/leepol.pdf. Howell filed a six-page surreply without permission. The Court has still considered his brief, but Howell's counsel are expected to be familiar with these policies and procedures for the remainder of this case.

III. Howell's ADEA claims are not barred by the Eleventh Amendment.[3]

The faculty members contend that Howell's ADEA claims are barred by Pennsylvania's Eleventh Amendment immunity, in light of Millersville's status as part of the Commonwealth.

Howell recognized that he could not sue Millersville itself, given that Congress did not validly abrogate the states' sovereign immunity to suit under the ADEA. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). So instead, he brought his ADEA claims solely against the five faculty members in their official capacities—and solely for prospective injunctive relief, not money damages—relying on the principle that the Eleventh Amendment does not bar suits to enjoin individual state officials from violating federal law. *See Ex parte Young*, 209 U.S. 123 (1908).

In the analogous context of a suit under the Americans with Disabilities Act, the Supreme Court suggested that Howell's approach would be proper. In *Board of Trustees of University of Alabama v. Garrett*, the Court held that the ADA—like the ADEA—did not validly abrogate the states' sovereign immunity to suit, but nonetheless noted that "the ADA still prescribes standards applicable to the States," which "can be enforced by . . . private individuals in actions for injunctive relief under *Ex parte Young*." 531 U.S. 356, 374 n.9 (2001). Since *Garrett*, the Third Circuit has had the opportunity to squarely confront the question, and twice it has turned away Eleventh Amendment challenges to claims like Howell's—first, in a case involving the ADA, *see Koslow v. Pennsylvania*, 302 F.3d 161, 178 (3d Cir. 2002) (citing *Garrett* and holding that "federal ADA claims for prospective injunctive relief against state officials are authorized by the *Ex parte Young* doctrine"), and more recently, in a case involving both the ADA and the ADEA, *see Smith v. Sec'y of Dep't of Envtl. Prot.*, 540 F. App'x 80 (3d Cir. 2013) (per curiam) (reversing the dismissal of ADA and ADEA claims against the head of a Pennsylvania state agency and directing the district court to consider the plaintiff's claim for injunctive relief); *see also Smith v. Sec'y of Dep't of Envtl. Prot.*, No. 12-2189, 2013 WL 6388555 (E.D. Pa. Dec. 5, 2013) (on remand, allowing the plaintiff to proceed with his claim for injunctive relief in the form of an order directing the Secretary to hire him for a position he had been denied). Sovereign immunity, therefore, is no bar to Howell's claims.

The faculty members contend that even if Howell's claims are not barred by the Eleventh Amendment, they are barred by the ADEA itself because "the ADEA does not provide for individual liability," only liability against the "employer." *See Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006). But by suing these faculty members in their official capacities—rather than their individual capacities—Howell has met that requirement. The term "employer" under the ADEA includes "any agent" of the employer, *see* 29 U.S.C. § 630(b), and "an official sued in his official capacity is an 'agent' of the state employer." *Koslow*, 302 F.3d at

[3] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

178 (concluding, under an analogous provision of the ADA, that claims for "prospective relief against state officials acting in their official capacities may proceed under the statute").

For those reasons, neither sovereign immunity nor the ADEA bars Howell's claims against the five faculty members. Some questions do remain about whether injunctions directed to these particular faculty members would be able to afford Howell all of the relief he seeks,[4] *see, e.g.*, *Barrett v. Univ. of N.M. Bd. of Regents*, 562 F. App'x 692, 694 (10th Cir. 2014) (concluding that a former employee of a state university could not obtain reinstatement through injunctions directed at individual members of the university's board because, under state law, the members were "not empowered to act individually, but must act as 'a body corporate'"), but those questions go to the scope of the equitable relief that may be appropriate to award if he succeeds on his claims, not to the viability of those claims.

IV. Howell has failed to state a plausible claim for retaliation under either the First Amendment or Title IX.

To make out a prima facie claim of retaliation under either the First Amendment or Title IX, a plaintiff must plead the same three basic elements: (1) protected conduct, (2) retaliatory action,[5] and (3) "a causal link between the . . . protected conduct and the retaliatory action." *See Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006) (First Amendment retaliation); *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 564 (3d Cir. 2017) (Title IX retaliation).

Defendants contend that both of Howell's retaliation claims fail because he has not pleaded facts sufficient to establish a causal link between the protected activities he engaged in and the retaliatory conduct he claims to have suffered as a result. They are correct.

As a threshold matter, the parties dispute which standard of causation applies to Howell's Title IX claim. The University believes that to prevail, Howell must show that the protected conduct he engaged in was the "but for" cause of the adverse actions he suffered, while Howell believes he need only show that his protected conduct was a motivating factor. At this stage of the proceedings, there is no need to reach that question because Howell need only plead sufficient allegations to establish some "causal link" between the two to make out a prima facie claim. Title IX retaliation claims are "generally govern[ed]" by the same analytical framework as Title VII retaliation claims, and under that framework, the but-for causation requirement—if it indeed applies in the Title IX context—would not come into play until the defendant has rebutted

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[4] For his ADEA claims, Howell seeks "all equitable remedies and injunctive relief permitted by law, including, but not limited to, immediate promotion to the rank of full Professor, an immediate increase in salary, the cessation of any retaliatory actions against him, and recognition by the Defendants that he has been hired—and serves in—the capacity of Director of Choral Activities." Am. Compl. ¶¶ 94, 108.

[5] In the First Amendment context, the retaliatory action must be of a kind that is "sufficient to deter a person of ordinary firmness from exercising his constitutional rights." *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). In the Title IX context, the retaliatory conduct must amount to an "adverse action." *Mercy Catholic*, 850 F.3d at 564. Title IX retaliation claims are "generally govern[ed]" by the same framework that governs Title VII retaliation claims, *id.*, so, as with Title VII claims, the retaliatory action must be more than "trivial" to qualify as an adverse action—it must be material enough to "dissuade[] a reasonable [person] from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

the plaintiff's prima facie claim by articulating a legitimate reason for its actions. *Mercy Catholic*, 850 F.3d at 564. Only then does the burden shift back to the plaintiff to show that those actions would not have occurred but for the plaintiff's protected conduct. *Id.*; *see Young v. City of Phila. Police Dep't*, 651 F. App'x 90, 95-97 (3d Cir. 2016) (concluding, in the context of Title VII, that a district court erred in requiring a plaintiff to establish but-for causation to make out a prima facie claim of retaliation because "the causation standards for establishing a prima facie retaliation case and proving pretext are not identical," and a plaintiff need only satisfy the "less onerous" burden of establishing some causal link between the protected conduct and the challenged action to make out a prima facie claim).[6]

As for whether Howell's allegations have established that requisite causal link, Howell claims that the same two acts—"the denial of [his] promotion and the failure to acknowledge his appointment as Director of Choral Activities"—were done in retaliation for two different instances of protected conduct: speaking critically about the University (his First Amendment retaliation claim), and reporting gender-based harassment in one of his classes (his Title IX retaliation claim). At this stage of the proceedings, there is no inherent tension in claiming that the same two acts were done in retaliation for two separate things (even if one or both of these claims require but-for causation), *see* Fed. R. Civ. P. 8(d) (permitting pleading in the alternative), but Howell's allegations fail to raise a plausible inference that either of those acts were causally linked to either instance of protected conduct.

Taking Howell's Title IX claim first, the problem with this claim is that the retaliation he claims to have suffered—the failure to grant him the title and duties of Director of Choral Activities he claims he was promised when he was hired, and the denial of his request for a promotion—had already happened well before he asked the University to conduct a "Title IX Investigation" into the harassment occurring in his class. According to Howell, the harassment occurred at some time during the spring 2017 semester, which was at least six months after the University had notified him that his promotion had been denied, and approximately two and a half years after he started at Millersville without the title or duties of Director of Choral Activities that he claims he had been promised in his letter of appointment. The linear nature of

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[6] While that settles the matter at this stage of the case, the Supreme Court does seem to have suggested that the "but for" causation standard is the ultimate evidentiary standard that must be met to prevail on a Title IX retaliation claim after the burden shifts back to the plaintiff to discredit any legitimate reasons the defendant is able to articulate for its conduct. At the time that the Court first recognized the existence of a cause of action for retaliation under Title IX, the Court pointed out that to succeed on the claim, the plaintiff would need to show that he was "retaliated against . . . *because* he complained of sex discrimination," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184 (2005) (emphasis the Court's), and the Court has recognized in the past that "the ordinary meaning of the word 'because' . . . 'require[s] proof that the desire to retaliate was [a] but-for cause of the challenged . . . action." *Burrage v. United States*, 134 S. Ct. 881, 889 (2014) (quoting *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013)). Putting *Jackson* and *Burrage* together, it would seem that a showing of but-for causation is needed to ultimately prevail on a Title IX retaliation claim. *See Baldwin v. New York*, No. 15-3910, 2017 WL 1951971, at *2 (2d Cir. May 10, 2017) (per curiam) (concluding, after citing *Jackson* and *Burrage*, that a Title IX retaliation plaintiff must show that "[t]he desire to retaliate . . . [was] a 'but-for cause'").

time prevents either of those actions from being connected in any way to his later report about the harassment occurring in his class.[7]

Howell's First Amendment claim does not have the same immediate chronological problem, but that is only because his complaint omits any mention of when he made the critical comments about the University. While it is therefore possible that the denial of his promotion, or the failure to recognize him as the Director of Choral Activities, may have been linked to those comments, Howell still has not "raised [his] right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The facts that Howell has pleaded—that he made comments critical of the University, and that he was denied a title and duties he had been promised and a promotion he had sought—are certainly consistent with retaliation, but to survive a motion to dismiss, a plaintiff must do more than plead facts consistent with liability—the plaintiff must plead facts sufficient to make the claim plausible. *Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" (quoting *Twombly*, 550 U.S. at 557)). Without any mention of whether he made the critical comments prior to either act of alleged retaliation, or any allegation that would give rise to an inference that any of the five faculty members he has sued even knew about those comments,[8] *see Ambrose v. Twp. of Robinson*, 303 F.3d 488, 493 (3d Cir. 2002) (pointing out that "[i]n order to retaliate against an employee for his speech, an employer must be aware of that speech"), Howell has not "nudged [his] claim[] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

While both of Howell's retaliation claims fail as currently pleaded, it cannot be said for sure that he could not cure these deficiencies with an amendment. With respect to his First Amendment claim, it may be the case that he made some or all of his critical comments before he suffered the adverse actions that he claims were done in retaliation for them, so Howell could amend his complaint to specify when he made those comments relative to those adverse actions.[9]

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[7] To be sure, Howell includes an allegation in his complaint that the retaliation he suffered included not only the failure to grant him the titles and duties of Director of Choral Activities when he started at Millersville and the failure to award him the promotion he requested, but also the "continuing" failure to do these things. Am. Compl. ¶ 141. In other words, Howell is suggesting that it can be inferred that the University may have changed its mind, sua sponte, and given him the promotion it had denied him six months prior, as well as the role of Director of Choral Activities that it had been withholding for the past two and a half years, had his report about the harassment occurring in his class not motivated the University to stay the course. In the face of a motion to dismiss, Howell is entitled to have inferences drawn in his favor, but only plausible ones. *Iqbal*, 556 U.S. at 682.

[8] The only reference Howell makes to these comments is in two adjacent paragraphs in his complaint, which allege that "Howell has been highly critical of the governance of Millersville in general and of the Music Department in particular; some of [which] directly implicated [one of the faculty member defendants] and his allies within the departmental leadership," Am. Compl. ¶ 62, and that these "aforementioned comments have been primarily in the form of 'blogs' or electronically made and disseminated statements," *id.* ¶ 63.

[9] While that would at least make it possible that one or both of those actions were done in retaliation for his critical comments, Howell should note that merely alleging that he engaged in protected activity and that he later suffered an adverse employment action is likely not enough, standing alone, to permit an inference of a causal link between the two. There generally must also be allegations of either "an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action" or "a pattern of antagonism coupled with timing to establish a causal link." *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). Otherwise,

He may also be able to plead sufficient allegations to give rise to an inference that one or more of the faculty members were aware of his comments at the time they allegedly engaged in those acts of retaliation.

With respect to his Title IX retaliation claim, Howell has a more difficult problem, since no amendment could change the fact that the two instances of retaliation he claims to have suffered took place before he engaged in any Title IX protected activity. But he did suggest in his complaint that those two instances of retaliation were not exhaustive,[10] so perhaps he may have suffered other "adverse actions"[11] that bear a causal link to his protected activity. The Court cannot say for sure, so he will be afforded an opportunity to amend his complaint.

V. Conclusion

Neither sovereign immunity nor the ADEA itself bars Howell's ADEA claims against the faculty members in their official capacities for prospective injunctive relief, so their motion to dismiss those claims is denied. But neither of Howell's retaliation claims states a plausible claim for relief, so they are dismissed with leave to amend as set forth in the accompanying order.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

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the claim would rest on nothing more than the fallacy of *post hoc ergo propter hoc*—the notion that the adverse action can be attributed to the protected activity simply because one followed the other.

[10] *See* Am. Compl. ¶ 141 (alleging that the retaliation he suffered "include[ed], but [was] not limited to," those two actions).

[11] *See supra* note 5.