IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DR. GAVIN CLARKSON,

Plaintiff,

v. **No. 2:18-cv-00870-KRS-GBW**

BOARD OF REGENTS OF
NEW MEXICO STATE UNIVERSITY,

Defendant.

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

COMES NOW Defendant Board of Regents of New Mexico State University ("NMSU"), by and through its attorney of record, and respectfully requests that this Court dismiss portions of Plaintiff Dr. Gavin Clarkson ("Plaintiff")'s complaint pursuant to F.R.C.P. 12(b)(6). Plaintiff opposes this Motion.

I. Standard

A plaintiff must state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). When reviewing a motion to dismiss under Rule 12(b)(6), the court accepts all well-pleaded allegations in the complaint as true. *Id.* at 678. Allegations that merely recite "labels and conclusions" or are "'naked assertion[s]" without factual development are not well-pled. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 & 557 (2007). Although a plaintiff does not have to establish each element of its prima facie case, he or she still must provide sufficient facts to support a reasonable inference of liability. *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016).

II. Argument

Plaintiff advances five causes of action: wrongful termination, denial of due process, breach of contract, racial discrimination under 42 U.S.C. § 1983, and age discrimination. For the purposes of this motion, NMSU contends that Plaintiff failed to state a claim under his first, second, fourth, and fifth causes of action.

a. Cause of Action 1: Wrongful Termination.

Plaintiff alleges that NMSU wrongfully terminated him. There is no general "wrongful termination" cause of action in New Mexico. Instead, there are two exceptions to the at-will employment doctrine: a tort action for retaliatory discharge, and a breach of contract action based on an express or implied employment contract. *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, 121 N.M. 728, 918 P.2d 7. It is unclear which theory Plaintiff is pursuing. Plaintiff, however, has failed to state a claim of retaliatory discharge.

In order to assert a retaliatory discharge claim, Plaintiff would have to show that he was discharged because he "performed an act that public policy has authorized or would encourage." *Chavez v. Manville Prods. Corp*., 1989-NMSC-050, 16, 108 N.M. 643, 777 P.2d 371. Plaintiff has not alleged any such act. Although Plaintiff appears to link his termination with his decision to run for Congress (see Complaint at ¶¶ 26, 28 30-31, 32, 46, 69), the act of running for office is insufficient as a matter of law to support a retaliatory discharge action. In *Shovelin v. Cent. N.M. Elec. Coop., Inc*., 1993-NMSC-015, 115 N.M. 293, 850 P.2d 996, the New Mexico Supreme Court held that, as a matter of law, a plaintiff who alleged that his employer discharged him because he successfully ran for mayor could not assert a retaliatory discharge claim. *Shovelin* controls here, and Plaintiff cannot his first cause of action insofar as he alleges retaliatory discharge.

b. Cause of Action 2: Due Process

Plaintiff alleges that NMSU violated his due process rights.[1] He does not identify any cause of action or legal theory under which he seeks to vindicate these rights. Instead, he appears to be suing directly under the due process clauses of the state and federal constitutions, which appear in Fourteenth Amendment to the U.S. Constitution and Article II, Section 18 of the New Mexico Constitution. (*Compare* Complaint, p. 12 *with id.* at p. 14).

There is no implied cause of action to enforce the due process clause of the Fourteenth Amendment. The Supreme Court has only recognized three implied constitutional causes of action. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment). These exceptions, however, only allow a plaintiff to sue a **federal** officer in his or her individual capacity. There is no *Bivens*-style action for state officials, let alone state governments. *Stanko v. Mahar*, 419 F.3d 1107, 1110 n.2 (10th Cir. 2005) ("*Bivens* creates a remedy for violations of constitutional rights committed by federal officials acting in their individual capacities…Mr. Maher is a state brand inspector…[t]herefore, this action arises, if at all, pursuant to 42 U.S.C. § 1983 rather than Bivens"). For the reasons discussed below, Plaintiff cannot maintain a Section 1983 action against NMSU. Plaintiff's claim under Article II, Section 18 of the New Mexico Constitution fares no better; "there is no private cause of action to enforce the New Mexico Constitution." *Chavez-Rodrigues v. City of Santa Fe*, 2008 U.S. Dist. LEXIS 108742, *18, 2008 WL 5992269 (D.N.M. Oct. 17, 2008). *See also Barrerras v. State Corr. Dep't*, 2003-NMCA-027, ¶ 24, 133 N.M. 313, 62 P.3d 770. In addition, Plaintiff cannot use

[1] Although Plaintiff refers to both substantive and procedural rights, the rest of Cause 2 appears to refer to procedural due process.

Section 1983 to enforce his state constitutional rights; Section 1983 only provides a remedy for violations of federal rights. *Jones v. Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988).

Without any viable cause of action, Plaintiff has failed to state a due process claim upon which relief could be granted.

c. Cause 4: Racial Discrimination, 42 U.S.C. § 1983

Plaintiff alleges that he was subjected to a hostile work environment because of his race in violation of the Fourteenth Amendment. Plaintiff has not stated a claim upon which relief could be granted, however, because he cannot sue NMSU under Section 1983. Section 1983 creates a cause of action against "[e]very **person**" who deprives another of a federal right under the color of state law. 42 U.S.C. § 1983 (emphasis added). For the purposes of Section 1983, a state is not a "person." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989). A plaintiff therefore may not sue a state under Section 1983. *Id.* at 63-71.

NMSU is part of the State of New Mexico. *See U.S. ex rel. Burlbaw v. Regents of the N.M. State Univ.*, 324 F.Supp.2d 1209, 1212-13 (D.N.M. 2004) (finding that the Physical Sciences Laboratory was an arm of the State for the purposes of the Eleventh Amendment and the False Claims Act because it was part of NMSU); *Livingston v. Regents of the N.M. College of Agric. & Mech. Arts*, 1958-NMSC-089, ¶¶ 6, 24, 64 N.M. 306, 328 P.2d 78 (holding that a suit against the Board of Regents of NMSU (under a former name) was a suit against the state). *See also* NMSA 1978 §§ 21-8-1 through -43 (creating and regulating NMSU); *Watson v. Univ. of Utah Medical Ctr.*, 75 F.3d 569, 575 (10th Cir. 1996) ("Our cases have consistently found state universities are arms of the state"). NMSU is an arm of the State and therefore not a person for the purposes of Section 1983. Plaintiff failed to state a claim in its fourth cause of action.

Even if Plaintiff could bring a Section 1983 claim against NMSU, he has failed to state a plausible claim of racial discrimination. Plaintiff alleges that he was subjected to a racially hostile work environment. In order to succeed on such a claim, a plaintiff must demonstrate that he or she was subjected to harassment that was sufficiently severe or pervasive that it altered the terms, conditions, or privileges of employment. *Nieto v. Kapoor*, 268 F.3d 1208, 1217-20 (10th Cir. 2001) (applying the hostile environment analysis used for Title VII claims to a Fourteenth Amendment discrimination claim). Crucially, a plaintiff must show more than "sporadic racial slurs"; instead, there must be "a steady barrage of opprobrious racial comments." *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) (emphasis added). The plaintiff in *Bolden*, who was an African American, was subjected to a few instances of "blatant racial harassment" over the course of eight years: a co-worker used an extremely offensive racial slur in his presence, warned him that "'you better be careful because we know people in [the] Ku Klux Klan'" and drew a demeaning cartoon. *Bolden*, 43 F.3d at 551. Even when added to other, racially-neutral, conduct, these facts were insufficient to support a racial harassment case as a matter of law. *Id.* at 551-52. Although a plaintiff does not have to plead each element of a prima facie case, he or she must provide more than bare allegations and can be expected to provide specific details of the alleged discrimination even at the pleading stage. *Khalik v. United Air Lines*, 671 F.3d 1188, 1194 (10th Cir. 2012).

Plaintiff has failed to plausibly plead a hostile environment claim. Plaintiff worked at NMSU for approximately six years. (Complaint, ¶ 93). Out of those six years, Plaintiff only provided two well-pled allegations involving his race. Plaintiff alleged that he was "specifically recruited" to "'do Indian stuff,'" by Dr. Garrey Carruthers in 2012. (*Id.* at ¶ 4). It does not appear Plaintiff viewed this as a negative comment; Plaintiff considers Dr. Carruthers to be his mentor and followed his career path. (*Id*. at ¶ 18). Plaintiff further alleges that, in a meeting in 2014, Dean

Hoffman wanted someone who "'looked more like a New Mexican Indian'" to run a particular program. (Complaint, ¶¶ 4, 16). These two comments, isolated over the course of six years, are far cry from "sporadic racial slurs," let alone "a steady barrage of opprobrious racial comments." *Bolden*, 43 F.3d at 551.

Plaintiff vaguely alleges that NMSU "previously attempted to discriminate" against him at some point after January 2017 because an unknown party submitted a "defamatory dossier to his supervisors." (*Id.* at ¶ 13). Plaintiff does not allege, however, that he was targeted because of his race. These allegations boil down to the following: 1) an unknown party submitted a dossier alleging that Plaintiff had plagiarized material, 2) the dossier was meritless, 3) one professor had "targeted" Plaintiff for years, 4) that professor "publicly denigrated" Plaintiff's research regarding Indian tribes, and 5) that same professor stated that it was a waste of time to "teach anything regarding Indians to business law students in New Mexico." (*Id.* at ¶¶ 13-15). Notably absent is any allegation that anyone targeted Plaintiff because of his race, used offensive language, or that NMSU sanctioned or was aware of the conduct until it received the dossier (which it apparently disregarded) in early 2017. Plaintiff links the dossier incident to his political affiliations instead of his race; he notes that the dossier was sent "[a]pproximately two weeks after [Plaintiff] attended the presidential inauguration in January 2017[.]" (*Id*. at ¶ 13).

Plaintiff's remaining allegations regarding hostile-work environment are not well-pled and not entitled to be taken as true. Plaintiff broadly asserts that he endured a hostile work environment at NMSU. (*Id.* at ¶ 96). Mere "labels and conclusions" are not well-pled allegations. *Bell Atl. Corp*, 550 U.S. at 555. Whether two of Plaintiff's Native American co-workers are still employed at NMSU does not bear on whether Plaintiff was subjected to a hostile environment.

Plaintiff cannot bring a Section 1983 action against NMSU. Even if he could, the well-pled allegations contained in his complaint fall far short of stating a plausible claim of racial harassment.

d. Cause 5 – Age Discrimination

At the end of his complaint, without any factual elaboration or support in the rest of the pleading, Plaintiff alleges that NMSU discriminated against him on the basis of age because it assigned more classes to untenured faculty over the age of 40 than it did to untenured faculty below the age of 40. This claim fails because Plaintiff cites to statutes that do not give him the right to sue. Plaintiff also failed to exhaust his administrative remedies. In addition, Plaintiff has not stated a plausible claim for relief.

There is no such thing as a common-law age discrimination claim; Plaintiff may only bring such a claim if there is a particular source of law that gives him the right to do so. In his Complaint, Plaintiff identified three candidates: the Age Discrimination in Employment Act (ADEA), the Age Discrimination Act of 1975 (ADA), and section 188 of the Workforce Investment Act of 1998 (WIA). Plaintiff, however, cannot bring a claim under any of them.[2]

The ADA prohibits discrimination under "any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. This prohibition, however, only applies to programmatic activities and does not apply to employment law claims:

> Congress intended the ADA to prohibit only age discrimination in the provision of services by government funded programs, not in the employment practices of such programs. Consequently, since [the plaintiff] seeks relief for employment discrimination, his ADA claim must be dismissed.

[2] Plaintiff also cited to *Griffis v. City of Norman*, 232 F.3d 901 (10th Cir. 2000). That page of the Federal Reporter refers the reader to an unpublished opinion, *Griffis v. City of Norman*, 2000 U.S. App. LEXIS 25947, *11 (10th Cir. 2000) (unpublished) concerning race discrimination claims brought under Title VII and 42 U.S.C. § 1981., which is not applicable to Plaintiff's age discrimination claim.

Tyrrell v. City of Scranton, 134 F.Supp.2d 373, 383 (M.D.Pa. 2001). *Accord Montalvo-Padilla v. Univ. of P.R.*, 498 F.Supp.2d 464, 467 (D.P.R. 2007); *Brown v. Wash. Metro Area Transit Auth.*, 2005 U.S. Dist. LEXIS 16881, *14 n. 2, 2005 WL 1941630 (D.Ma. Aug. 12, 2005); *Fairfax v. Sch. Dist.*, 2004 U.S. Dist. LEXIS 7750, *15 (E.D.Pa. Apr. 26, 2004). The ADA did not "amend or modify the [ADEA]" or "affect the rights or responsibilities of any person or party pursuant to such Act." 42 U.S.C. § 6103(c)(2). Plaintiff alleges that NMSU treated one class of employees differently than it treated another. This is not actionable under the ADA.

Plaintiff cannot sue under the section 188 of WIA (29 U.S.C. § 3248) because that act did not create a private cause of action. *See Borrero-Rodrigues v. Montalvo-Vazquez*, 275 F.Supp.2d 127, 132-33 (D.P.R. 2003) (holding that section 188 of WIA – which prohibits discrimination on the basis of, among other things, age and religion –"does not give the alleged victim the right to sue…the decision whether or not to bring a civil action lies solely with the Attorney General").[3] Only the Secretary of Labor or Attorney General may enforce section 188 of WIA. 29 U.S.C. §§ 3248(b), (c). Plaintiff cannot state a claim under the WIA.

Plaintiff cannot sue under the ADEA because he failed to exhaust his administrative remedies. Under the ADEA, an aggrieved employee must attempt to resolve a claim through the EEOC's investigation and conciliation process before filing suit. 29 U.S.C. § 626(d) ("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [Commission]"); *Riley v. Tulsa Cnty. Juvenile Bureau ex rel. Tulsa Cnty. Bd. of Comm'rs*, 421 Fed. Appx. 781, 783 (10th Cir. 2010) (unpublished) ("Before a plaintiff may file suit under Title VII or the ADEA, he must exhaust his

[3] Although it dealt with section 188 of WIA, the court in *Borrero* cited to 29 U.S.C. § 2938. *See Borrero*, 275 F.Supp.2d at 130. Although that section has since been repealed, it appears to be have been identical in its relevant parts – down to the subsection – to what is now codified at § 3248. *See id.* (discussing 2938(a)(2), (b), and (c)).

administrative remedies by filing a charge with the EEOC"). Plaintiff has not alleged that he filed a timely charge of discrimination with the EEOC or exhausted his remedies. He has therefore not stated a claim upon which relief may be granted.

Even if Plaintiff could identify a statute under which he could sue, he has not provided sufficient well-pled facts to state a plausible claim. Plaintiff does not allege that he suffered an adverse employment action as a result of age discrimination. *See Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 531 (10th Cir. 1998) (listing "suffer[ing] an adverse employment action" as an element of a prima facie case under the ADEA). Although Plaintiff did not have to plead each element of a prima facie case, he or she must provide more than a single conclusory sentence. *See Khalik*, 671 F.3d at 1194. No other allegations in Plaintiff's complaint foreshadow or support Plaintiff's last-minute age discrimination argument. Plaintiff failed to plead a plausible claim of age discrimination.

III. Conclusion.

For the reasons discussed above, NMSU respectfully requests that this Court dismiss causes of action one, two, four, and five with prejudice.

Respectfully Submitted,

CONKLIN, WOODCOCK, & ZIEGLER, P.C.

By: /s/ *Christa M. Hazlett*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of November, 2018, I filed the foregoing electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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