UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Frances Elaine Butler,

Plaintiff,

v. Court File No. 0:20-cv-02332-DSD-KMM

Leech Lake Band of Ojibwe, et al.,

Defendant.

Memorandum in Support of Defendant's Motion to Dismiss

Introduction

As a federally recognized Indian tribe, the Leech Lake Band of Ojibwe ("Band") enjoys sovereign immunity from suit. This immunity extends to its employees when they are sued in their official capacities or when the Band is the real party in interest. Plaintiff, Frances Butler, has sued Faron Jackson, Arthur LaRose, and Bob Whipple ("Band Defendants") in their official capacities in regards to her ADEA claims and the Band is the real party in interest in her Equal Pay Act claims. Because neither Congress nor the Band has waived the Band's sovereign immunity to permit Plaintiff's claims, her suit is barred. Even if it were not, Plaintiff has failed to state a claim upon which relief can be granted because the facts she has alleged do not support the claims she has pleaded.

Background

The Leech Lake Band of Ojibwe ("Band") is a federally recognized Indian tribe. *Cass County v. Chippewa Indians*, 524 U.S. 103, 118 (1998) ("The Leech Lake Band of Chippewa Indians is a federally recognized Indian tribe."); Indian Entities Recognized & Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5463 (Jan. 30, 2020). The Reservation Business Committee ("Tribal Council") is the governing body of the Band, and consists of a Tribal Chairman, Secretary-Treasurer, and three district representatives. Ex.1. Faron Jackson serves as the Band's Tribal Chairman and Arthur LaRose serves as the Band's Secretary-Treasurer. Compl. Dk. 1 at 2. Robert Whipple is the Band's Human Resources Director. *Id*. All defendants maintain offices at the Band's Governmental headquarters in Cass Lake, Minnesota, within the exterior boundaries of the Leech Lake Reservation. Ex. 1. The Band offers numerous government related services to both it's on and off reservation members, including child welfare, health services, elder services, food distribution, veteran services, roads and utilities maintenance, housing and housing assistance, as well as many other services. *Id*. To offer these services to the Band's members who live in the Minneapolis-Saint Paul metropolitan area, the Band maintains a Twin Cities government office ("TCO") in Minneapolis, Minnesota. *Id*. The TCO functions to deliver services to Leech Lake members living in the Minneapolis-St. Paul metropolitan area, and houses offices for the Legal Department and Leech Lake Child Welfare programs. *Id*.

Plaintiff, Frances Butler, was employed by the Band as Director of the TCO. Compl. Dk. 1 at 4. Plaintiff alleges that in January of 2020 she reprimanded Jasmine Jackson, the

TCO's receptionist, for inappropriate text messages and creating a "hostile work environment." *Id*. Plaintiff states that the Band defendants started to "retaliate and harass" her after she reprimanded Mrs. Jackson. *Id*. Plaintiff was demoted to administrative assistant in March of 2020. Comp. Dk. 1-3 at 69. Plaintiff maintains that this demotion was a result of her reprimanding Mrs. Jackson. Compl. Dk.1 at 4. According to Plaintiff, she was terminated from employment with the Band on March 31, 2020, also a result of her reprimand of Mrs. Jackson. *Id*. Plaintiff filed an Age Discrimination in Employment Act of 1967 ("ADEA") based claim with the Equal Employment Opportunity Commission ("EEOC") on April 5, 2020. *Id.* at 8; Ex. 2. On August 8, 2020, the EEOC dismissed Plaintiff's claims citing that the "evidence obtained to date, in addition to our limited resources, does not justify further investigation" and issued a Notice of Right to Sue. *Id*. at 26-27. The Dismissal and Notice of Rights form provided to Plaintiff also indicates a lack of jurisdiction as a reason for dismissal. *Id.* at 27. Plaintiff filed this action against the Band Defendants on November 12, 2020, asserting age discrimination under the ADEA, retaliation, harassment, intimidation, wrongful demotion and termination in relation to her ADEA claim, violation of the Equal Pay Act ("EPA"), and unspecified state and local law claims. *Id*. at 1.

Argument

I. This Court must dismiss Plaintiff's claims against the Band under Rule 12(b)(1) of the Federal Rules of Civil Procedure because the Band, its elected officials, and its employees are immune from this suit.

The Eighth Circuit has observed that "sovereign immunity is a jurisdiction consideration separate from subject matter jurisdiction." *See In re Prairie Island Dakota*

Sioux, 21 F.3d 302, 304-05 (8th Cir. 1994). But it nevertheless recognizes "sovereign immunity is a jurisdictional question," *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) (quotation omitted), that should be assessed under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Brown v. United States*, 151 F.3d 800, 803-04 (8th Cir. 1998). Thus, Rule 12(b)(1) remains the proper vehicle to raise sovereign immunity. *See, e.g.*, *Harper v. White Earth Human Res.*, No. 16-CV-1797 (JRT/LIB), 2016 WL 8671911, at *3 (D. Minn. Oct. 7, 2016) ("[M]otions to dismiss asserting sovereign immunity challenges are considered pursuant to Federal Rule of Civil Procedure 12(b)(1) . . . .") *report & recommendation adopted*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354 (D. Minn. Feb. 22, 2017); *Issaenko v. University of Minnesota*, 57 F. Supp. 3d 985, 1001 (D. Minn. 2014) (describing *Hagen* as "explaining that sovereign immunity is a jurisdictional question and properly addressed as a Rule 12(b)(1) motion to dismiss" (quotation omitted)). When considering a Rule 12(b)(1) motion, the Court is not bound to accept the allegations in the complaint as true and may consider matters outside the pleadings. *See Osborn v. United States*, 918 F.2d 724, 729-730 (8th Cir. 1990) (citing cases from other circuits and explaining the courts must have freedom to thoroughly examine subject-matter jurisdiction without attaching "presumptive truthfulness" to plaintiff's allegations).

A. Sovereign immunity bars Plaintiff's claims against the Band because employment relationships between an Indian tribe and their own members is an intramural government action and Congress does not express an intent to interfere with treaty protected rights to self-government in employment discrimination statutes.

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 (1978). They occupy a unique place in the United States' political landscape as "domestic dependent nations" that still exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509 (1991) (internal quotation omitted). This inherent sovereign authority is subject to the plenary control of Congress. *Michigan v. Bay Mills Indian Cmty.*, 572 U. S. 782, 788 (2014). Yet, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Id*. (*citing United States v. Wheeler*, 435 U. S. 313, 323 (1978)).

One of the core aspects of this retained sovereignty is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U. S. at 58. This immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C.*, 476 U. S. 877, 890 (1986). Indeed, "[a]s a matter of law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Technologies*, 523 U.S. 751, 753 (1998). Any waiver of this immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 55. Absent any unequivocal and express waiver of immunity by the Band or Congress, a "Court lacks subject matter jurisdiction over claims against an Indian tribe or its agencies." *Harper*, 2016 WL 8671911, at *3 (*citing Hagen*, 205 F.3d at 1043). Because it retains core aspects of sovereignty, the Band is immune from suit.

1. The Band enjoys the protections of sovereign immunity because employment of tribal members by an Indian tribe is a matter of self-government protected by treaty.

As stated above, absent an unequivocal and express waiver of immunity by the Band or Congress, "the Court lacks subject matter jurisdiction over claims against an Indian tribe or its agencies." *Harper*, 2016 WL 8671911, at *3 (*citing Hagen*, 205 F.3d at 1043). A waiver "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 55. Plaintiff does not allege that the Band has waived its immunity from suit in this matter. *See* Compl. Dk. 1 at 1-47. Nor has she pleaded a Congressional waiver. *Id*. And nothing in the statutes she cites in her complaint expressly and unequivocally waives the Band's immunity. *See* 29 U.S.C. § 621 *et seq*. (ADEA); 29 U.S.C. § 201 *et seq*. (Fair Labor Standards Act as amended by the Equal Pay Act).

Admittedly Congress can abrogate tribal sovereign immunity in statutes of general applicability. However, when a federal law of general applicability interferes with an Indian tribe's right to self-government, whether the federal law is binding on an Indian tribe depends on whether the statute expresses a clear and plain intent to limit, interfere, or abrogate the tribal right to self-government. *United States v. Dion*, 476 U.S. 734, 738-40 (1986). In the context of employment law, the 8th Circuit in *Equal Employment Opportunity Commisssion v. Fond du Lac*, noted that Congress's intent to abrogate a tribe's inherent right to self-government through statutes of general applicability can be evinced in three ways (1) an "express declaration in the statute" of an intent to abrogate treaty rights, (2) by an intent shown in the legislative history, and (3) "by surrounding circumstances." 986 F.2d 246, 248 (quoting *Dion*, 476 U.S. at 739) (internal quotation marks omitted).

None of these factors are present here—neither the ADEA nor the Equal Pay Act evince any express intent to limit, interfere, or abrogate the tribal right to self-government, and therefore, they do not waive the Band's sovereign immunity.

2. The ADEA does not apply to employment relationships between tribal governments and tribal members, and therefore, does not waive the Band's immunity to this suit.

In *Fond du Lac*, the 8th Circuit found that the ADEA does not apply to a tribal employer, employing a tribal member, for work on the reservation. 986 F.2d at 251. The court determined that the application of the ADEA would dilute tribal self-government and, absent a clear intent expressed by Congress, tribal law should determine whether age is a relevant consideration in hiring. *Id.* at 249. "[T]he omission of the phrase 'an Indian tribe' from the definition of 'employer' in the ADEA" could not be used to show Congressional intent to interfere with the right to self-government, despite other federal employment laws specifically excluding tribes from the definition of employer. *Id.* at 251. In short, 8th Circuit precedent does not allow application of the ADEA to the employment relationship between tribal members and tribal government employers. *Id.*; *see also Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (holding that the application of ADEA to tribal government employer would directly interfere with treaty retained right to self-government).

Similar to *Fond du Lac*, Plaintiff is a member of the Leech Lake Band of Ojibwe and the employer is a federally recognized Indian tribe, the Leech Lake Band of Ojibwe. *See* Comp. Dk. at 7; Ex. 1. Plaintiff's employment duties were based at the Band's Twin Cities Office. Ex. 1. The Band uses the TCO to provide essential government services to

Band members. *Id*. The TCO Director manages the essential government functions necessary to provide services to the Band's membership in the Minneapolis-Saint Paul metropolitan area. *Id*. Due to the essential government functions performed by the TCO Director, employment decisions regarding this position clearly fall within the category of intramural matters of self-government that are protected treaty rights retained by the Band. Therefore, the ADEA does not cover the employment relationship between the Band and the TCO Director and Plaintiff's claims under the ADEA should be dismissed with prejudice.

3. Congress did not express a clear intent to interfere with tribal self-governance through the Equal Pay Act, therefore, the Equal Pay Act does not waive the Band's Immunity to Plaintiff's claims.

The Equal Pay Act of 1963 ("EPA") amended the Fair Labor Standards Act of 1938 ("FLSA") and prohibits employers from discriminating in rates of pay between male and female employees who preform equal work. Pub. L. 88-38, 77 Stat. 56 (June 10. 1963) (codified at 29 U.S.C. § 206 (d)(1)). The EPA nor the FLSA expressly mentions its applicability to Indian tribes. 29 U.S.C. § 201 *et seq*. Nevertheless, the analysis applied to the ADEA in *Fond du Lac* answers this question—whether the EPA applies to the employment relationship in question depends on whether Congress expressed a clear intent to interfere in the inherent right to self-government protected by treaty. As stated above, Congressional intent to interfere in the right to self-government can be shown by an express declaration in the statute, the legislative history, or by the surrounding circumstances. *Fond du Lac*, 986 F.2d at 248.

Although the District of Minnesota, the Eighth Circuit, and the United States Supreme Court have not addressed the applicability of the FLSA (as amended by the EPA) to Indian tribes, the Seventh and Ninth Circuits both found the FLSA does not apply to federally recognized Indian tribe employment for intramural government activities. *Reich v. Great Lakes Indian Fish and Wildlife Com'n*, 4 F.3d 490 (7th Cir. 1993) (herein "*GLIF*"); *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004). These cases dealt specifically with law enforcement duties, but they also found that activities outside of the respective reservations did not render the FLSA applicable due to the intramural governmental nature of law enforcement activities, even when conducted outside of the reservation. *Id.* at 896. These cases are consistent with the 8th Circuit's holding in *Fond du Lac*. *See* 986 F.2d at 248.

Here the intramural governmental nature of Plaintiff's employment activities is clear. She was employed as the Director of the Leech Lake Band of Ojibwe Twin Cities Office ("TCO"). As stated above, the TCO functions to deliver services to Leech Lake members living in the Minneapolis-Saint Paul metropolitan area and houses offices for the Legal Department and Leech Lake Child Welfare programs. These functions are purely governmental and the Director of the TCO is the direct representative of the Leech Lake Band of Ojibwe Reservation Tribal Council, the elected leadership of the Leech Lake government. Whether these activities occur on or off the Leech Lake Reservation is irrelevant to determining that the TCO Director provides an essential government function that is intramural to the Leech Lake Band—the TCO houses and supports essential government functions the Band provides to Band members. While the Eighth Circuit has

not directly addressed the issue of applying the FLSA or Equal Pay Act to tribal employers, ruling that the Equal Pay Act does not apply to this employment relationship is consistent with Eighth Circuit precedent declining to apply the ADEA and other federal employment laws to tribal governments. Finding the Equal Pay Act does not express an intent to interfere with intramural government activities of federally recognized Indian tribes is also consistent with the Seventh and Ninth Circuit decisions regarding application of the FLSA to intramural tribal government employment activities. Therefore, the Court should find that the EPA does not cover the employment relationship at issue and does not waive the Band's sovereign immunity, and therefore, Plaintiff's claims under the EPA should be dismissed with prejudice.

B. The Band's immunity from suit extends to the Band Defendants because they have been sued in their official capacities.

1. There is no individual liability under the ADEA, therefore, claims against the Band Defendants can only be brought in their official capacity and are barred by sovereign immunity.

The ADEA, and other claims brought in reference to the ADEA (retaliation, harassment, wrongful termination and demotion), give an employee redress against employers for age discrimination related claims. 29 U.S.C. § 623. However, the ADEA limits liability to employers and not individuals. *Henderson v. City of Minneapolis*, No. 12-12 (DWF/FLN) at *10-11 (D. Minn. Oct. 16, 2013) (holding that defendants named in their individual capacity could not be sued under Title VII, the ADEA, the Minnesota Dismissal for Age Act, the Minnesota Human Rights Act, and Minneapolis Civil Rights Ordinance); *Rothmeier v. Investment Advisers, Inc.*, 932 F.Supp. 1156 (D. Minn. 1996)

(following the majority opinion that individual liability under the ADEA is not appropriate); *Onyiah v. St. Cloud State University*, 655 F.Supp.2d 948 (D. Minn. 2009) ("Title VII, and the ADEA, are applicable to employers, and not to individuals."). Accordingly, Defendants Jackson, LaRose, and Whipple cannot be sued in their individual capacities under the ADEA, and the other claims brought in reference to the ADEA (retaliation, harassment, wrongful termination and demotion). Thus, any claim against them can only be brought against them in their official capacities or not at all. *See Lenhardt v. Basic Institute of Technology, Inc.*, 55 F.3d 377 (8th Cir. 1995) (noting that Title VII actions brought against individual employees are against those employees in their official capacities). A suit against governmental employees in their official capacities is the same as a suit directly against the government. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Given this, "[d]efendants in an official-capacity action may assert sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). As such, Plaintiff's suit is the same as a suit directly against the Band and is barred by the Band's sovereign immunity.

2. Individual claims available under the Equal Pay Act should be dismissed based on the Band's sovereign immunity because the Band is the real party in interest.

The definition of employer applied to the EPA includes individuals acting in an employer's interest with relation to an employee. 29 U.S.C. § 203(d). However, the same analysis that requires Congress to express an intent to interfere with tribal self-government requires any individual claims under the EPA to be dismissed. While it is unquestionable that the EPA allows individual claims when an individual is acting in the interest of an

employer. If the employer that an individual is acting on behalf of is immune from suit, then that individual cannot be liable under the EPA. As discussed above, the Seventh and Ninth Circuits have found the FLSA definition of employer to not include Indian tribes employing members of their own tribe for internal government activities. *See GLIF*, 4 F.3d 490; *Navajo Nation*, 382 F.3d 892. If this Court agrees with the analysis of the Seventh and Ninth Circuits, then any potential individual claims under the EPA should be dismissed with prejudice as barred by sovereign immunity.

Beyond this, even if a party has been named in their individual capacity, the suit may still be barred by sovereign immunity if the tribe is the real party in interest. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291. (2017). A tribe is the real party in interest if an adverse judgment will bind the tribe and "will . . . require action by the sovereign or disturb the sovereign's property." *Id*. In the context of state immunity, the 8th Circuit has articulated this standard further noting the sovereign "is the real party in interest when the judgment is sought from the public treasury, when the judgment would interfere with public administration, or when the judgment would restrain or compel state action." *U.S. v. State of Iowa*, 269 F.3d 932 (8th Cir. 2001) (discussing state immunity in the context of the False Claims Act).

In her complaint, Plaintiff asks for $300,000 in punitive damages, requests personal belongings from her former office, a copy of her personnel file, and a calculation of her last paycheck to ensure her personal leave was paid out to her correctly. Compl. Dk. 1 at 15. Punitive damages are not allowed under the EPA. 29 U.S.C. § 216(d) (The only damages a plaintiff can seek under the EPA are (1) the amount of their unpaid minimum

wages, (2) their unpaid overtime compensation, and liquidated damages equal to their unpaid minimum wages or unpaid overtime.) Beyond this, a court may grant a plaintiff other equitable and legal relief for violations of 29 U.S.C. § 215(a)(3), including reinstatement, promotion, and payment of lost wages and liquidated damages. *Id*.

Considering the possible relief under the EPA, it is clear that the Band is the real target of this action because an adverse judgment will bind the Band and "will . . . require action by the sovereign or disturb the sovereign's property." *Lewis v. Clarke*, 137 S. Ct. at 1291. First, the only relief explicitly sought by the Plaintiff that might be cognizable under the EPA is seeking the calculation of her last paycheck. The Band's payroll department, not the named defendants, will be required to give the above accounting and overpayment. Second, on its face, any equitable relief including reinstatement, promotion, or repayment of lost wages (including liquidated damages) sought against the Band will bind the Band and require the Band, not the individual defendants, to act. Indeed, reinstatement, promotion, or repayment of lost wages (including liquidated damages) would require systemic government action, including tribal council action (not just the individual named defendants), action by the Band's Human Resources Department, and Payroll Department. Comp. Dk.1-3 at 31-35. Moreover, any repayment of wages would come from the Band's coffers, not the individual defendants. As such, it is clear that the Band is the real party in interest in the Plaintiff's EPA claim, and such claim is barred by the Band's sovereign immunity.

D. This Court lacks supplemental jurisdiction over non-federal law claims because the Court lacks original jurisdiction over the federal law claims.

The only way that Plaintiff's state law claims can be heard in this Court is if there is supplemental jurisdiction under 28 U.S.C. 1367 because diversity of citizenship jurisdiction is unavailable unless there is complete diversity between a plaintiff and defendants. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 553 (2005). Supplemental jurisdiction over state law claims requires a court to have original jurisdiction over an action under some other avenue to original jurisdiction in the district court. *See generally United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). When "federal claims are dismissed before trial . . . the state claims should be dismissed as well." *Id.* at 726. If this Court had jurisdiction over Plaintiff's federal law claims, then supplemental jurisdiction would obtain for state law claims based on a common nucleus of facts as the federal claims. However, as demonstrated in the foregoing sections of this argument, this Court lacks jurisdiction over the federal claims raised in Plaintiff's complaint based on the inherent right to self-government retained by the Band and the federal court doctrine of tribal sovereign immunity. Therefore, any potential state law claims in Plaintiff's complaint should be dismissed because there is no jurisdiction over the federal law claims raised.

II. Even if sovereign immunity did not block Plaintiff's claims, dismissal is appropriate because she has failed to state a claim upon which relief can be granted under Rule 12(b)(6).

To survive a motion to dismiss, a complaint must contain a short and plain statement of the claim that shows the plaintiff is entitled to relief. Fed. R. Civ. Pro. 8(a)(2). Further, it must contain enough facts, that when accepted as true, presents a claim that is plausible on its face. *McDonough v. Anoka Cty.*, 799 F.3d 931, 945 (8th Cir. 2015) (citation omitted).

Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." Id. at 555.

When evaluating a Rule 12(b)(6) motion to dismiss, this Court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party . . ." *Id*. But this does not mean that the Court is bound to accept "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," or "legal conclusions couched as factual allegations" as true. *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 (2009) and *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

A. Plaintiff has failed to state a claim upon which relief can be granted against the defendants under the Equal Pay Act because she has not pleaded *any* facts to support her Equal Pay Act claim.

The Equal Pay Act ("EPA") prohibits discrimination in rates of pay between male and female employees who preform equal work. 29 U.S.C. § 206 (d)(1). "To establish a claim under the EPA, [the Plaintiff] must show that she was paid less than similarly situated male employees for equal work in jobs that required equal skill, effort, and responsibility, and that were performed under similar working conditions." *Ewald v. Royal Norwegian Embassy*, 902 F.Supp.2d 1208 (D. Minn. 2012); *McLaughlin v. Esselte Pendaflex Corp*., 50 F.3d 507, 513 (8th Cir. 1995). In the 12(b)(6) motion to dismiss context, this court in *Ewald v. Royal Norwegian Embassy*, found sufficiently plead facts to survive a motion to dismiss when the plaintiff (1) identified a specific male comparator—that is a male employee who she alleged did "equal work," (2) detailed many of the job responsibilities

considered parallel between her position and the male comparator's position, and (3) alleged a salary disparity between her position and that of the male comparator. *Ewald*, 902 F.Supp. at 1218-19.

Plaintiff has not met this burden. Her complaint does not allege *any* facts that support the contention that "she was paid less than similarly situated male employees for equal work . . ." *Id*. She has not identified any male comparator, does not allege any facts that show that her former position as Twin Cities Office Director was similar or the same to any position held by any male employee of the Band, and does not allege any pay disparity between that position and that of any male Band employee who does equal work. *See generally* Compl. Dk. 1. Indeed, she does not allege any facts based on gender-based discrimination at all. *Id*. In short, she has not pled *any* facts to state a claim under the EPA "that is plausible on its face," and therefore, her EPA claims must be dismissed.

B. Plaintiff has failed to state a claim upon which relief can be granted against the defendants under the ADEA because she has not pleaded *any* facts to that give rise to an inference of discrimination based on age.

The ADEA, and other claims brought in reference to the ADEA (retaliation, harassment, wrongful termination and demotion), give an employee redress against employers for age discrimination related claims. 29 U.S.C. § 623. An age discrimination claim has four prima facie elements: (1) the employee was a member of a protected age group, (2) the employee met the employer's legitimate expectations, (3) the employee suffered an adverse employment action, and (4) there are circumstances that give rise to an inference of discrimination based on age. *Grant v. City of Blytheville, Ark.*, 841 F.3d 767,

773 (8th Cir. 2016). Conclusory statements alone do not raise a reasonable inference of age discrimination sufficient to survive a 12(B)(6) motion to dismiss. *Bad Wound v. Zinke*, No. 18-cv-0369 at *8 (D. Minn. 2019).

Plaintiff fails to state a claim under ADEA because she has not alleged any facts that give rise to an inference of age based discrimination above a purely speculative level. Indeed, she only alleges that the adverse employment action she experienced was a result of reprimanding the TCO's receptionist. Compl. Dk. 1 at 32-34. Specifically, she alleges, that:

- "after the reprimand Chairman Jackson and his little team of above named Defendants started to 'Retaliate and Harass'" her. Compl. Dk. 1 at 4.
- She was demoted after the reprimand. *Id*.
- Communication ceased with "upper management" after the incident. *Id*. at 7.
- And ultimately she was terminated. *Id*.

Plaintiff does not allege that her age was a factor in the adverse employment action. *See Id*. at 1-8. Even when accepted as true, these allegations, taken together, do not give rise to an inference of age based discrimination. At most, they only allow an inference that she experienced adverse employment actions because she reprimanded the TCO's receptionist. Given this, Plaintiff has failed to state a claim under the ADEA and her claims should be dismissed.

Conclusion

For the foregoing reasons the Defendants respectfully request the Court to grant their Motion to Dismiss.

Date: April 26, 2021

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