

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FERRUCCIO ROMEO,

Plaintiff,

v.

TOWN OF WINTHROP, TERENCE M.
DELEHANTY, Chief of Police/Interim
Town Manager and AUSTIN FAISON,
Former-Town Manager,

Defendants.

DOCKET NO.: 1:22-CV-10573-DJC

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO DISMISS COUNT I, IN PART,
AND COUNTS II AND III OF THE COMPLAINT**

Pursuant to Fed. R. Civ. P. 12(b)(6) and Local Rule 7.1, Defendants Town of Winthrop ("Town of Winthrop"), Chief of Police Terence M. Delehanty ("Chief Delehanty"), and Austin Faison ("Mr. Faison") (collectively "Defendants"), respectfully move to dismiss Plaintiff Ferruccio Romeo's ("Plaintiff") Complaint, in part, as it fails to state claims upon which relief may be granted. Specifically, Plaintiff's Title VII claim (Count I) against Chief Delehanty and Mr. Faison is barred as a matter of law and should be dismissed because Title VII does not provide for the relief sought which is individual liability. Moreover, Plaintiff's retaliation claim (Count II) against Defendants fails as a matter of law because Plaintiff has not sufficiently pled facts, even if accepted as true, to establish that he is a "disabled person" protected by the statute under which he bases his claim, 42 U.S.C. § 12203. Further, Plaintiff's FMLA claim (Count III) against Defendants fails as a matter of law because Plaintiff has not sufficiently pled facts, even if accepted

as true, to establish Defendants unlawfully interfered with Plaintiff's exercise of his rights under FMLA. Alternatively, Plaintiff's FMLA claim (Count III) against Defendants as it relates to 2019 is procedurally barred by the statute of limitations.

Accordingly, Count I, as it relates to Chief Delehanty and Mr. Faison, and Counts II and III of Plaintiff's Complaint should be dismissed, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

STATEMENT OF FACTS

A. Factual Allegations in the Complaint.¹

Plaintiff is a Massachusetts Police Sergeant employed by the Town of Winthrop. *See* Complaint, ¶ 2. Plaintiff was the Local Union President for approximately ten (10) plus years. *Id.* at ¶ 9. In or around January 2015, the Town of Winthrop terminated Plaintiff's employment. *Id.* at ¶ 10. However, after litigation, the Town of Winthrop reinstated Plaintiff's employment in or around July 2018. *Id.* at ¶ 11.

On or about February 28, 2019, Plaintiff filed a request for paid intermittent Family and Medical Leave ("FMLA") to care for his aging parent and disabled spouse. *Id.* at ¶ 12. Plaintiff's FMLA request was approved by the Town of Winthrop. *Id.*

On or about January 24, 2022, Plaintiff submitted a request for intermittent FMLA to the Town of Winthrop for a chronic medical condition Plaintiff was experiencing. *Id.* at ¶ 19. Plaintiff received notice from the Town of Winthrop that Plaintiff's request for intermittent FMLA was approved through December 31, 2022. *Id.*

¹Solely for the purposes of this motion, Defendants accept all well-pled facts, as opposed to conclusions, as stated in Plaintiff's Complaint as true.

B. Procedural Allegations Not in the Complaint, But Specifically Referenced Therein.²

On or about October 22, 2018, Plaintiff filed a complaint at the Massachusetts Commission Against Discrimination (“MCAD”) and Equal Employment Opportunity Commission (“EEOC”) alleging Defendants discriminated against him based on retaliation in violation of M.G.L. c. 151B, § 4(4), and Title VII of the Civil Rights Act of 1964. (MCAD Docket No. 18BEM02981). On or about November 20, 2018, May 16, 2019, and October 19, 2020, Plaintiff amended his complaint to include additional claims of retaliation against Defendants.

On or about November 30, 2021, the MCAD issued its Investigative Disposition with a finding of Lack of Probable Cause as to Plaintiff’s claims of discrimination against Defendants. On or about February 28, 2022, Plaintiff filed an appeal in relation to the MCAD decision, which the MCAD denied on or about March 2, 2022, thereby affirming its Lack of Probable Cause finding. The EEOC adopted the finding of the MCAD, and issued a Notice of Dismissal on January 10, 2022. (EEOC Docket No. 16C-2019-00146). Plaintiff filed the instant litigation on April 15, 2022, against the same Defendants as those he named in the MCAD & EEOC complaints.

STANDARD OF REVIEW

In federal court, a complaint should be dismissed under Rule 12(b)(6) when it appears “that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must allege “a plausible entitlement to relief,” meaning that plaintiff must provide specific factual grounds establishing an entitlement to relief, not mere “labels and

² Pertinent to this action are the following allegations regarding the procedural history of Plaintiff’s claims.

conclusions.” *See Phillips v. City of Methuen*, No. 11-1071-JLT, 2011 WL 4793220, at *6 (D. MASS. Oct. 11, 2011).

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a claim must contain factual allegations “enough to raise a right to relief above the speculative level.” *See Pyramid Holdings, Inc. v. Inverness Med. Innovations, Inc.*, 638 F. Supp. 2d 120, 124 (D. Mass. 2009). “In order to survive a motion to dismiss, plaintiffs must set forth ‘factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery.’” *See Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988). A plaintiff cannot defeat a motion to dismiss by resting on “subjective characterizations” or “conclusory descriptions of a ‘general scenario which could be dominated by unpleaded facts,’” or merely casting legal conclusions in the form of factual allegations. *See Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995).

Moreover, “affirmative defenses, such as the statute of limitations, may be raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), provided that the facts establishing the defense [are] clear ‘on the face of the plaintiff’s pleadings.’” *See Trans-Spec Truck Serv., v. Caterpillar, Inc.*, 524 F.3d 315, 320 (1st Cir. 2008). Thus, “[w]here the dates included in the complaint show that the limitations period has been exceeded and the complaint fails to ‘sketch a factual predicate’ that would warrant the application of either a different statute of limitations period or equitable estoppel, dismissal is appropriate.” *See Caterpillar*, 524 F.3d at 320.

Here, Plaintiff’s claims with respect to Count I (in part), Count II and Count III of his Complaint fail to articulate a valid claim and/or fail to provide any factual basis for imposing liability on Defendants. Therefore, Plaintiff’s Complaint should be dismissed, in part, as to Count I (as to Chief Delehanty and Mr. Faison), and dismissed in its entirety as to Count II and Count III.

ARGUMENT

I. Plaintiff's Title VII Claim Against Individual Defendants Chief Delehanty and Mr. Faison Must Be Dismissed as a Matter of Law as There is No Recognized Claim for Individual Liability Under this Federal Statute.

Plaintiff's claim against individual Defendants Chief Delehanty and Mr. Faison under Title VII of the Civil Rights Act must be dismissed because there is no individual liability imposed under the federal statute. *See Lemire v. Silva*, 104 F.Supp.2d 80, 82 (D. Mass. 2000). A plaintiff may bring a cause of action under Title VII of the Civil Rights Act only against an "employer;" not against an individual. *See Fantini v. Salem State College*, 557 F.3d 22, (2009). The Town of Winthrop is Plaintiff's employer. Therefore, given that Chief Delehanty and Mr. Faison are not Plaintiff's employer, a claim by Plaintiff against them in their individual capacities for any alleged violations of Title VII fails as a matter of law.

There is no individual liability under Title VII for persons who are not "employers" as that term is defined by statute. Under Title VII of the Civil Rights Act, an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person..." 42 U.S.C. § 2000e(b). While Title VII's definition of the term employer includes "any agent" of an employer, Congress' purpose was merely to import *respondeat superior* liability into Title VII of the Civil Rights Act. *See Horney v. Westfield Gage Co.*, 95 F.Supp.2d 29, 33 (D. Mass. 2000) (citing 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and D.C. Cir. Decisions holding no individual liability under Title VII); *see also Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 262 (5th Cir. 1999) ("Congress' purpose in extending the

definition of an employer to encompass an agent in Section 2000e(b) was simply to incorporate respondeat superior liability into Title VII.”).

The *Westfield Gage* case sets forth several legislative reasons for not permitting individual liability under Title VII of the Civil Rights Act. First, the plain language of Title VII imposes requirements such as record keeping and notice posting on employers. *Westfield Gage*, 95 F.Supp.2d at 34. Imposition of such requirements on all supervisors and agents would create a statutory reading of “employer” that “stretched the language too far.” *Id.* Second, inclusion of the term “any agent” in the definition of employer was intended by Congress to render the employer liable for the actions of its agents and was not to be read to impose individual liability. *Id.* Further, certain remedies under Title VII (such as reinstatement and back pay) fall squarely on employers and cannot logically be required for individual employees. *Id.* at 34-35. Finally, damage caps are imposed under Title VII but determined based upon employer size. *Id.* The absence of any reference to damages applicable to individual respondents further corroborates the absence of individual liability. *Id.*

Here, Plaintiff has brought a claim for violation of Title VII of the Civil Rights Act against “Terence M. Delehanty, Police Chief and Interim Town Manager, both in his official and *individual* capacity, and Austin Faison, former Town Manager, both in his official and *individual* capacity.” See Complaint, ¶ 1. Although Plaintiff’s Complaint generally sets forth that Chief Delehanty and Mr. Faison both had oversight and supervision responsibilities within the Town of Winthrop, such duties and responsibilities on the part of individuals do not make such an individual an “employer” within the meaning of Title VII of the Civil Rights Act. Moreover, assuming, *arguendo*, that Chief Delehanty and Mr. Faison are “agents” of the Town of Winthrop, such a classification as “agents” still does not render Chief Delehanty and Mr. Faison individually liable

under Title VII. Notably, federal courts have treated Title VII claims as one suit against the employer, wherein “claims against individual defendants ‘essentially merge’ with the claims against the employer.” *See Jenkins v. Jackson*, F.Supp.2d 31, 34 (D.D.C. 2008).

In the instant litigation, Plaintiff’s claim against individual Defendants Chief Delehanty and Mr. Faison is without legal basis. Defendants request that this Court dismiss Count I of Plaintiff’s Complaint insofar as it pertains to individual Defendants Chief Delehanty and Mr. Faison.

II. Plaintiff’s Retaliation Claim Against Defendants in Count II of the Complaint Must Be Dismissed because Plaintiff Fails to Allege He is a “Disabled Person” as Defined by the ADA, which is the Statute under which He Brings the Retaliation Claim.

Plaintiff’s claim at Count II against Defendants for violation of 42 U.S.C. § 12203 must be dismissed because Plaintiff does not allege any facts that he is a “disabled person” protected by the very statute on which he bases his claim, which is commonly known as Americans with Disabilities Act (“ADA”). To qualify for the ADA’s protection, a plaintiff has the burden of establishing that: (1) he suffers from a “disability” within the meaning of the Act; (2) he was able to perform the essential functions of his position with or without reasonable accommodation; and (3) was subject to an adverse employment action by a company subject to his disability. *See Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.*, 447 F.3d 105, 111 (1st Cir. 2006). A person is “disabled” under the ADA if he suffers from a “physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(1)(A).

A three-part analysis is applied to determine whether an impairment qualifies as a disability under the ADA. *See Ramos Echevarria v. Pichi’s, Inc.*, 659 F.3d 182 (1st Cir. 2011); *Carroll v. Xerox Corp.*, 294 F.3d 231, 238 (1st Cir. 2002). First, the plaintiff must establish that he suffers from a physical or mental impairment. *See Carroll*, 294 F.3d at 238. Second, the plaintiff must

demonstrate that it affects life activities that are “major,” i.e., “of central importance to daily life.” *Id.* Major life activities are basic activities of daily life that an average person in the general population can perform with little or no difficulty – “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.” 29 C.F.R. § 1630.2(i)(1991). Finally, the plaintiff must show that the impairment “substantially limits” the identified major life activity. *See Carroll*, 294 F.3d at 238. Notably, evidence of a medical diagnosis of impairment, standing alone, is insufficient to prove a disability. *See Together Employees v. Mass General Brigham, Inc.*, 573 F.Supp.3d 412 (D. Mass. 2021).

Here, it is prominently evident that Plaintiff has neither alleged nor demonstrated any level of disability or handicap that rises to the level of protection under the ADA. Although Plaintiff states in the Complaint that he suffered from a chronic medical condition, Plaintiff did not plead, and the Court cannot presume, facts sufficient to establish that Plaintiff’s medical condition substantially limits a major life activity. It is abundantly clear that Plaintiff’s contention that he “submitted a request for Intermittent FMLA Leave to Defendants for a chronic medical condition for Calendar Year 2022” does not come anywhere near the standard for qualified disability under any stretch of the imagination; as evidence of a medical diagnosis of impairment, standing alone, is insufficient to prove a disability. *See Together Employees*, 573 F.Supp.3d at 412. Plaintiff continues to work as a Sergeant for the Town of Winthrop and has maintained active employment since July 2018. Because Plaintiff has failed to plead the necessary elements to avail himself of the protections of 42 U.S.C. § 12203, his retaliation claim under this section cannot stand. Defendants request that this Court dismiss Count II of Plaintiff’s Complaint.

III. Plaintiff's FMLA Claim Against Defendants Must Be Dismissed as Plaintiff Fails to Allege a Cognizable Claim. Moreover, Plaintiff's FMLA Claim is Time-Barred by the Statute of Limitations.

A. Plaintiff fails to allege a cognizable FMLA claim against Defendants.

Plaintiff's claim at Count III against Defendants for violations of FMLA must be dismissed as Plaintiff does not allege any facts that would entitle him to relief. "In order to make out a *prima facie* case for FMLA interference, a plaintiff must show that: (1) he was eligible for FMLA's protections; (2) his employer was covered by FMLA; (3) he was entitled to leave under FMLA; (4) he gave his employer notice of his intention to take leave; and (5) his employer denied him FMLA benefits to which he was entitled. *See Chacon v. Brigham and Women's Hospital*, 99 F.Supp.3d 207, 213 (D. Mass. 2015). To state an interference claim, a plaintiff must allege a deprivation of guaranteed rights by his employer. *See Carrero-Ojeda v. Autoridad de Energia Electrica*, 755 F.3d 711, 722 (1st Cir. 2014) (granting defendants' motion to dismiss on plaintiff's FMLA interference claim because plaintiff's complaint showed multiple approvals of FMLA leave and no denials). Here, there is no allegation Defendants denied Plaintiff FMLA benefits and/or guaranteed him rights never fulfilled, either of which is a necessary element to bringing a claim under FMLA.

With the facts alleged in the Complaint in this case, Plaintiff was eligible for FMLA protections, and Defendants were required to adhere to the federal statute. However, Plaintiff did not plead, and the Court cannot presume, facts sufficient to establish the remaining elements of the *prima facie* case. In his Complaint, Plaintiff has not plead any allegations that he was denied any request for FMLA leave. In fact, quite the opposite is true. Plaintiff admits that each time he requested intermittent FMLA leave, Defendants granted his requests, and he utilized intermittent FMLA leave. *See* Complaint, ¶¶ 12, 19. Specifically, Plaintiff requested intermittent FMLA leave

which was granted by Defendants in or around February 2019. Moreover, Plaintiff, again, requested intermittent FMLA leave in or around January 2022. Even if the statements in the Complaint are taken as true for purposes of the instant motion, and his application for FMLA was granted by Defendants approximately eighty-one (81) days after his request, which is denied as to timing, Plaintiff nonetheless concedes that Defendants still granted him FMLA leave. As such, based on the facts alleged by Plaintiff, he fails to articulate a cognizable claim for FMLA violation. For this reason, Defendants request that this Court dismiss Count III of Plaintiff's Complaint.

B. Plaintiff's FMLA claim against Defendants as it relates to 2019 is time-barred by the statute of limitations.

Even for the sake of argument, if this Court were to find that Plaintiff brings a valid FMLA claim, which is denied, such claim as it relates to 2019 is time-barred by the statute of limitations. Generally, the statute of limitations may be raised by motion to dismiss where the complaint shows on its face that the statute has run. *See U.S. v. Bernice*, 908 F. Supp. 1004 (D. Mass. 1995); *Hendrickson v. Sears*, 359 F. Supp. 1031 (D. Mass. 1973). Therefore, in this case, to the extent that Count III of Plaintiff's Complaint arises from alleged interference by Defendants that occurred in 2019, that claim is ripe for dismissal on statute of limitations grounds.

The statute of limitations under FMLA is two (2) years after the date of the last event constituting the alleged violation for which the action is brought or three (3) years if the alleged violation is willful. *See Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 33-34 (1st Cir. 2003). "To establish a willful violation under FMLA, a plaintiff must show that 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.'" *Hillstrom*, 354 F.3d at 33. An employer that acts reasonably to determine its legal obligations cannot be deemed liable for a willful violation of FMLA. *Id.* Further, conduct that is "merely negligent" is not considered willful. *Id.*

Here, even assuming, *arguendo*, that Defendants interfered with Plaintiff's benefits under FMLA, which Defendants deny, when reading Plaintiff's Complaint most liberally, the last possible date that Plaintiff's cause of action arguably could have accrued for his FMLA claim was when Defendants allegedly deducted nineteen (19) of Plaintiff's accrued vacation hours due to his taking of approved intermittent FMLA leave, in or around August 2019. Therefore, since Plaintiff does not allege any willful violation by Defendants, Plaintiff had until August 2021 to file a lawsuit asserting violations of FMLA by Defendants. Plaintiff's filing of the instant litigation in April 2022 is far beyond the permissible date to bring a valid claim for FMLA violations concerning events in 2019.

CONCLUSION

For the reasons set forth above, Defendants Town of Winthrop, Chief of Police Terence M. Delehanty, and Austin Faison respectfully requests that this Court grant their Motion to Dismiss Count I, in part, and Dismiss Counts II and III of the Complaint.

Respectfully submitted,
TOWN OF WINTHROP,
TERENCE M. DELEHANTY, and
AUSTIN FAISON,
By their attorneys,

/s/ Janet Barringer

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Dated: July 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be served upon non-registered participants.

/s/ Janet R. Barringer

Janet R. Barringer