

Ramirez v. City of Fort Lauderdale Fire Rescue

United States District Court for the Southern District of Florida

April 29, 2019, Decided; April 29, 2019, Entered on Docket

CASE NO. 19-60169-CIV-DIMITROULEAS

Reporter

2019 U.S. Dist. LEXIS 72739 *

JOHN H. RAMIREZ, Plaintiff, vs. CITY OF FORT LAUDERDALE FIRE RESCUE, Defendant.

Counsel: [*1] For John H Ramirez, Plaintiff: Randy Alan Fleischer, LEAD ATTORNEY, Randy A. Fleischer Law Offices, Davie, FL.

For City Of Ft. Lauderdale Fire Rescue, Defendant: Carmen Maria Rodriguez, Law Offices of Carmen Rodriguez, P.A., Miami, FL.

Judges: WILLIAM P. DIMITROULEAS, United States District Judge.

Opinion by: WILLIAM P. DIMITROULEAS

Opinion

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court on Defendant, City of Fort Lauderdale's, Motion to Dismiss [DE 4]. The Court has carefully considered the Motion [DE 4], Plaintiff's Response [DE 6], Defendant's Reply [DE 9], and is otherwise fully advised in the premises.

I. Background

On January 18, 2019, this action was removed to this Court. See [DE 1]. Plaintiff John H. Ramirez ("Ramirez" or "Plaintiff") initiated this action against Defendant City of Fort Lauderdale Fire Rescue ("Defendant" or "City") for violation of Uniformed Services Employment and Reemployment Rights Act (USERRA, 38 U.S.C. 4301-4333). [DE 1-1]. Plaintiff was hired by Defendant in March 1994. ¶ 5.¹ During Plaintiff's employment, he served in the United States Army and was called for various deployments. ¶ 6. Plaintiff has repeatedly

applied for promotion to Division Chief and was passed over for promotion several [*2] times. ¶¶ 7-14.

Defendant uses the rule of five to select personnel for promotion, which, according to Plaintiff violates Plaintiff's rights under USERRA by "not following the State of Florida Veterans preference." ¶ 17. Plaintiff has complained to the Defendant that his military service was a factor in the decision to deny him promotion. ¶ 19. Plaintiff seeks injunctive relief in the form of an order requiring Defendant to promote Plaintiff to Division Chief. ¶ 27. Plaintiff also seeks back pay and other damages. *Id.* Defendant moved to dismiss the Complaint in its entirety.

II. Standard of Review

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*, 355 U.S. at 41). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct [*3] alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. See *Linder v. Portocarrero*, 963 F. 2d 332, 334-36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)).

The Court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. In sum, "a district court weighing a motion to dismiss asks 'not whether a

¹ Citations to the Complaint [DE 1-1] are styled as ¶ __.

plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Twombly*, 550 U.S. at n.8 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984)).

III. Discussion

To establish a prima facie case under USERRA, "a plaintiff must show by a preponderance of the evidence that his protected status was a motivating factor in the challenged action." *Dominguez v. Miami-Dade Cty.*, 669 F. Supp. 2d 1340, 1347 (S.D. Fla. 2009), *aff'd*, 416 F. App'x 884 (11th Cir. 2011). "A motivating factor does not mean that it had to be the sole cause of the employment action." *Id.* (citations omitted). "Instead, it is one of the factors that a truthful employer would list if asked for the reasons for its decision." *Id.* (citations omitted). Once an employee meets this burden, the burden shifts to the employer to demonstrate that the action would have been taken despite the employee's protected [*4] status. *Id.*

The Court finds that Plaintiff has failed to meet the burden to allege that his protected status as a servicemember was the motivating factor behind Defendant's choice not to promote him.

In his response, Plaintiff alleges that he "was denied opportunities to take exams that were given while he was serving overseas. [DE 6 at p. 7]. This statement is contradicted by Plaintiff's Complaint, which states that Plaintiff "was given the opportunity to take the Division test." [DE 1 at ¶ 13]. Furthermore, Plaintiff alleges in response that he complained of USERRA violations to the Veterans' Administration, but this allegation is similarly not supported by the Complaint. Plaintiff cannot supplement the allegations of the Complaint through a brief in response to a motion to dismiss, and Plaintiff certainly cannot contradict the allegations in the Complaint with a response to a Motion to Dismiss. See *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (observing that court could not consider contracts attached to response brief in connection with motion to dismiss, because court "may consider only the complaint itself and any documents referred to in the complaint which are central to the claims"); *Payne v. Ryder Sys., Inc. Long Term Disability Plan*, 173 F.R.D. 537, 540 (M.D. Fla. 1997) ("Courts have held that a plaintiff [*5] cannot amend a complaint through statements in a brief.").

Defendant's Motion to Dismiss [DE 4] is granted. In an

abundance of caution, Plaintiff is afforded an opportunity to amend the Complaint to allege a violation of USERRA.

A. Conclusion

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [DE 4] is **GRANTED** as set forth above;
2. The Complaint [DE 1-1] is **DISMISSED** with leave to amend;
3. Plaintiff shall file an amended complaint on or before **May 10, 2019**; and
4. Failure to file an amended complaint consistent with this Order will result in dismissal of this action.

DONE AND ORDERED in Chambers in Ft. Lauderdale, Broward County, Florida this 29th day of April, 2019.

/s/ William P. Dimitrouleas

WILLIAM P. DIMITROULEAS

United States District Judge

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