

2470.24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KENNETH SNYDER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 12-CV-2723 JAR/DJW
)	
WILLIAM JOHNSON, et al)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF DEFENDANTS WILLIAM JOHNSON AND ERIC CLARK’S MOTION TO DISMISS

Defendants William Johnson and Eric Clark (unless otherwise specified herein, “Defendants”) provide the following Memorandum in Support of their Motion to Dismiss.

I. Nature of the Matter.

Plaintiff has brought an action against Defendants for alleged violations of Uniformed Services Employment and Reemployment Rights Act (“USERRA”). The claims contained in Plaintiff’s Complaint (Complaint, Dkt. #1) are asserted against both Plaintiff’s former employer, Unified Government of Wyandotte County/Kansas City/Board of Public Utilities, as well as William Johnson and Eric Clark, two individual employees of Unified Government of Wyandotte County/Kansas City/Board of Public Utilities. Defendants William Johnson and Eric Clark seek dismissal of Plaintiff’s Complaint (Dkt. #1) on the following bases:

A. Plaintiff has failed to state a claim upon which relief can be granted

against either Defendant; and

B. No personal jurisdiction exists concerning Plaintiff's claims against Defendants William Johnson and Eric Clark as Plaintiff has failed to serve these Defendants with process as required by Fed.R.Civ.P. 4.

Accordingly, Plaintiff's claims against Defendants William Johnson and Eric Clark should be dismissed.

II. Statement of Facts.¹ Because this matter is before the Court on a motion to dismiss, the facts are generally those non-conclusory facts set forth in Plaintiff's Complaint (Dkt. #1). However, because this motion seeks dismissal for lack of jurisdiction, the Court may consider materials outside the pleadings. *Schmidt v. Cline*, 127 F. Supp. 2d 1169, 1175 (D.Kan. 2000)(when reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations). Instead, "[w]hen a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), 'the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Id.* (quoting *Richmond, Frederickburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts. *Schmidt*, 127 F. Supp. 2d at 1175; *see also Marcus v. Kansas, Department of Revenue*, 980 F. Supp. 398, 400 (D. Kan. 1997), *reversed on other grounds*, 170 F.3d 1305 (10th Cir. 1999) ("In reviewing a factual attack on subject matter jurisdiction, a district court must go beyond the allegations and evaluate the

¹ These facts are admitted solely for purposes of this motion and should not be deemed admissions for purposes of trial. Wright, Miller & Kane, Fed.Prac. & Proc. § 2722 at 48.

evidence presented by the parties."). The plaintiff must carry the burden of proving that subject matter jurisdiction exists. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 646 (4th Cir. 1999). Accordingly, to the extent defendant seeks dismissal based on lack of jurisdiction, the Court is not limited to the facts set forth in the pleadings.

For purposes of this motion to dismiss, the relevant facts are as follows:

1. On November 13, 2012, Plaintiff filed a Complaint (Dkt. #1) with the United States District Court for the District of Kansas.

2. Plaintiff filed claims under 38 U.S.C. §§ 4301 to 4333 against the Unified Government of Wyandotte County/Kansas City, Kansas, a governmental entity created under the laws of the State of Kansas. (Complaint, Dkt. #1, ¶ 2, Counts 1 & 2).

3. The individual Defendants William Johnson and Eric Clark have been named in this lawsuit. (Complaint, Dkt. #1, ¶¶ 3-4, Counts 1 & 2).

4. The Board of Public Utilities ("BPU") is an administrative agency of a Kansas municipality. *See K.S.A. 13-1220 et seq.*

5. On November 19, 2012, a Return of Service (Dkt. #4) was filed purporting to show service of process on Defendant Eric Clark.

6. On November 19, 2012, a Return of Service (Dkt. #5) was filed purporting to show service of process on Defendant William Johnson.

7. Jessica Leiker was not authorized or appointed by William Johnson as an agent to accept service on his behalf, nor is she alleged to be in the Complaint (Dkt. #1). Jessica Leiker Affidavit, Exhibit A, ¶ 3.

8. Jessica Leiker was not authorized or appointed by Eric Clark as an agent to accept service on his behalf, nor is she alleged to be in the Complaint (Dkt. #1). Jessica Leiker Affidavit, Exhibit A, ¶ 4.

III. Questions Presented.

- A. Whether Plaintiff has Failed to State a Claim upon Which Relief can be Granted against Defendants William Johnson and Eric Clark?
- B. Whether this Court has Personal Jurisdiction over Plaintiff's Claims?

IV. Legal Argument and Authorities.

In evaluating a motion to dismiss, all well pled factual allegations are taken as true. *Free v. Department of Corrections*, 949 F.2d 360, 361 (10th Cir. 1991). This deferential rule, however, does not allow the court to assume that a plaintiff can prove facts that they have not alleged or that the defendants have violated the law in ways that have not been alleged. *Gallardo v. Board of County Comm'rs, Kearny County*, 857 F. Supp. 783, 786 (D. Kan. 1994). Legal conclusions made by the parties are not taken as true. *Kruse v. Hawaii*, 857 F. Supp. 741, 749 (D. Hawaii 1994). A court may grant a motion to dismiss where there is no doubt the plaintiff cannot prove any set of facts entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See generally*, 5A Wright & Miller, Fed. Prac. & Proc.; Civil 2d § 1368 (1990).

Fed.R.Civ.P. 8 requires Plaintiff to “provide the ‘grounds’ of [his] ‘entitle[ment] to relief’ [by alleging] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3rd Cir. 2008)(“[I]t is no longer sufficient to allege mere

elements of a cause of action; instead ‘a complaint must allege facts suggestive of [the proscribed] conduct’”(citation omitted). The U.S. Supreme Court has further clarified its holding in *Twombly*, making it clear that a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ascroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 1949.

A corollary to Plaintiff’s obligation to plead factual content is that courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan*, 478 U.S. at 286. Nor is the Court “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quotation omitted); *see also Twombly*, 550 U.S. at 557 (a plaintiff cannot rely on conclusory allegations of a violation but must provide “factual enhancement” of how the alleged violation occurred to support its claims). Thus, the Supreme Court has instructed that “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 129 S.Ct. at 1950.

“Rule 8 does not empower [a plaintiff] to plead the bare elements of his cause of action, affix the label “general allegation,” and expect his complaint to survive a motion to dismiss.” *Iqbal*, 129 S.Ct. at 1954 (citations omitted). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S.Ct. at 1949.

Plaintiff must plead each element of his USERRA claims under Rule 8 with supporting facts rather than mere “labels and conclusions.” *Twombly*, 550 U.S. at 557.

A. Plaintiff has Failed to State a Claim Upon which Relief Can be Granted against Defendants William Johnson and Eric Clark. Under the provisions of USERRA, Defendants William Johnson and Eric Clark are not “employers” against whom claims may be brought.² USERRA includes in its definition of “employer” subject to suit for USERRA violations “a person . . . or other entity to whom the employer has delegated the performance of employment-related responsibilities.” *See* 38 USC § 4303(4). This statutory language does not, however, answer the question as to whether individuals who are state employees are subject to suit in federal court. In the general definitions of USERRA, the term “State” specifically includes the “political subdivisions” of such States of the United States. *See* 38 USC § 4303(14). Accordingly, the Unified Government of Wyandotte County/Kansas City, Kansas/Board of Public Utilities, a political subdivision of the State of Kansas, is a “State” for purposes of USERRA³.

Although the Tenth Circuit has not directly addressed this issue, the Ninth Circuit has concluded that “Section 4323 does not create either an express or implied cause of action against individual state supervisors.” *Townsend v. Univ. of Alaska*, 543 F.3d 478, 485 (9th Cir. Alaska 2008). In reaching such a conclusion the Court reasoned as follows:

² In paragraphs 3 and 4 of his Complaint (Dkt. #1) Plaintiff alleges legal conclusions that Defendants William Johnson and Eric Clark are employers, as defined as USERRA. As set forth above, such legal conclusions are not taken as true for purposes of a motion to dismiss. *See Papasan*, 478 U.S. at 286; *Twombly*, 550 U.S. at 555.

³ The exception being 38 USC § 4323(i)(the enforcement provisions) which, for purposes of § 4323, defines a “private employer” to include political subdivisions.

Despite the plain text of the statute, [the Plaintiff] argues that USERRA also creates a cause of action against the supervisors, because the Act defines "employer" to include "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities," 38 U.S.C. § 4303(4)(A)(i) (emphasis added), and the supervisors are persons. The USERRA cause of action, however, arises against "a State (as an employer)." See *id.* § 4323(a)(2). Individual supervisors are not included in the definition of "State." See *id.* § 4303(14) (defining "State"). Although the cause of action can be brought against a "State (as an employer)," "as an employer" describes the capacity in which the State can be sued; it does not create a cause of action against individual state employees even if they exercise supervisory responsibility. Thus, an action under USERRA is available only against the State "as an employer," and not in some other capacity... Thus, [Plaintiff's] attempt to sue individual supervisors under the cause of action which the Act provides against a "State (as an employer)" fails".

Townsend v. Univ. of Alaska, 543 F.3d 478, 486 (9th Cir. Alaska 2008)

Following the logic of the Court in *Townsend*, it is clear that the claims against Williams and Clark fail as there is no claim available under USERRA against a supervisor of a state employer.⁴

⁴ Furthermore, Defendant Unified Government of Wyandotte County/Kansas City, Kansas/Board of Public Utilities has agreed that it will satisfy any damages recoverable against Defendants William Johnson and/or Eric Clark. Accordingly, Dismissal of the individual Defendants in this case will not prejudice Plaintiff's recovery.

B. Defendants William Johnson and Eric Clark are Entitled to Dismissal of Plaintiff's Complaint (Dkt. #1) for Lack of Personal Jurisdiction due to Plaintiff's Failure to Serve these Defendants with Process as Required by Fed.R.Civ.P. 4.

Plaintiff has never properly served Defendant William Johnson and Eric Clark in this litigation. His Complaint (Dkt. #1) was filed on November 13, 2012. On November 19, 2012, a Return of Service (Dkt. #4) was filed purporting to show service of process on Defendant Eric Clark. The Return of Service indicates that the Summons and Complaint were purportedly served on November 15, 2012, by service of summons at Defendant Eric Clark's place of employment upon Jessica Leiker, who is designated to accept service of process on behalf of Board of Public Utilities, but whom Defendant Eric Clark did not designate or authorize as his agent to accept service on his behalf. See Affidavit of Jessica Leiker, ¶4. This attempt at service is not proper under the Rules and does not constitute service on Defendant Eric Clark. Instead, Fed.R.Civ.P. 4(e)(2) provides that service upon an individual shall only be effected by "(A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process." Accordingly, no service has been effected on Defendant Eric Clark and he is entitled to dismissal of the claims against him on that basis.

Also on November 19, 2012, a Return of Service (Dkt. #5) was filed purporting to show service of process on Defendant William Johnson. Again, the Return of Service indicates that the Summons and Complaint were purportedly served on November 15,

2012, by service of summons at Defendant William Johnson's place of employment upon Jessica Leiker, whom Defendant William Johnson did not designate or authorize as his agent to accept service on his behalf. See Affidavit of Jessica Leiker, ¶3. This attempt at service is therefore not proper under the Rules and does not constitute service on Defendant William Johnson.

V. **Conclusion.** Plaintiff has not pled a viable claim against Defendants William Johnson and Eric Clark and cannot establish jurisdiction as to Defendants William Johnson and Eric Clark. Therefore, Plaintiff's claims against these Defendants as alleged in his Complaint (Dkt. #1) should be dismissed.

Respectfully submitted,

McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Drive, Suite 300
Kansas City, Kansas 66103
Telephone (913) 371-3838
Fax (913) 371-4722
Email: rwonnell@mvplaw.com
jwilson@mvplaw.com

By: /s/ Robert J. Wonnell

Robert J. Wonnell #20727
Jane Sieve-Wilson #23837
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing was sent electronically pursuant to D.Kan.R. 5.4.2 and 26.3 and via U.S. first-class mail, postage prepaid, to the below listed individuals on this the ___ day of December, 2012.

Luanne Leeds
LEEDS LAW, LLC
515 SW Horne Street, Ste. 201
Topeka, KS 66606
leedslua@gmail.com
Attorney for Plaintiff

/s/ Robert J. Wonnell