BARRY MAYNARD, Plaintiff, -against- CITY OF NEW YORK; RICHARD J. CONDON, Special Commissioner of Investigation for the New York City School District; NEW YORK CITY DEPARTMENT OF EDUCATION; DENNIS WALCOTT, Chancellor of the New York City Department of Education; LISA LUFT, individually and in her official capacity as Principal; NICHOLAS ROSE-MEYER, individually and in his official capacity as Investigator; Defendants.

13 Civ. 3412 (CM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2013 U.S. Dist. LEXIS 178433

December 17, 2013, Decided
December 17, 2013, Filed

CORE TERMS: discriminatory, custom, official capacity, individually, investigator, misconduct, equal protection, satisfactorily, conclusorily, termination, promulgated, personally, municipal, female, fired, discriminatory acts, factual allegations, factual matter, reasonable inferences, sufficient facts, employment discrimination, racial discrimination, paraprofessional, municipality, policymakers, conceivable, alteration, supervisors, quotation, conferred

COUNSEL: [*1] For Barry Maynard, Plaintiff: Edward Hirsch Wolf, Jason M. Wolf, Wolf & Wolf, LLP, Bronx, NY.

For City of New York, Special Commissioner Richard J. Condon, of Investigation for the New York City School District, New York City Department of Education, Chancellor Dennis Walcott, of the New York City Department of Education, Lisa Luft, individually, Lisa Luft, in her official capacity as Principal, Nicholas Rose-Meyer, individually, Nicholas Rose-Meyer, in his official capacity as Investigator, Defendants: Benjamin Eldridge Stockman, Corporation Counsel Office City of New York, New York, NY.

JUDGES: COLLEEN McMAHON, U.S.D.J.

OPINION BY: COLLEEN McMAHON

OPINION

DECISION AND ORDER

McMahon, J:

Introduction

Plaintiff Barry Maynard ("Plaintiff") brings this action against defendants the City of New York ("City"), the New York City Department of Education ("DOE"), Special Commissioner of Investigation Richard J. Condon ("Condon"), DOE Chancellor Dennis Walcott ("Walcott"), School Principal Lisa Luft, individually and in her official capacity ("Luft"), and Investigator Nicholas Rose-Meyer of the DOE Office of Special Investigations, individually and in his official capacity ("Rose-Meyer" and collectively the "Defendants"). Plaintiff, **[*2]** a former paraprofessional at DOE alleges that Defendants discriminated against him based on his race in violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, by firing him after he was accused of improper conduct with female students. Defendants move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the reasons set forth below, Defendants' motion is granted.

Facts

The following facts are taken from the complaint and assumed to be true for this motion to dismiss.

Plaintiff, an African-American male, was formerly employed by DOE as a paraprofessional. (Compl. ¶¶ 5, 17).

Defendant DOE is an agency of Defendant City; both are organized under the laws of the State of New York. (*Id*. ¶¶ 6, 8).

Defendant Condon was Deputy Commissioner of the New York City Department of Investigations and the Special Commissioner of Investigation for the New York City School District, and had broad investigative authority as well as the responsibility to train investigators under his charge. (*Id*. ¶ 7).

Defendant Walcott is the Chancellor of the DOE. (*Id*. ¶ 9).

Defendant Luft was the Principal of John F. Kennedy High School, which **[*3]** is under the auspices of the DOE, and was responsible for the hiring, firing, and discipline of employees of the school. (*Id*. ¶ 10).

Defendants Condon, Walcott, and Luft are allegedly policymakers for the DOE and the City. (*Id*. ¶¶ 7, 9-10).

Defendant Rose-Meyer is an investigator employed by Defendant City; he conducted the investigation into allegations of misconduct against Plaintiff. (*Id*. ¶ 11).

Plaintiff alleges that he performed the functions of his position satisfactorily for several years. (*Id*. ¶ 13).

On November 8, 2010, a minor female student told her guidance counselor that Plaintiff had been harassing her and another student by asking the girls to spend time with him away from school. (*Id*. ¶ 13). Plaintiff denied the allegations. (*Id*. ¶ 15). The students' statements were otherwise uncorroborated. (*Id*. ¶ 15).

During the investigation into the students' complaint, an employee of the Defendants, who Plaintiff "believes" to be Defendant Rose-Meyer said to Plaintiff:

"Since Obama became President, you people think you can get away with anything." (*Id*. ¶ 16).

During the investigation Plaintiff was only provided a "faded" and illegible copy of the witness statement against him. (*Id*. ¶ **[*4]** 17). He alleges that Defendants refused to interview two witnesses who could have exonerated him. (*Id*.).

The students' allegations were credited over plaintiff's version of events and Plaintiff was fired. (*Id*.).

Discussion

I. Legal Standard for a Motion to Dismiss

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cargo Partner AG v. Albatrans, Inc*., 352 F.3d 41, 44 (2d Cir.2003); *see also Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007).

However, to survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "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*. (citing *Twombly*, 550 U.S. at 556). "While a complaint attacked **[*5]** by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff's well-pleaded allegations have "nudged [its] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Id*. at 570; *Iqbal*, 129 S.Ct. at 1950-51.

II. Defendants' Motion to Dismiss is Granted

Plaintiff's complaint is no model of clarity. Plaintiff is represented by counsel, but I have received complaints from pro se plaintiffs that are more "professional." For example, the Complaint in multiple instances describes Plaintiff--a

male--with female pronouns. It refers to a gender discrimination claim, although Plaintiff only advances a race discrimination claim. I can read it clearly enough, however, to ascertain that it should be dismissed.

A. Framework for Plaintiff's Claims of Race Discrimination

Plaintiff claims Defendants deprived him of his right to equal protection **[*6]** under the law in violation of 42 U.S.C. §§ 1981, 1983, and the Fourteenth Amendment of the United States Constitution[1] by taking an adverse employment action against Plaintiff based on his membership in a racial and ethnic minority.[2]

1 Plaintiff's complaint also states that Plaintiff was denied equal protection in violation of the Fifth Amendment. Although the Fifth Amendment's Due Process Clause has an equal protection component that applies to the Federal Government, *see e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954), it does not appear the Fifth Amendment has any applicability to this case.

2 Plaintiff's complaint also references a hostile work environment claim; however, Plaintiff concedes in his Memorandum of Law that he has not pleaded sufficient facts to support a hostile work environment claim and he withdraws this claim. (Pl.'s MOL at 10).

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) **[*7]** (quoting U.S. Const, amend. XIV).

Section 1981, enacted as part of the Civil Rights Act of 1866, provides that "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). " [T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "[Section] 1981 therefore bans racial discrimination with respect to employment." *Guan N.*, 2013 WL 67604, at *20 (citing *Patterson v. Cnty. Of Oneida*, 375 F.3d 206, 224 (2d Cir.2004)).

Section 1983 is not the source of any substantive rights, but "merely provides a method for vindicating federal rights elsewhere conferred such as those conferred by § 1981" or the Equal Protection Clause. *Patterson*, 375 F.3d at 225. In fact, "§ 1983 constitutes the *exclusive* federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." *Id*. (quoting *Jett v. Dallas Independent School District*, 491 U.S. 701, 733, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

To **[*8]** state a claim under 42 U.S.C. § 1983 against a defendant in her individual capacity a plaintiff must allege: (1) the defendant was acting under color of state law, and (2) the defendant's conduct deprived plaintiff of a constitutional or a federal statutory right. *Bermudez v. City of New York*, 783 F.Supp.2d 560, 576 (S.D.N.Y. 2011) (citing *Washington v. County of Rockland*, 373 F.3d 310, 315 (2d Cir.2004). "[U]nder Section 1983 and Section 1981 supervisors can be sued individually, without directly participating in the underlying conduct, only if they promulgated unconstitutional policies or plans under which action occurred, or otherwise authorized or approved challenged misconduct." *Id*. at 602; *see also Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1066 (2d Cir. 1989). When a defendant is sued for discrimination under § 1983 is a municipality or an individual sued in his official capacity, the plaintiff is required to show that the challenged acts were performed pursuant to a municipal policy or custom. *See Patterson v. County of Oneida*, 375 F.3d 206, 225-227 (2d Cir.2004) (citing *Jett*, 491 U.S. at 733-36, 109 S.Ct. 2702; *Monell v. Department of Social Services*, 436 U.S. 658, 692-94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)) **[*9]** (internal citations omitted).

Claims of employment discrimination brought pursuant to § 1983, under either the constitution or § 1981 are analyzed under the *McDonnell Douglas framework. Bermudez*, 783 F.Supp.2d at 575 (citing *Boykin v. KeyCorp*., 521 F.3d 202, 213 (2d Cir.2008)). Plaintiff must allege the following four elements: (1) he falls within a protected class, (2) he was performing his duties satisfactorily, (3) he was subject to an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Id*. (citing *Graham v. Long Island R.R*., 230 F.3d 34, 39 (2d Cir.2000)).

Although "an employment discrimination plaintiff need not plead a prima facie case of discrimination" in order to survive a motion to dismiss, *Swierkiewicz v. Sorema N. A*., 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), Plaintiff must allege sufficient facts showing that he is entitled to relief. *See, e.g.,Alleyne v. American Airlines, Inc*., 548 F.3d 219, 221 (2d Cir.2008); *Leibowitz v. Cornell University*, 445 F.3d 586, 591 (2d Cir.2006).

Additionally, "Section. 1981 claims, [and] those under the Equal Protection Clause, must **[*10]** be based on intentional conduct." *Olivera v. Town of Woodbury*, 281 F.Supp.2d 674, 684 (S.D.N.Y.2003) (citing *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania United Engineers & Constructors, Inc*., 458 U.S. 375, 391, 102 S. Ct. 3141, 73 L.Ed.2d 835 (1982)). "That is, the plaintiff must allege that the defendant acted 'because of a protected characteristic (e.g., race or ethnicity), and must plead sufficient factual matter to 'nudge [her] claims of invidious discrimination across the line from conceivable to plausible.'" *Guan N*., 2013 WL 67604, at *16 (quoting *Iqbal*, 556 U.S. at 677, 680) (alteration in original).

A. Plaintiff Fails to Allege Defendants Condon, Walcott, and Luft Were Personally Involved

Defendants argue that Plaintiff has not alleged that Defendants Condon, Walcott, or Luft were personally involved in any alleged discrimination. Defendants' are correct.

"It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (internal quotation marks omitted). Additionally, to be liable under section 1983, a defendant must **[*11]** personally participate with "knowledge of the facts that rendered the conduct illegal." *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001).

Here, Plaintiff does not allege any facts that show that Condon, Walcott, or Luft were involved or had knowledge of any of the alleged discriminatory acts. Plaintiff conclusorily alleges that Condon, Walcott, and Luft were involved in the discriminatory action by virtue of their positions as "policymakers" for the DOE and City; however, this is insufficient to state a plausible claim against them. As discussed above, supervisors who did not directly participate in the challenged conduct can be sued individually only if they promulgated unconstitutional policies or plans under which action occurred, or otherwise authorized or approved challenged misconduct. *See e.g., Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1066 (2d Cir. 1989). Plaintiff points to no policy or plan of the City or DOE that is unconstitutional. Conclusory allegations that there was such a policy or custom, without identifying or alleging supporting facts, is insufficient to state a claim. *See e.g., Costello v. City of Burlington*, 632 F.3d 41, 49 (2d Cir. 2011); *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993), **[*12]** *overruled on other grounds, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

The one alleged act evidencing racial discrimination is the comment allegedly made by Rose-Meyer to Plaintiff about "you people." Plaintiff alleges no facts which indicate Condon, Walcott, or Luft were even aware of the challenged discriminatory act, let alone promulgated a discriminatory policy or approved of any discriminatory conduct.

Plaintiff alleges that Luft made employment decisions for a high school where Plaintiff presumably worked (nowhere in the Complaint does Plaintiff actually allege he worked at Luffs school), but he does not connect her in any way to the discriminatory statement allegedly made by Rose-Meyer. Plaintiff does not allege that Luft was aware of Rose-Meyer's discriminatory statement, nor does he plead any facts which would lead to an inference Luft fired him for discriminatory reasons (even assuming that it was Luft who fired Plaintiff, which is not plead in the Complaint). In fact, Plaintiff states in his Complaint he was terminated because the allegations of the students were credited over his version of **[*13]** the events. It is not race discrimination to credit one witness over another unless the reason for not believing the discredited witness is his race. No such allegation appears in the complaint.

Plaintiff's claims against Condon, Walcott, and Luft are dismissed.

A. Plaintiff's Claim Against Rose-Meyer Is Dismissed

Defendants argue that Plaintiff has even failed to state a plausible claim against Defendant Rose-Meyer.

In his Complaint, Plaintiff alleges he is African-American, did his job satisfactorily with no incidents for five years, and was terminated. Plaintiff alleges his termination followed an investigation during which the investigator told him, "Since Obama became President, you people think you can get away with anything." The investigation also had alleged defects: Plaintiff was only provided an illegible statement of the allegations against him, and there was no interview of any witnesses aside from the two students who made the accusation.

This is insufficient to state a claim against Rose-Meyer. Plaintiff alleges that Rose-Meyer conducted the investigation and made a discriminatory statement. However, Plaintiff does not allege Rose-Meyer was the person who made the decision **[*14]** to terminate him, nor does he allege any facts which connect the remark attributed to Rose-Meyer to Plaintiff's termination.

Plaintiff's claims against Rose-Meyer are dismissed.

B. Plaintiff Fails to State a Claim Against the City or the DOE

Defendants argue that Plaintiff's claims fail as against the City and the DOE because Plaintiff fails to allege facts which make it plausible that the City or the DOE are liable under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Defendants are correct.

Claims brought under § 1983 against a municipality require the plaintiff "to show that the challenged acts were performed pursuant to a municipal policy or custom." *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir.2004) (citing *Monell*, 436 U.S. at 692-94). The same standard applies to claims brought against individuals sued in their official capacity. *Id*. (citing *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

In order for Plaintiff to state a claim against the City or the DOE Plaintiff must allege that the discriminatory action was performed pursuant to a municipal policy or custom. However, conclusorily alleging that there **[*15]** was a policy or custom, without alleging supporting facts is insufficient. *Costello v. City of Burlington*, 632 F.3d 41, 49 (2d Cir. 2011); *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993), *overruled on other grounds, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517(1993).

Here Plaintiff alleges no facts that any of the alleged discriminatory action was pursuant to an official policy or custom. Plaintiff simply conclusorily states that the City and DOE have a policy or custom of discriminating against African-Americans. This is insufficient. Plaintiff's claims against the City and DOE are dismissed.

Conclusion

Defendants' motion to dismiss the Complaint is granted. Plaintiff's complaint is dismissed in its entirety.

The Clerk of Court is respectfully directed to remove the motion at docket number 12 from the Court's list of active motions.

Dated: December 17, 2013

/s/ Colleen McMahon

U.S.D.J.