

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

MARY MARGARET DAGGY,)	
Plaintiff,)	Civil Action No. 5:04CV00023
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
STAUNTON CITY SCHOOLS, et al.,)	By: Samuel G. Wilson
Defendants)	United States District Judge
)	

Following the elimination of her position with the Staunton City Schools, plaintiff Mary Margaret Daggy filed this lawsuit under 42 USC §§1983 and 1985, the Age Discrimination in Employment Act (“ADEA”), and unspecified provisions of Virginia law against the Staunton City School Board and its members, the Superintendent of Schools, the Director of the Commonwealth Center for Children and Adolescents and an employee of the Virginia Department of Education. Daggy alleges that defendants conspired to violate and violated her rights to procedural and substantive due process and discriminated against her on account of her age. The matter is before the court on defendants’ motion to dismiss pursuant to Rule 12(b)(6). The court finds that Daggy has failed to allege a viable procedural or substantive due process claim. In addition, the court finds that only the School Board is a proper defendant under the ADEA. Accordingly, the court dismisses all of Daggy’s claims except her ADEA claim against the School Board. The court also declines to exercise supplemental jurisdiction over her unspecified state law claims.

I.

In June 1994, the Staunton City School Board hired Daggy as Assistant Director of Education for the Commonwealth Center for Children and Adolescents (“CCCA”). The CCCA, a mental health

facility for youth, is funded by the Virginia Department of Health, Mental Retardation, and Substance Abuse. Staunton City Schools, under the direction of the Virginia Department of Education, operates the educational facilities connected with the CCCA. Daggy was a continuing contract employee of the Staunton City Schools.

On March 7, 2003, Teri Sumey, Director of the CCCA, Harry Lunsford, Superintendent of Staunton City Schools, and Nancy Haynes, a specialist with the Virginia Department of Education, met to discuss restructuring the education program at the CCCA in order to improve the coordination and organization of the special education programs. On March 26, 2003, Lunsford informed Daggy by letter that, as a result of this restructuring, they would no longer have adequate funding for the assistant director position and that he would “have to recommend to [the] School Board that [her] position be eliminated.” The restructuring plan called for hiring an IEP Coordinator at CCCA. Lunsford indicated that Daggy would be eligible to apply for the newly-created position, and that he would be available to discuss her options. Daggy met with Lunsford on March 28, 2003. On April 7, 2003, Daggy presented a grievance to the School Board, contending that the restructuring was a pretext to terminate her employment without cause. On April 8, 2003, the School Board informed Daggy that it had voted to eliminate her position, effective June 30, 2003.

Daggy, who is fifty-six years old, alleges that the responsibilities of the IEP coordinator were essentially the same responsibilities she held as assistant director and that the Staunton City School Board hired a younger woman for the position. She claims that Lunsford, Sumey and Haynes sought to abolish her position in retaliation for her involvement in departmental disputes or, alternatively, because of her age.

Daggy filed a Charge of Discrimination with the EEOC alleging that the CCCA discharged her and denied her alternative placement in the new position because of her age.¹ She claims in this lawsuit that defendants: (1) failed to afford her procedural due process, (2) deprived her of her substantive due process rights, (3) engaged in a conspiracy to deprive her of her constitutional rights, (4) violated the ADEA, and (5) violated unspecified state laws.

The defendants have moved to dismiss pursuant to Rule 12(b)(6). Defendants argue: first, that the facts Daggy pleads do not support a procedural due process claim; second, that Daggy's substantive due process claim is similarly deficient; third, that Daggy has failed to state a claim for relief under 42 U.S.C. § 1985; fourth, that Lunsford and Sumey are not appropriate defendants under the ADEA; and finally, that Daggy's official capacity claims against individual members of the Staunton City School Board should be dismissed because the School Board is the real party in interest.

II.

The court finds that Daggy's allegations, taken as true, fail to state a claim for violation of procedural due process. To determine whether her complaint alleges a viable procedural due process claim, the court must examine whether Daggy had a property interest in her position and whether she was deprived of that interest without notice and a hearing. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985).² Dismissal is appropriate if the complaint clearly shows that

¹The EEOC issued a right-to-sue letter on December 23, 2003.

² The court assumes, and defendants do not dispute, that Daggy had a property interest in continued employment. Whether an employee has a constitutionally protected property right in continued employment is a question of state law. Garraghty v. Commonwealth of Virginia, 52 F.3d 1274, 1279 (4th Cir. 1995). Under Virginia law, continuing contract status amounts to a protected property interest. Wilkinson v. School Bd., 566 F. Supp. 766, 769 (E.D.Va. 1983). Here, Daggy has

the plaintiff “can prove no set of facts in support of his claim which would entitle him to relief.” Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). Accepting the allegations of her complaint as true, the court finds that Daggy has not raised a viable procedural due process claim.³

Liberalizing the allegations of her complaint, Daggy claims that Lunsford, Sumey and Haynes sought to abolish her position in retaliation for her involvement in departmental disputes or, alternatively, because of her age. In essence, Daggy claims that the restructuring and funding concerns cited by Lunsford as the reason for recommending the elimination of her position were pretextual.

Where a plaintiff has alleged facts which, taken as true, show that the elimination of her position was a “sham” or pretext, then she is entitled to a pretermination hearing before a neutral decisionmaker. See Dwyer v. Regan, 777 F.2d 825, 833 (2d Cir. 1985). Here, Daggy not only had the opportunity to

alleged that she was a continuing contract employee.

³In reaching its conclusion, the court has taken into consideration several facts not specifically alleged in the complaint. A court may consider facts outside the complaint without converting the motion to dismiss into a motion for summary judgment (1) where the documents are referenced in the complaint and are central to the plaintiff’s claim; and (2) where the plaintiff has himself raised the facts outside of the complaint. See Norman v. Tradewinds Airlines, Inc., 286 F. Supp. 2d 575, 581 (M.D.N.C. 2003). Here, the defendants have attached as an exhibit to their motion to dismiss the letter from Lunsford to Daggy informing her of his recommendation. Because this document is specifically referenced in the complaint, the court is permitted to consider it. See Gasner v. County of Dinwiddie, 162 F.R.D. 280, 281 (E.D.Va. 1995)(“When a plaintiff fails to introduce a pertinent document as part of his complaint, the defendant may attach the document to a motion to dismiss the complaint and the court may consider the same without converting the motion to one for summary judgment.”). In addition, the plaintiff has attached as an exhibit to her brief in opposition a copy of Daggy’s initial Charge of Discrimination, filed with the EEOC. Because the plaintiff herself has raised these facts outside of the complaint, the court may consider them. See McNair v. Lend Lease Trucks, Inc., 62 F.3d 651, 656 (4th Cir. 1995)(permitting consideration of fact not alleged in complaint without converting motion to summary judgment where plaintiff recognized fact in argument on motion to dismiss), vacated on other grounds by 95 F.3d 325, 328 n.3 (4th Cir. 1996) (expressly adopting reasoning of panel as to this point).

meet with Lunsford before the final decision was made regarding the elimination of her position, but she also had a hearing before the School Board on April 7, 2003, before the School Board voted on Lunsford's recommendation.⁴ Although Daggy alleges that Lunsford was biased, she does not allege that the School Board was not a "neutral decision-maker." She has therefore failed to state a viable procedural due process claim.

III.

The court finds that Daggy has also failed to state a viable substantive due process claim. The threshold test for analyzing an executive act is "whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the conscience.'" Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (citing County of Sacramento v. Lewis, 523 U.S. 833 (1998)). Only if the challenged conduct was "fatally arbitrary" in this sense is the court required to determine the "nature of the asserted liberty interest." Id.

The conduct of the defendants in this matter does not rise to the level of conduct that implicates substantive due process. The type of conduct that so "shocks the conscience" as to be "fatally arbitrary" is conduct that involves "abusing executive power, or employing it as an instrument of oppression." Collins v. Harker Heights, 503 U.S. 115, 126 (1992). The defendants' actions in this matter were not so outrageous, malicious, or arbitrary as to offend judicial notions of fairness or human

⁴Daggy appears to allege that her termination occurred on the day that Lunsford informed her that her position would be eliminated, and that she, therefore, did not receive notice and a pretermination hearing. This argument fails because only the School Board had the power to eliminate Daggy's position. As evidenced by his letter, Lunsford could only recommend to the Board that the Board eliminate the assistant director position. A recommendation is not a termination.

dignity. Thus, the court need not reach the second stage of the analysis, that is, whether the defendants' action violated a fundamental right.⁵ Daggy's allegations do not "shock the conscience," and she has therefore failed to raise a viable substantive due process claim.

IV.

Because she has failed to allege an actionable procedural or substantive due process deprivation, Daggy has failed to state a claim under 42 U.S.C. § 1985. To state a § 1985 claim, Daggy must allege that the defendants conspired with one another for the purpose of depriving her of equal protection of the laws, that there was an overt act in furtherance of the conspiracy, and that she was deprived of a constitutionally-protected right. See Simon v. Poe, 43 F.2d 1370, 1376 (4th Cir. 1995). The court has already determined that Daggy's complaint does not raise a viable procedural or substantive due process claim. She, therefore, has failed to allege an underlying deprivation of a constitutional right.

Additionally, Daggy cannot bring a claim under § 1985 to assert violations of the substantive rights created by the ADEA. "The language [of § 1985] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial or perhaps otherwise class-

⁵The court notes, however, that Daggy's right to continued employment with the CCCA, if any, was a right created by state law. Substantive due process protects those fundamental rights that are "deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). Daggy's asserted right does not, therefore, implicate substantive due process. See Myers v. Town of Landis, 957 F. Supp. 762, 770 (M.D.N.C. 1996) (holding that any right a public employee had to continued employment was not protected by substantive due process); McKinney v. Pate, 20 F.3d 1550, 1553 (11th Cir. 1994) (holding that deprivation of state-created property interest in employment does not give rise to a substantive due process claim).

based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (emphasis in original). Age-motivated discrimination cannot be the basis for a claim under § 1985.⁶ To the extent that she alleges deprivation of a right created by the ADEA, Daggy has failed to state a claim under § 1985.

V.

The court also finds that Sumey and Lunsford are not proper defendants under the ADEA.⁷ The ADEA limits civil liability to the employer. Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511 (4th Cir. 1994). Supervisors or those employees with authority to make "personnel decisions of a plainly delegable character" are, therefore, not appropriate defendants under the ADEA. Id. Daggy argues that Lunsford is a proper defendant because he was "vested with the power to make the decisions that led to plaintiff's loss of employment." However, making decisions regarding the termination of employment falls squarely within the category of "personnel decisions of a plainly delegable character." See, e.g., Pardasani v. Rack Room Shoes, Inc., 912 F. Supp. 187, 191

⁶The ADEA provides the exclusive remedy for age discrimination in public employment. Section 1985 does not create substantive rights, but simply "provides a remedy for violation of the rights it designates." Great American Federal Savings & Loan v. Novotny, 442 U.S. 366, 372 (1979). In Novotny the Supreme Court found that, in light of the comprehensive statutory scheme of Title VII, the "deprivation of a right created under Title VII [could] not be the basis for a cause of action under § 1985." Id. at 378. The Fourth Circuit relied on Novotny to hold that the comprehensive statutory provisions of the ADEA "evidence Congressional intent to foreclose actions for age discrimination under § 1983." Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1369 (4th Cir. 1989). Recognizing that § 1983 and § 1985 are analogous, the court is persuaded that a violation of the ADEA similarly does not give rise to a claim under § 1985. See Sherlock v. Montefiore Medical Center, 84 F.3d 522, 527 (2d Cir. 1996)(holding that an ADEA violation could not be the basis of a § 1985 claim); Taylor v. Brown, 928 F. Supp. 568, 573 (D. Md. 1995)(holding that § 1985 did not provide a cognizable cause of action for age discrimination).

⁷Daggy has conceded that Sumey is not a proper defendant.

(M.D.N.C. 1996) (finding that supervisors making “normal personnel decisions” could not be held individually liable for violations of the ADEA); Cortes v. McDonald’s Corp., 955 F. Supp. 531, 537 (E.D.N.C. 1996) (noting that the decision to terminate an employee was a personnel decision of a plainly delegable character). The court, therefore, dismisses Daggy’s ADEA claims against Sumey and Lunsford.⁸

VI.

In addition, the individual members of the Staunton City School Board are not proper defendants in this matter. “As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.” Kentucky v. Graham, 473 U.S. 159, 166 (1985). The real party in interest in this case is, therefore, the School Board, and not its members. Id. Accordingly, the court dismisses Daggy’s official capacity claims against defendants Sumey, Lunsford, Bryant, Cook, Harrington, Kier, Oakes, and Whitesell.

VII.

For the reasons stated, the court finds that Daggy has failed to state a viable procedural or substantive due process claim. Accordingly, the court dismisses her 42 U.S.C. §§ 1983 and 1985 claims. In addition, the court dismisses Daggy’s ADEA claims against defendants Sumey and Lunsford. Finally, the court dismisses Daggy’s claims against individual members of the Staunton City

⁸The defendants also claim that Sumey and Lunsford are not proper defendants because Daggy did not name them in the EEOC complaint. Because the court dismisses her ADEA claim against Sumey and Lunsford on other grounds, it need not address this argument.

School Board.

ENTER: This 13th day of December, 2004.

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

MARY MARGARET DAGGY,)	
Plaintiff,)	
)	Civil Action No. 5:04CV00023
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v.)	<u>ORDER</u>
)	
STAUNTON CITY SCHOOLS, et al.,)	By: Samuel G. Wilson
Defendants)	United States District Judge
)	

In accordance with the memorandum opinion entered on this day, it is **ORDERED** and **ADJUDGED** as follows:

(1) Plaintiff's 42 U.S.C. § 1983 claim for violation of procedural due process is **DISMISSED**;

(2) Plaintiff's 42 U.S.C. § 1983 claim for violation of substantive due process is **DISMISSED**;

(3) Plaintiff's 42 U.S.C. § 1985 claim is **DISMISSED**;

(4) Plaintiff's ADEA claims against defendants Sumey and Lunsford are **DISMISSED**; and

(5) Plaintiff's 'official capacity' claims against defendants Sumey, Lunsford, Bryant, Cook, Harrington, Kier, Oakes, and Whitesell are **DISMISSED**.

ENTER: This 13th day of December, 2004.

UNITED STATES DISTRICT JUDGE