

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

DONALD YOUNT,

Plaintiff,

v.

No. 2:09-cv-2079-STA-cgc

FEDEX EXPRESS,

Defendant.

ORDER DENYING MOTION TO AMEND COMPLAINT

Before the Court is Plaintiff Donald Yount’s Motion to Amend Complaint. (D.E. #25). The motion was referred to United States Magistrate Judge Charmiane G. Claxton for determination. (D.E. #28). For the reasons set forth herein, Plaintiff’s Motion to Amend is hereby DENIED.

I. Introduction

This case arises from a Complaint for Wrongful Termination alleging that Defendant FedEx Express (“FedEx”) discriminated against Plaintiff Donald Yount on the basis of age, race, and military service and committed unlawful retaliation in violation of the Tennessee Human Rights Act (“THRA”), Tenn. Code Ann. § 4-21-401, *et seq.*, and the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4301 *et seq.* FedEx filed a Motion to Dismiss seeking, *inter alia*, to dismiss Plaintiff’s USERRA claim for failure to state a claim upon which relief may be granted. Plaintiff’s response “concedes his USERRA claim” but states that he has filed the instant Motion to Amend Complaint “to address the veteran’s discrimination claim.” Pl.’s Resp. to Mot. to Dismiss at 4. In the Motion to Amend, Plaintiff seeks to add a claim for breach of

contract based upon FedEx's alleged policy against veteran's discrimination, which Plaintiff contends amounts to a contractual obligation. FedEx responds that Plaintiff's proposed amendment does not set forth sufficient factual basis to support a claim for breach of contract, and thus FedEx argues that the proposed amendment should be denied as futile.

II. Analysis

Under Rule 15 of the Federal Rules of Civil Procedure, a party may amend its pleading with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* However, "[i]t is well settled that the district court may deny a motion for leave to amend a complaint if such complaint, as amended, could not withstand a motion to dismiss." See Neighborhood Development Corp. v. Advisory Council on Historic Preservation, Dept. of Housing and Urban Development, City of Louisville, 632 F.2d 21, 23 (6th Cir. 1980); see also Valley Products Co., Inc. v. Landmark, 877 F. Supp. 1087, 1094 (W.D. Tenn. 1994) ("The court denies plaintiffs' motions to amend their complaints on the grounds that such amendments would be futile."); Carrier Corp v. Piper, 460 F. Supp. 2d 853, 860 (W.D. Tenn. 2006) ("[B]ecause the proposed amendment would not survive a motion to dismiss, amending the complaint would be futile.")

The United States Supreme Court has promulgated the following requirements:

A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility

and plausibility of entitlement to relief. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citations and internal quotations omitted). .

Under Tennessee law, a plaintiff must establish three factors to maintain an action for breach of contract: (1) the existence of an enforceable contract; (2) non-performance of the contract amounting to a breach of that contract; and (3) damages flowing from the defendant's nonperformance. Ingram v. Cedant Mobility Financial Corp., 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006). Employers are not presumed to be contractually bound by employment policies unless there is express language in the policy to the contrary. See Rose v. Tipton County Public Works Dept., 953 S.W.2d 690-92 (Tenn. Ct. App. 1997). Thus, a policy can only become part of an employment contract if it contains "specific language showing the employer's intent to be bound by the . . . provisions." King v. TFE, Inc., 15 S.W.3d 457, 461 (Tenn. Ct. App. 1999).

In this case, the initial Complaint alleges that "FedEx supervisors specifically stated that he did not want ex-military individuals working for him." Compl. ¶ 47.¹ Further, the proposed amendment sets forth the following allegations: (1) FedEx has written policies against discrimination against veterans; (2) Plaintiff is a veteran of the United States military; (3) FedEx's policies create a contractual obligation to Plaintiff, whereby FedEx is not allowed to discriminate based upon veteran status; (4) Plaintiff agreed to the policies and procedures of FedEx and provided years of diligent and loyal service as consideration for the obligation not to discriminate against him based upon veteran status; (5) FedEx terminated Plaintiff based upon his veteran status; (6)

¹ In response to FedEx Express's Motion to Dismiss, Plaintiff concedes that his USERRA claim must be dismissed. However, the Court will consider the factual allegations set forth in the section of the initial Complaint and Proposed Amended Complaint containing the USERRA claim, Proposed Am. Compl. ¶¶ 44-49, as Plaintiff's proposed breach of contract claim states that the allegations of the preceding paragraphs are "incorporated herein by reference as if fully set forth herein." Proposed Am. Compl. ¶ 50.

Defendant breached the employment contract by terminating Plaintiff based on his veteran status; (7) Plaintiff has suffered and will continue to suffer loss of earnings and fringe benefits and compensatory damages in the form of future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses as a result of FedEx's breach of contract. Proposed Am. Compl. ¶¶ 51-56.

Upon review of the proposed amendment, the Court finds that a substantial portion of the allegations are conclusory statements reciting the elements of a cause of action for breach of contract. See Proposed Am. Compl. ¶¶ 55-56. Under Twombly and Iqbal, such conclusory allegations are insufficient to survive a motion to dismiss. Notwithstanding the conclusory statements, the sole factual allegations contained as to the breach of contract claim are that FedEx has written policies against veteran discrimination, that Plaintiff is a veteran, that FedEx terminated his employment, and that a FedEx supervisor stated that he did not want ex-military individuals working for him. Id. While these allegations may be pertinent to establishing whether a contract was breached and whether damages resulted, there are no allegations in the proposed amendment that support the primary element of a breach of contract claim—that a valid contract containing the alleged legal obligations exists. See Ingram, 215 S.W.3d at 374. Namely, Plaintiff has not set forth any specific FedEx policy regarding discrimination against veterans or any language in a policy that expressly creates a contractual obligation to Plaintiff, both of which are required by Tennessee law to maintain a breach of contract action based upon an employer's alleged policy violation.

Without such a factual basis asserting that FedEx had contractual obligations to Plaintiff, Plaintiff has failed to meet his burden under Twombly and Iqbal to allow the Court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129

S.Ct. 1937, 1950 (2009). Therefore, the Court finds that the proposed amendment would be futile and would not survive a motion to dismiss for failure to state a claim upon which relief may be granted. Accordingly, Plaintiff's Motion to Amend is hereby DENIED.

III. Conclusion

For the reasons set forth herein, Plaintiff's Motion to Amend is hereby DENIED.

IT IS SO ORDERED this 27th day of October, 2009.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE