No. 15-4208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL R. GAMBLE,

Plaintiff-Appellant,

v.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,

Defendant-Appellee.

ORDER

Before: GUY, ROGERS, and DONALD, Circuit Judges.

Pro se litigant Michael R. Gamble petitions the court to rehear our June 2, 2017 order affirming the dismissal of his civil action. We have reviewed the petition for rehearing and conclude that we did not overlook or misapprehend any point of law or fact when we entered our previous order. *See* Fed. R. App. P. 40(a)(2).

Accordingly, Gamble's petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 15-4208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL R. GAMBLE,

Plaintiff-Appellant,

v.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: GUY, ROGERS, and DONALD, Circuit Judges.

Michael R. Gamble, a pro se litigant from Ohio, appeals the district court's judgment dismissing his complaint against his former employer, the Greater Cleveland Regional Transit Authority ("Transit Authority"), for allegedly terminating his employment in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. The Transit Authority also moves to strike a letter that Gamble filed in this court. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Gamble was a bus driver for the Transit Authority, and their relationship was governed by a collective bargaining agreement ("CBA"). In April 2011, Gamble injured his knee getting out of the driver's seat of the bus. The Ohio Bureau of Workers' Compensation approved Gamble's request for surgery, and the Ohio Industrial Commission affirmed that decision after the Transit Authority appealed. Gamble had knee surgery in November 2011. In May 2012, the Transit Authority notified him that his circumstances met the conditions for a terminable Long-

Term Absence under Section 7.0 of the CBA, as Gamble had been unable to work on a regular basis for more than six months due to his injury. Gamble received notice of, and participated in, a pre-termination hearing, after which the Transit Authority fired him. He did not file a grievance, as the CBA provides for. Instead, he pursued a charge with the Equal Employment Opportunity Commission, in which he alleged that the Transit Authority's firing amounted to discrimination on the basis of his disability. The EEOC dismissed his charge and issued a right to sue letter.

Gamble then filed suit in federal court. His complaint alleged that the Transit Authority violated the ADA by intentionally misclassifying his on-the-job injury and alleged disability—which would toll the six-month-absence termination period under the CBA—as a non-industrial medical condition in order to fire him. Gamble sought damages and reinstatement of his job and related benefits.

The Transit Authority moved to dismiss Gamble's complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or for failure to state a claim upon which relief could be granted under Rule 12(b)(6). The district court granted the motion. *Gamble v. Greater Cleveland Reg'l Transit Auth.*, No. 1:15 CV 1219, 2015 WL 5782073 (N.D. Ohio Sept. 30, 2015). The court determined that it lacked jurisdiction because Gamble's suit alleged a violation of the CBA, which is merely an issue of state law. Alternatively, the district court ruled that Gamble's complaint failed to state a claim under the ADA, because his allegations about his injury could not establish that he was "disabled" under the ADA, which requires a long-term impairment that limits a major life activity. *See* 42 U.S.C. § 12102(1)(A).

On appeal, Gamble argues that the federal court had jurisdiction because his complaint stated a valid claim for discrimination under the ADA. In fact, there are two ways of construing Gamble's complaint: as alleging a breach of the CBA due to the misclassification of his injury, or as alleging a free-standing claim of discrimination under the ADA not requiring interpretation of the CBA. The first claim, however, cannot support federal jurisdiction, and while the second claim could, Gamble has nevertheless failed to allege enough facts to state a proper claim for

relief under the ADA. Either way, then, the district court properly dismissed Gamble's complaint.

Gamble may be claiming that the Transit Authority breached its contract with him by misclassifying his injury under the CBA. But if so, his claim cannot support federal jurisdiction. In most cases, the Labor Management Relations Act ("LMRA") grants federal jurisdiction over suits alleging that an employer has breached a CBA. 29 U.S.C. § 185(a). But the definition of "employer" under that section does not include a "State or political subdivision thereof." 29 U.S.C. § 152(2). Therefore, when an employee sues a state for breaching a CBA, it is a matter of state law, and federal jurisdiction is absent. Here the district court correctly determined that the Transit Authority was a political subdivision of the state and, thus, was exempt from the LMRA. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 272 (6th Cir. 1990). As a result, any claim that the Transit Authority breached the CBA with Gamble must arise under state, not federal, law. If Gamble is claiming, then, that the Transit Authority breached the CBA by misclassifying his injury, resulting in his termination under the Long-Term Absences provision, his suit belongs not in federal but in state court.

Gamble might not have been asserting a claim based on the CBA, however. He might instead be alleging a cause of action arising directly under the ADA, one that would support federal jurisdiction over his suit, *see Watts v. United Parcel Serv., Inc.*, 701 F.3d 188, 192 (6th Cir. 2012). But even if that is the case, Gamble's complaint is still subject to dismissal for having failed to state a claim upon which relief can be granted. Gamble alleged that he was forced to stop working when he injured his knee, which, along with the resulting surgery, kept him from working for at least six months, and that the Transit Authority terminated him because of his six-month absence. Assuming generously that Gamble alleged enough to claim a disability under the generous standard of 42 U.S.C. § 12102(1)(A), he has still failed to allege any facts that would speak to another basic element for a cause of action under the ADA: that the Transit Authority harbored an "animus toward the disabled" that was a but-for cause of his termination, *Gohl v. Livonia Pub. Sch. Sch. Dist.*, 836 F.3d 672, 682 (6th Cir. 2016). Even

allowing for the laxer requirements for pleading a prima facie case at this stage, *see Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009), all Gamble alleges in his complaint is that he *believes* that he was fired because of his disability, *see* Doc. 1, PageID# 4. An allegation of discriminatory intent this conclusory, however, is not enough to establish entitlement to relief. *See HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012). Thus, no matter how Gamble's complaint is read, the district court properly dismissed it.

Finally, the Transit Authority moves to strike a letter filed in this court by Gamble, in which he accused its attorney of several improprieties. That motion will be granted, and we caution Gamble that he should file only briefs containing arguments about his case or motions for the court to resolve.

Accordingly, we affirm the district court's judgment and grant the Transit Authority's motion to strike Gamble's correspondence from the docket.

Bernice B. Donald, dissenting. I dissent because I believe Gamble has stated a cause of action under the ADA. Gamble's complaint alleges that the Transit Authority terminated him because he was not able to "perform [his] regular position of employment on a regular basis . . . as a result of a non-industrial medical condition," Compl. 3, ECF No. 1; that it "intentionally misclassified [his] disability as a long term absence," *id.*; and that he "believe[s] that [he] was discharged because of [his] disability" in violation of the ADA, *id.* at 4. Particularly when construing these statements liberally, *see Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), I believe Gamble's complaint sufficiently alleged that the Transit Authority discriminated against him "on the basis of disability" as required under the ADA. *See Michael v. City of Troy Police Dep't*, 808 F.3d 304, 307 (6th Cir. 2015) (quoting 42 U.S.C. § 12112(a)). These facts are sufficient to allege that Gamble would not have been terminated had he not taken time off for his injury. *See Demyanovich v. Cadon Plating & Coatings, LLC*, 747 F.3d 419, 433 (6th Cir. 2014) (concluding that the plaintiff's claim survived summary judgment where he established his disability was a but-for cause of his termination because "[h]e would not have been terminated had he not asked about taking leave to treat his medical conditions"). While the majority is correct that, at the summary judgment stage, Gamble must come up with "sufficiently 'significant' evidence of animus toward the disabled that is a but-for cause of the discriminatory behavior," *Gohl v. Livonia Pub. Schs. Sch. Dist.*, 836 F.3d 672, 682 (6th Cir. 2016), I believe Gamble has pled sufficient facts to state a plausible claim for relief at the pleading stage, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, I dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Michael Gamble,	)	**CASE NO. 1:15 CV 1219**
	)	
Plaintiff,	)	**JUDGE PATRICIA A. GAUGHAN**
	)	
v.	)	
	)	**Judgment Entry**
Greater Cleveland Regional Transit Authority,	)	
	)	
Defendants.	)	

This Court, having issued its Memorandum of Opinion and Order granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Dismiss for Failure to State a Claim (Doc. 11), hereby enters judgment for defendant.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 9/30/15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Michael Gamble,	)	**CASE NO. 1:15 CV 1219**
	)	
Plaintiff,	)	**JUDGE PATRICIA A. GAUGHAN**
	)	
vs.	)	
	)	
Greater Cleveland Regional Transit Authority,	)	**Memorandum of Opinion and Order**
	)	
Defendant.	)	

Introduction

This matter is before the Court upon Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Dismiss for Failure to State a Claim (Doc. 11). For the following reasons, the motion is GRANTED.

Facts

Plaintiff Michael Gamble filed his *pro se* Complaint against defendant Greater Cleveland Regional Transit Authority (GCRTA) asserting one claim that he was terminated from his employment in violation of the Americans with Disabilities Act (ADA). The

Complaint alleges the following.[1]

Plaintiff was employed by defendant since 2000 as a part-time bus operator. On April 3, 2011, plaintiff suffered a knee injury during the course of his employment. On November 4, 2011, plaintiff left work as he was scheduled for knee surgery on November 11, 2011. By letter of May 14, 2012, defendant notified plaintiff:

> Under the GCRTA's Absence Policy, Section 7.0, titled 'Long-Term Absences', the GCRTA has the right to terminate employment should an absence exceed six (6) months. You were expected to return to full duty on or before May 5, 2012. You were absent from November 5, 2011 through the present date. Therefore, your absence exceeded six months on May 5, 2012.

Plaintiff was also notified that a pre-termination hearing was scheduled for May 18, 2012, and plaintiff would have the opportunity to present his account of the circumstances and/or additional medical evidence. (Doc. 11 Ex. A) Plaintiff participated in the pre-termination hearing where he states that defendant misclassified his injury as a non-industrial medical condition.

By letter of May 22, 2012, defendant notified plaintiff that he had been terminated as of that date, "in accordance with [GCRTA's] Attendance Policy, Section 7.0, 'Long Term Absences'," based on the fact that plaintiff did not return to work within the six month time frame of November 4, 2011 through May 5, 2012. The termination was classified as an "Administrative Separation Due to Extended Absence" as permitted under Section 7.0, Long Term Absences. (Doc. 11 Ex. C)

Plaintiff filed a charge of discrimination with the EEOC. He thereafter filed this

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[1] The Court has also considered facts from documents referred to in the Complaint. The documents are submitted by defendant.

Complaint alleging that he was discharged because of his disability in violation of the ADA. This matter is now before the Court upon Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, Motion to Dismiss for Failure to State a Claim.

Standard of Review

Fed.R.Civ.P. 12(b)(1)

"When a Rule 12(b)(1) motion is a factual attack, as opposed to facial, on subject matter jurisdiction, 'no presumptive truthfulness applies to the allegations' and "the district court must weigh the conflicting evidence to arrive at the factual predicate that subject matter does or does not exist." *U.S. v. Chattanooga-Hamilton County Hosp. Authority*, 782 F.3d 260 (6th Cir. 2015) (citing Gentek Bldg. Prods., Inc. v. Sherwin–Williams Co., 491 F.3d 320, 330 (6th Cir.2007).

Fed.R.Civ.P. 12(b)(6)

"Dismissal is appropriate when a plaintiff fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). We assume the factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff." *Comtide Holdings, LLC v. Booth Creek Management Corp.*, 2009 WL 1884445 (6th Cir. July 2, 2009) (citing *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir.2008)). In construing the complaint in the light most favorable to the non-moving party, "the court does not accept the bare assertion of legal conclusions as enough, nor does it accept as true unwarranted factual inferences." *Gritton v. Disponett,* 2009 WL 1505256 (6th Cir. May 27, 2009) (citing *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997). As outlined by the Sixth Circuit:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests."*Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. A plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Keys v. Humana, Inc., 684 F.3d 605, 608 (6th Cir.2012). Thus, *Twombly* and *Iqbal* require that the complaint contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face based on factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 570; *Iqbal,* 556 U.S. at 678. The complaint must contain "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.

Discussion

The Court initially addresses subject matter jurisdiction. Defendant argues that the Court lacks jurisdiction because an arbitrator's finding that the collective bargaining agreement (CBA) was breached is a condition precedent to a federal discrimination claim based on an allegation that the breach itself was the discriminatory act. For the following reasons, this Court agrees.

Plaintiff's Complaint alleges that he was hired in 2000 as an at-will employee. But, by letter of March 14, 2011, defendant offered plaintiff employment as a part-time operator wherein he was informed of his bargaining unit status covered by the CBA with the Amalgamated Transit Union, Local 268 (the Union). (Doc. 11 Ex. E) The CBA between the

Union and GCRTA governed the terms and conditions of plaintiff's employment. (*Id.*, Ex. F) Under the CBA, plaintiff was required to submit any dispute, claim, or grievance to binding arbitration. (*Id.*) As an employee of GCRTA, a political subdivision, plaintiff's employment was governed by Ohio Revised Code § 4117 which states in part,

> If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.

O.R.C. § 4117(A).

Consequently, it has been held that political subdivisions such as GCRTA are exempt from federal jurisdiction in an action brought by a union employee seeking relief under a collective bargaining agreement. *Roulhac v. Southwest Regional Transit Authority*, 2008 WL 920354 (S.D.Ohio 2008). Plaintiff is ostensibly not bringing a challenge to the CBA, but defendant asserts that he should not be permitted to skirt O.R.C. § 4117 by converting a state law contract claim into a federal cause of action simply by alleging that a breach was discriminatory. This Court agrees. Plaintiff's Complaint alleges that defendant misclassified his injury as a non-industrial medical condition so that defendant could appropriately terminate plaintiff under its Attendance Policy with its Long Term Absences provision. Therefore, interpretation of the Attendance Policy is dispositive to plaintiff's discrimination claim. Accordingly, plaintiff's claim is actually a state law contract claim over which this Court lacks jurisdiction.

Even assuming the Court has subject matter jurisdiction over the Complaint, it fails to state a claim. In order to establish a prima facie case of discrimination under the ADA, a

plaintiff must show that "(1) [he] is disabled; (2)[he] is otherwise qualified for the position with or without reasonable accommodation; (3)[he] suffered an adverse employment decision; (4)[his] employer knew or had reason to know of [his] disability; and (5)[his] position remained open." Azzam v. Baptist Healthcare Affiliates, Inc., 855 F.Supp.2d 653, 658 (W.D.Ky.2012) (quoting *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 449 (6th Cir.1999)). Although the plaintiff need not plead a prima facie case, he must, at a minimum, allege facts from which an inference can be drawn that he was disabled under the ADA's definition. A plaintiff's failure "to identify, even in general terms, his disability and fail[ure] to identify a specific medical condition for which he was regarded as disabled" does not meet the threshold pleading requirements. *Thomas v. Dana Commercial Vehicle Products*, LLC, 2014 WL 1329948 (W.D.Ky. April 1, 2014). A complaint alleging an ADA violation is properly dismissed for failure to identify a disability. *Coleman v. Ford Motor Co.*, 2005 WL 1459549 (N.D.Ohio June 17, 2005)

Plaintiff's Complaint merely alleges that he suffered a knee injury which required surgery and his absence from work for more than six months. These allegations do not support an inference that plaintiff had a disability under the ADA. Furthermore, although not mentioned in his Complaint, plaintiff's brief makes clear that his claim is based on GCRTA's failure to accommodate him in January 2013 by returning him to work although his physician had "cleared" him to do so. Plaintiff had already been terminated in May 2012 and, therefore, was no longer an employee to which defendant owed a duty under the ADA.

For these reasons, the Complaint fails to state a claim.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 9/30/15