Appendices

Appendix C

FILED

September 15, 2020

OFFICE OF APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

A19-1790

Benjamin Mario Soto,

Petitioner,

vs.

AFSCME Union Council 5 Local 12181,

Respondent,

Minnesota Department of Human Services,

Respondent.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The motion of petitioner Benjamin Mario Soto for leave to proceed in forma pauperis be, and the same is, granted.

2. The motion of petitioner Benjamin Mario Soto to correct the petition for review filed on July 29, 2020 be, and the same is, granted. The corrected pages to the petition for review are accepted as filed as of August 24, 2020.

3. The petition of Benjamin Mario Soto for further review be, and the same is, denied.

Dated: September 15, 2020

BY THE COURT:

Lorie S. Gildea
Chief Justice

Appendix A

STATE OF MINNESOTA

IN COURT OF APPEALS

A19-1790

Benjamin Mario Soto,

Appellant,

vs.

AFSCME Union Council 5 Local 12181,

Respondent,

Minnesota Department of Human Services,

Respondent.

ORDER OPINION

Ramsey County District Court
File No. 62-CV-19-3770

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Kirk, Judge.*

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. Pro se appellant Benjamin Mario Soto challenges a district court order dismissing his claims against respondents AFSCME Union Council 5 Local 12181[1] (union) and Minnesota Department of Human Services (DHS), after he was non-certified for employment with DHS during his six-month probationary period.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] The order states that the union is misidentified as "AFSCME Union Council 5 Local 12181" and is properly identified as Local "2181."

2. We review de novo a district court's decision to dismiss a complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 36 (Minn. App. 2012), *review denied* (Minn. June 19, 2012). "When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) . . . , the question before [an appellate] court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). To be legally sufficient, a complaint must include more than just legal conclusions. *Id.* at 235. In evaluating a motion to dismiss for failure to state a claim, the district court is limited to "consider[ing] only the facts alleged in the complaint, accepting those facts as true, and . . . constru[ing] all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Documents that are central to the parties' claims and referenced in the complaint, such as contracts, are deemed included within the pleadings. *In re Hennepin Cty. Recycling Bond. Litig.*, 540 N.W.2d 494, 497 (Minn. 1995).

3. Soto's due-process claims under the Fifth Amendment and Fourteenth Amendment fail as a matter of law. Because DHS is a state agency and the Fifth Amendment applies only to "the federal government or federal actions," Soto has no cause of action. Under the Fifth Amendment, a "federal action" is necessary "before there is any deprivation of due process." *Junior Chamber of Comm. of Kansas City, Mo. v. Missouri State Jr. Chamber of Comm.*, 508 F.2d 1031, 1033 (8th Cir. 1975) (quotation omitted). And because Soto has no "legitimate claim of entitlement" with DHS amounting to a

"property interest," he is not subject to due-process protections under the Fourteenth Amendment. *Barnes v. City of Omaha*, 574 F.3d 1003, 1006 (8th Cir. 2009).

4. Soto's 42 U.S.C. § 1983 claim also fails as a matter of law. "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S. Ct. 2304, 2309 (1989). "[N]either a state nor its employees acting in their official capacity may be sued under 42 U.S.C. § 1983." *Carter v. Peace Officers Standards and Training Bd.*, 558 N.W.2d 267, 273 (Minn. App. 1997). Soto's complaint names only DHS as a defendant and therefore fails.

5. Soto has alleged insufficient facts to support a failure-to-accommodate claim under the Americans with Disabilities Act (ADA), and he has not exhausted his administrative remedies. Soto does not allege that he was discriminated against because he has a disability or that he sought any accommodation for a disability while employed by DHS. *See Ballard v. Rubin,* 284 F.3d 957, 960 (8th Cir. 2002) (setting forth requirements of ADA accommodation claim). In addition, Soto failed to assert that he exhausted his administrative remedies, a prerequisite for bringing an ADA accommodation claim. *See McInerney v. Rensselaer Polytechnic Inst.,* 505 F.3d 135, 138 (2nd Cir. 2007) (noting that accommodation claims brought under Title I of the ADA must satisfy statutory prerequisite to exhaust administrative remedies); *Randolph v. Rodgers*, 253 F.3d 342, 347 n.8 (8th Cir. 2001) ("Title I of the ADA . . . require[s] exhaustion of administrative remedies").

probationary employee shall notify the employee in writing with a copy to the Local Union of the reasons for the non-certification. The Union shall have the right to challenge such reasons through the third step of the grievance procedure." Soto offers no facts to suggest that the union did not represent him in accordance with the collective-bargaining agreement because he was represented through the third step of the grievance process. *See Sonenstahl v. L.E.L.S., Inc*[.], 372 N.W.2d 1, 5 (Minn. App. 1985) (stating that the duty of fair representation is breached by a union when its conduct is "arbitrary, discriminatory or in bad faith," as "evidenced by fraud, deceitful action or dishonest conduct") (quotations omitted)). Soto's fair-representation claim is also untimely, because he did not assert it within 90 days as required by law. *See Allen v. Hennepin Cty.*, 680 N.W.2d 560, 563-65 (Minn. App. 2004) (recognizing a 90-day statute of limitations for fair-representation claims brought under collective-bargaining agreement for public employees), *review denied* (Minn. Aug. 17, 2004).

8. On appeal, Soto may not allege new claims of judicial bias and may not add new defendants. *See Bodah*, 663 N.W.2d at 553 (limiting consideration of motion to dismiss for failure to state a claim to "only the facts alleged in the complaint"); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating, "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.").

9. Soto's reply brief was docketed after the date the appeal was set for nonoral consideration by this court. We have fully considered all of the parties' submissions, including Soto's reply brief, in reaching our decision.

IT IS HEREBY ORDERED:

1. The district court's order is affirmed.

2. Pursuant to Minn. R. Civ. App. P. 136.01, subd. 1(b), this order opinion will not be published and shall not be cited as precedent except as law of the case, res judicata, or collateral estoppel.

Dated: June 30, 2020

BY THE COURT

/s/
Judge Michael Kirk

Appendix B

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

CASE TYPE: Employment

Honorable Leonardo Castro
Court File No.: 62-CV-19-3770

Benjamin Mario Soto,

Plaintiff,

vs.

AFSCME Union Council 5 Local 12181, and Minnesota Department of Human Services,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

MOTION TO DISMISS

The above-entitled matter came on for hearing on August 16, 2019, before the Honorable Leonardo Castro, Judge of Ramsey County District Court, on Defendants' (AFSCME Union Council 5 Local 12181 ("AFSCME") and Minnesota Department of Human Services ("DHS")) Minn. R. Civ. P. 12.02(e) Motions to Dismiss Plaintiff's Complaint. Minnesota Solicitor General Liz Kramer and Minnesota Assistant Attorney General Hillary A. Taylor appeared on behalf of DHS. Joshua D. Hegarty, *Esq.*, and Gregg M. Corwin, *Esq.*, appeared on behalf of AFSCME. Plaintiff was present and appeared *pro se*.

Based upon all the files, pleadings, records, proceedings herein, and the arguments and submissions of the parties, the Court makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Defendant DHS is a department of the State government of Minnesota with independent authority over its own employees. Minn. Stat. § 15.01 (establishing that the DHS is

a department of state government); Minn. Stat. § 15.06, Subd. 6(2) (providing the commissioner of each department with the authority to "appoint all subordinate employees and to prescribe their duties"); Minn. Stat. § 245.03 (establishing DHS).

2. Defendant AFSCME is a labor union and a party to a collective bargaining agreement ("CBA") with the State of Minnesota which determines the terms and conditions of employment for state employees in bargaining units covered by the CBA.[1]

3. Plaintiff Benjamin Mario Soto filed his Summons and Complaint against Defendants on May 23, 2019. Plaintiff is a former probationary employee of DHS, and was non-certified[2] on February 14, 2019.

4. Plaintiff began his position as an Office and Admin Specialist Intermediate through a pre-probationary appointment in DHS's Health Care Eligibility Operations division as a part of the Connect 700[3] ("C700") Program on July 25, 2018.

5. Plaintiff reviewed and signed an "Acknowledgement of At Will Employment" prior to starting at DHS on July 13, 2018.

6. After four months, Plaintiff's pre-probationary C700 position was converted to a regular probationary appointment with the same job position and rate of pay, effective on November 21, 2018, with the expected end date of his six-month probationary period on May 21, 2019, per the AFSCME CBA.

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[1] Defendant AFSCME appears to be misidentified in the caption of this matter as AFSCME Union Council 5 Local 12181. The correct AFSCME Local should be 2181.

[2] The term non-certified refers DHS's decision not to offer Plaintiff a permanent position due to alleged job performance issues prior to the end of his probationary period.

[3] Connect 700 allows eligible individuals with disabilities the opportunity to demonstrate their ability to perform a specific position for up to 700 hours on the job. It is pre-probationary trial work program that undertakes a non-competitive selection process for individuals with certain disabilities seeking employment in the classified service of state government. https://mn.gov/mmb/careers/diverse-workforce/people-with-disabilities/connect700/

7. On February 14, 2019, DHS notified Plaintiff that it would not be certifying or converting his position to permanent status due to performance issues. Plaintiff's non-certification occurred before he completed the probationary period and while he was still under at-will employment. Plaintiff's official separation date from DHS was February 14, 2019.

8. In Plaintiff's February 14, 2019 non-certification letter, DHS informed Plaintiff that his non-certification was grievable through the third step in the grievance process, as identified in the CBA.

9. The CBA delineates AFSCME's 4-step grievance process, stating that the third step is a meeting with the employer, employee, and union representatives, and that arbitration of the grievance is the fourth step, which is inapplicable here because it applies to permanent employees, and not temporary, at-will employees.

10. Plaintiff grieved his non-certification through the third step, and additionally requested that AFSCME take his case to arbitration. On February 27, 2019, Plaintiff and representatives of AFSCME met with representatives of DHS to hold a third-step grievance meeting regarding Plaintiffs non-certification and removal from employment. At this meeting, AFSCME representatives argued on Plaintiffs behalf that he should not be removed from employment. Plaintiff also had the opportunity to speak on his own behalf at this grievance meeting about why he should not have been removed from employment and did in fact do so. Plaintiff contacted AFSCME on April 29, 2019, and asked why his grievance would not be taken to arbitration. In response, he was informed that his employment was "at will" due to being probationary and that the grievance would not be arbitrated. AFSCME informed Plaintiff that the fourth step was not an applicable grievance step under the CBA.

11. Plaintiff's claims all relate to his non-certification. He includes in his Complaint and attachments various vague and broad allegations against DHS about false statements, lack of accommodations, and violating his rights under the AFSCME collective bargaining agreement by non-certifying him without "just cause," even though he was a probationary employee. Plaintiff also alleges that AFSCME and its union representative misrepresented him through the process of his non-certification and separation from DHS.

12. Plaintiff is *pro se*. His Complaint and supporting materials do not delineate specific counts against Defendants. It appears that Plaintiff asserts against DHS a federal procedural due process claim and an Americans with Disabilities Act ("ADA") failure-to-accommodate claim. Plaintiff also appears to bring a misrepresentation claim against AFSCME.

13. Defendants moved to dismiss Plaintiff's Complaint on the grounds that Plaintiff's Complaint failed to state a claim upon which relief could be granted. Defendants supported their motion with briefing pursuant to Minnesota Rule of General Practice 115.

CONCLUSIONS OF LAW

I. Motion to Dismiss Standard

1. Where a complaint fails to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000).

2. Under Minnesota Rule of Civil Procedure Rule 12.02(e), a party may move to dismiss a claim in lieu of filing a formal answer to test the claim's legal sufficiency. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Consequently, only documents embraced by the pleadings may be considered. *In re Hennepin Co. Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Documents that are central to the parties' claims and referenced in the complaint

or counterclaim are embraced by the pleadings. *Id.* at 497 ("[t]he court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged").

3. When considering a motion to dismiss, the court must accept as true the factual allegations contained in the pleading, construing all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). However, the court is not bound by any legal conclusions asserted in the pleading. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A sufficient complaint "requires more than labels and conclusions." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Id.* (internal quotations and citation omitted). A district court may only dismiss a complaint under Rule 12.02(e) if "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Walsh v. U.S. Bank N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quotation omitted).

4. Minnesota Rule of Civil Procedure Rule 8.01 requires every complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Applying the Rule 8 standard, the Supreme Court stated in *Mumm v. Mornson* that "[t]he complaint should put the defendant on notice of the claims against him." 708 N.W.2d 475, 481 (Minn. 2006).

II. Plaintiff's Claims Against DHS

A. Procedural Due Process

5. Plaintiff alleges that DHS violated his procedural due process rights under the Fifth Amendment of the U.S. Constitution. Plaintiff's Fifth Amendment claims must be dismissed because DHS is a state agency, and the Fifth Amendment only applies to federal actors. *Barnes v. City of Omaha*, 574 F.3d 1003, 1005 n.2 (8th Cir. 2009) ("Fifth Amendment's Due Process Clause applies only to the federal government or federal actions[.]"); *State v. Pluth*, 195 N.W. 789, 790 (Minn. 1923).

6. Plaintiff does not refer to the Fourteenth Amendment in his Complaint. However, to the extent his Complaint appears to allege that DHS violated his due process rights under the Fourteenth Amendment, he has failed to state a procedural due process claim. Plaintiff was an at-will, probationary employee without any constitutionally protected property interest in continued employment with DHS.

7. To bring a procedural due process claim, Plaintiff must first have a protected property or liberty interest affected by the alleged violation. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997); *Phillips v. State*, 725 N.W.2d 778, 782 (Minn. App. 2007); *see, e.g., McIntire v. State*, 458 N.W.2d 714, 718 (Minn. App. 1990) (dismissing due process claim when plaintiff failed to "demonstrate an independent property interest") (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Only those interests to which an individual has a "legitimate claim of entitlement" are subject to due process protections. *Roth*, 408 U.S. at 577; *Phillips*, 725 N.W.2d at 783. A "legitimate claim of entitlement" stems from state law or an independent source like a contract which is sufficient to establish "mutual explicit understandings" of entitlement. *Barnes*, 574 F.3d at 1006 (internal quotation marks and citation omitted).

8. Here, state law and the AFSCME CBA determine that Plaintiff did not have a protected property interest in continued employment. State law provides that "[t]here is no presumption of continued employment during a probationary period. Terminations or demotions may be made at any time during the probationary period subject to the provisions of this section and collective bargaining agreements[.]" Minn. Stat. § 43A.16, Subd. 2. And nothing in the CBA altered Plaintiff's status as a purely at-will probationary employee, although the CBA allows probationary employees certain procedural processes to grieve non-certification.[4] Plaintiff had no protected property interest in continued employment; thus, Plaintiff's procedural due process claim fails. *See, e.g.*, *Willis v. State*, No. C5-96-2289, 1997 WL 193894, at *1 (Minn. App. Apr. 22, 1997) (dismissing procedural due process claim because plaintiff as a probationary employee "had no protected property interest in continued employment").

9. Plaintiff argues that he had a property interest in continued employment because he was a "just cause" probationary employee by virtue of moving from the C700 pre-probationary status to probationary status for his position. However, "[t]o have a property interest in a benefit, a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim to it." *Roth*, 408 U.S. at 577. Plaintiff's attachment to his Complaint clearly shows that his conversion from C700 pre-probationary status to probationary status on November 21, 2018, was considered at-will and "part of the selection process" to determine whether he would be able to perform in the position sufficient to attain permanent employment status, pursuant to the applicable AFSCME CBA.

[4] Article 16, Section 5 of the AFSCME CBA states: "The appointing authority shall not discharge any permanent employee without just cause." There is no presumption of continued employment for probationary employees in the CBA.

10. Plaintiff also has no direct cause of action under the Fifth or Fourteenth Amendments. Plaintiff's federal constitutional claims are dismissed to the extent he is not asserting them under § 1983. While an action may be brought under § 1983 to "'vindicate rights conferred by the Constitution,' a party cannot assert a direct cause of action for a constitutional violation." *Sanvee v. Hennepin Cty. Human Servs.*, No. CIV. 10-527 RHK/JSM, 2012 WL 4128388, at *14 (D. Minn. Aug. 13, 2012) (citing *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000)); *see Wax'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000).

B. 42 U.S.C. § 1983

11. Plaintiff's federal constitutional claims against DHS fail as a matter of law because a state and its agencies are not "persons" subject to suit under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Carter v. Peace Officers Standards & Training Bd.*, 558 N.W.2d 267, 273 (Minn. App. 1997).

12. To the extent Plaintiff is seeking damages under the Minnesota Constitution, those claims must also be dismissed because stating a claim under § 1983 only involves alleged violations "under the federal constitution or a federal statute." *Johnson v. Morris*, 453 N.W.2d 31, 34 (Minn. 1990). Moreover, Minnesota does not have a § 1983 equivalent to seek damages for alleged constitutional violations. *See Mitchell v. Steffen*, 487 N.W.2d 896, 905 (Minn. App. 1992); *Bird v. State, Dep't of Pub. Safety*, 375 N.W.2d 36, 40 (Minn. App. 1985). Nor does the Minnesota Constitution provide a private cause of action for damages. *See Riehm v. Engelking*, 538 F.3d 952, 969 (8th Cir. 2008); *Bird*, 375 N.W.2d at 40. To the extent Plaintiff alleges any claims for damages under § 1983 for state constitutional or statutory violations, those claims should be dismissed.[5]

[5] Plaintiff cites a variety of sources as a basis for his claims, however, none are applicable to this case. Plaintiff has no independent cause of action or viable claim under Minn. Const. Art. I, Sec. 8, or the Fifth Amendment or Article VI of the United States Constitution. *See Hoeft v. Hennepin Cty.*, 754 N.W.2d 717, 726 (Minn. App. 2008) (Minn.

C. ADA Failure-to-Accommodate

13. Plaintiff's ADA claims must be dismissed because he failed to exhaust his administrative remedies with respect to these claims. The ADA incorporates the administrative procedures and requirements used in Title VII matters. 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(b), (f)(1); *Hayes v. Blue Cross Blue Shield of Minn., Inc.*, 21 F. Supp. 2d 960, 969 (D. Minn. 1998). In order to initiate a lawsuit under the ADA against his employer, a plaintiff is first required to exhaust his administrative remedies. *See* 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(b), (e), (f)(1). Exhaustion requires (1) timely filing a charge of discrimination with the EEOC setting forth the facts and nature of the charge and (2) receiving notice of the right to sue. *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994). "Exhaustion of administrative remedies is central to [the ADA's] statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts."[6] *Id.*

14. Here, Plaintiff does not allege in his Complaint that he filed a charge of discrimination or received a right-to-sue letter regarding his ADA failure-to-accommodate or discrimination claims. Thus, Plaintiff has failed to exhaust his administrative remedies prior to filing this lawsuit, and his ADA claims are dismissed.

15. Alternatively, Plaintiff has failed to allege sufficient allegations to state an ADA failure-to-accommodate claim. To successfully allege a failure-to-accommodate claim under the ADA, a plaintiff must show that the employer had knowledge of his disability, the employee

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Const. Art. I, Sec. 8, "is not a separate and independent source of legal rights," nor does it guarantee a redress for every wrong); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383-85 (2015) (finding Supremacy Clause was not a private litigant's "source of any federal rights, and certainly does not create a cause of action).

[6] *Williams* analysis in the context of Title VII is applicable here, since "[b]y its terms, the ADA incorporates several of the 'powers, remedies, and procedures,' of Title VII . . . into its own regulatory scheme." *McKenzie v. Lunds, Inc.*, 63 F. Supp. 2d 986, 1000 (D. Minn. 1999); *see* 42 U.S.C. § 12117(a).

requested accommodations or assistance for his disability, the employer failed to make a good faith effort to assist the employee in seeking accommodations, and the employer could have provided a reasonable accommodation but for lack of good faith. *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002); *see Scheiderich v. City of Minneapolis*, Case No. C8-00-185, 2000 WL 1051976, at *2-3 (Minn. App. Aug. 1, 2000). Plaintiff's Complaint failed to establish a *prima facie* case: Plaintiff failed to show how he was discriminated against based on his purported disabilities, whether he made an accommodation request, whether DHS failed to make a good faith effort to assist Plaintiff in seeking accommodations, and whether DHS could have provided a reasonable accommodation but for lack of good faith. Thus, this claim is dismissed.

D. Collective Bargaining Agreement Provides the Exclusive Remedy

16. Because Plaintiff's exclusive remedy regarding his non-certification was to follow the grievance procedure in the CBA, his claims regarding the same fail as a matter of law. Under Minnesota law, if a plaintiff's areas of dispute are subjects encompassed by the applicable CBA and its grievance processes, then the CBA provides the sole remedy. *White v. Winona State Univ.*, 474 N.W.2d 410, 412 (Minn. App. 1991) ("widely-accepted rule" in Minnesota that "if a grievance procedure within a collective bargaining agreement is intended to be the exclusive remedy for an employee's claims, employees cannot bring actions in state or federal court for breach of contract").

17. The employment issues about which Plaintiff complains—non-certification and the grievance process—are terms and conditions of employment under the CBA. The CBA contains a grievance procedure when a probationary employee is non-certified, which provides the Union a right to challenge the reasons for a probationary employee's non-certification "through the third step of the grievance procedure." AFSCME CBA, Article 12, Section 10.F. Plaintiff, even as a

probationary employee, as a member of AFSCME, could grieve his non-certification and pleads that he did so. Thus, the Court has no basis to extend judicial review over Plaintiff's contract claims. *Willis*, 1997 WL 193894, at *2 (finding no basis to extend "direct judicial review for an alleged breach of the collective bargaining agreement," in a case with a plaintiff under probationary employment).

III. Plaintiff's Claim Against AFSCME

A. Breach of Duty of Fair Representation

18. Plaintiff generally alleges in the Complaint that AFSCME misrepresented him but does not reference the "duty of fair representation." Minnesota courts have recognized that a union who is an exclusive employee representative owes a duty of fair representation to the employees who it represents. *See Eisen v. State, Dep't of Public Welfare,* 352 N.W.2d 731, 735, (Minn. 1984) ("The judicially created doctrine of a duty of fair representation is derived from a union's statutory right to act as the exclusive bargaining representative of all employees in a designated bargaining unit."). To the extent that Plaintiff asserts a claim against AFSCME for failing to represent him, such claim must be evaluated as a claim that AFSCME has breached its duty of fair representation.

19. In order to establish a violation of the duty of fair representation, an employee must show that the exclusive representative engaged in conduct which is "arbitrary, discriminatory, or in bad faith." *Whipple v. Independent School Dist.,* 424 N.W.2d 559, 565, (Minn. Ct. App. 1988). Plaintiff has not alleged that any action of AFSCME's was arbitrary, discriminatory, or in bad faith, such that Plaintiffs claims against AFSCME must be dismissed. "To establish a breach of that duty [of fair representation] requires proof of arbitrary or bad faith conduct on the part of the union by 'substantial evidence of fraud, deceitful action

or dishonest conduct.'" *Davis v. Boise Cascade Corp.*, 288 N.W.2d 680,683, (Minn. 1979) *(quoting Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1970). The only conduct Plaintiff has alleged related to any dishonest conduct is the allegation that AFSCME representatives were dishonest with him in informing him that his employment was "at will" and he could be removed from employment at any time. Plaintiff has alleged a legal conclusion regarding his rights to continued employment which this Court is not obligated to accept as true on a motion to dismiss. *Bahr v. Capella University,* 788 N.W.2d 76, 80 (Minn. 2010).

20. Minnesota law provides that "There is no presumption of continued employment during a probationary period. Terminations or demotions may be made at any time during the probationary period subject to the provisions of this section and collective bargaining agreements." Minn. Stat. § 43A.16, Subd. 2. A probationary employee of the State of Minnesota may clearly be removed from employment at any time during the probationary period unless otherwise limited by a collective bargaining agreement.

21. The CBA between AFSCME and the State of Minnesota specifies that "The Appointing Authority shall not discharge any permanent employee without just cause." While permanent employees are protected from termination "at will," nonpermanent employees, such as probationary employees, are not so protected.

22. AFSCME's conduct in informing Plaintiff his employment was "at will" was not "arbitrary, discriminatory, or in bad faith" or "fraud, deceitful action or dishonest conduct." AFSCME representatives could not, and should not, have argued that "just cause" was required for Plaintiff to be removed from employment. AFSCME correctly informed

Plaintiff of his rights with respect to continued employment and engaged in conduct as authorized by the CBA in an attempt to keep Plaintiff in his position with DHS.

23. Further, any claims made by Plaintiff that AFSCME has failed to represent him are barred by the applicable statute of limitations for such a claim. The "duty of fair representation" is a judicial doctrine derived from a union's statutory right to act as the exclusive representative of the employees it represents. *Eisen v. State, Dep't of Public Welfare,* 352 N.W.2d 731, 735 (Minn. 1984). Minnesota courts have established that in a matter such as this, where a former employee brings a claim against a public employer for wrongful discharge and against a union representative for a breach of the duty of fair representation, such claims must be brought within 90 days. *Allen v. Hennepin County,* 680 N.W.2d 560, at 563, (Minn. Ct. App. 2004). This 90-day period begins to run at the time that the former employee "knew or should have known of the union's breach." *Id.* Plaintiff's response to AFSCME's motion to dismiss specifically references the February 27, 2019 grievance meeting as an instance in which AFSCME failed to represent him, by informing him that his employment was "at will" and failing to argue that "just cause" was required for his termination. Plaintiff served his Summons and Complaint on AFSCME after the 90-day period had expired. MN Stat 572.19 Subd. 2 2002 NLRA 10(b) 169.103 CV @ 2293

hybrid claims

24. Plaintiff has failed to state a claim that he was entitled to some form or level of representation from AFSCME that he did not receive. He has also failed to state a claim that AFSCME's representation was arbitrary, discriminatory, or in bad faith. Plaintiff has failed to state a claim that AFSCME failed to adequately represent him and no facts could be introduced which would support such a conclusion. As such, dismissal of this claim is appropriate. *Bahr v. Capella University,* 788 N.W.2d 76, 80 (Minn. 2010).

ORDER

1. Defendant DHS's Motion to Dismiss Plaintiff's Complaint is **GRANTED;**

2. Defendant AFSCME's Motion to Dismiss Plaintiff's Complaint is **GRANTED;**

3. Plaintiff's Complaint is **DISMISSED with PREJUDICE.**

4. The attached Findings of Fact and Conclusions of Law are incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: September 10, 2019

The Honorable Leonardo Castro
District Court Judge