

is **DISMISSED WITHOUT PREJUDICE** to plaintiff's right to file an amended complaint in which he sets forth a claim under 42 U.S.C. §1983,³ if warranted by the facts, within 45 days of the date of this Order.

IT IS FURTHER ORDERED as follows:

(1) Plaintiff's Motion to Deny the Commonwealth's Motion to Dismiss is **DENIED**;

(2) The Motion for a More Definite Statement of Commonwealth Defendants The Pennsylvania State Police and Christopher Carusone is **DENIED AS MOOT**; and

(3) Plaintiff's Request for Appointment of Attorney is **DENIED** on the present state of the record.

MEMORANDUM

A. BACKGROUND

The Motion to Dismiss is based upon the failure of plaintiff, in either his Complaint or Response,⁴ to allege a prima facie case under the Age Discrimination in Employment Act of

³ Section 1983 provides for a cause of action against anyone who, acting under color of state law, deprives an individual of rights created by the Constitution or federal statute. To state a cause of action under § 1983, plaintiff must establish that "(1) the defendants acted under color of [state] law, and (2) their actions deprived [the plaintiff] of rights secured by the Constitution or federal statutes." *Anderson v. Davila*, 125 F.3d 148, 159 (3d Cir. 1997).

⁴ Plaintiff filed his Complaint against defendant Commonwealth of Pennsylvania (Pennsylvania State Police) on July 11, 2001. The Commonwealth then filed a Motion for a More Definite Statement on December 4, 2001. By Order dated December 10, 2001, this Court directed plaintiff to provide a response to the motion. On December 21, 2001, this Court received plaintiff's Responses [sic] for More Definitive Statement Per Court Order Received on December 12, 2001 ("Response"). In his Response, plaintiff identified the Pennsylvania State Police as the only defendant and set forth the (1) the "Age Discrimination Act of 1967," ("ADEA") (2) the "Americans with Disabilities Act," ("ADA") and (3) "Titles I, II, V, and VII" as the statutes under which plaintiff proceeds in this case. The Court concludes from this

1967 (“ADEA”), Title VII, or Titles I, II, and V of the Americans With Disabilities Act of 1990 (“ADA”) and defendant’s sovereign immunity from suit by private individuals under the ADEA and Titles I and II of the ADA. The Court agrees with defendant and therefore grants the Motion.

This case arises out of the alleged wrongful denial by the Pennsylvania State Police (“PSP”) of plaintiff’s application for an Act 235 Lethal Weapon Certification to carry a firearm. Plaintiff, a security guard employed by a private company, alleges that, as a condition of his job, he must carry a firearm. See Pl.’s Response, at ¶ 1. According to plaintiff, he applied in February 2000 to the PSP for an Act 235 Certification to carry a firearm, see id. at ¶ 2, and was denied certification because of his age and impaired vision.

After receiving notice of the denial, plaintiff filed a notice of disagreement with the Commonwealth and requested an administrative hearing, which was conducted on May 17, 2001. See Pl.’s Response, at ¶ 5. The record before the Court does not reflect the outcome of this hearing. Plaintiff then appealed the decision rendered at the hearing and requested that the PSP Commissioner request an opinion from the Attorney General regarding the authority of the hearing officer. See Pl.’s Response, at ¶ 5. The record before the Court does not reflect the disposition of plaintiff’s appeal or request.

Plaintiff also filed charges with the EEOC, and the EEOC issued a Notice-of-Right-to-Sue letter on May 30, 2001. See Complaint, at ¶ 5. Plaintiff attached a copy of this letter to the Complaint.

Plaintiff now brings this pro se action alleging violations of the ADEA, ADA, and Title

submission that plaintiff purports to assert claims under the ADEA, Title VII of the Civil Rights Act, and Titles I, II, and V of the ADA.

VII. Specifically, plaintiff contends the PSP violated the ADEA by denying plaintiff's firearm application on the basis that plaintiff was fifty years old at the time of his application. See Pl.'s Response, at 1. He further asserts that, in violation of Titles I, II, and V of the ADA, the PSP denied his application for Act 235 certification on the basis of plaintiff's disability—uncorrected vision of 20/200. See id. at ¶¶ 4, 7. Finally, plaintiff contends that the PSP's denial of his application violated Title VII.

Plaintiff seeks compensatory and injunctive relief. Plaintiff requests a “change in the Statute and [PSP] regulations with respect to waivers, and visual acuity standards,” and that the Court direct the PSP to issue plaintiff an Act 235 Certification. Complaint, at ¶ 4.

B. STANDARD OF REVIEW

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In reviewing a pro se complaint, however, a court is “is less stringent than that of pleadings prepared by lawyers.” Milhouse v. Carlson, 652 F.2d 371, 373 (3d Cir. 1981). “A pro se complaint may be dismissed for failure to state a claim only if it appears ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief.” Id. (quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972)).

C. DISCUSSION

1. Dismissal of Plaintiff’s ADEA Claim Is Warranted

Defendant correctly asserts that plaintiff’s ADEA claim must be dismissed. “The ADEA prohibits age discrimination in employment decisions against persons who are at least 40 years of age.” Kelly v. Drexel Univ., 94 F.3d 102, 104 (3d Cir. 1996) (citing 29 U.S.C. § 623(a)(1)⁵). In this case, plaintiff simply fails to allege any past, current or prospective employment relationship between himself and the PSP, and thus plaintiff fails to state a claim under the ADEA.

Moreover, the ADEA claim is barred by the Eleventh Amendment. “[F]or over a century now, [the Supreme Court has] made clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting States.” Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000). The PSP, as an arm of the Commonwealth, is clearly entitled to this Eleventh Amendment protection. See Alabama v. Pugh, 438 U.S. 781, 782 (1978) (holding that a private individual’s suit against a state agency is barred by the Eleventh Amendment). Although a state loses its Eleventh Amendment protection if it “waives its immunity and consents to suit in federal court” or “Congress ... specifically abrogate[s] the states’ Eleventh Amendment immunity,” see Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 694 (3d Cir. 1996), neither

⁵ The ADEA provides in relevant part: “It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age ...” 29 U.S.C. § 623(a)(1).

exception applies in this case. In 42 Pa.C.S.A. § 8521(b),⁶ the Commonwealth explicitly reserved its right to immunity from suit in federal court. And, the Supreme Court recently held in Kimel, that Congress has not abrogated the States' Eleventh Amendment protection from suit under the ADEA. See id. at 91 (“[T]he ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment. The ADEA’s purported abrogation of the States’ sovereign immunity is accordingly invalid.”).

2. Dismissal of Plaintiff’s ADA Claims Is Warranted

Defendant next moves to dismiss plaintiff’s claims under Titles I, II, and V of the ADA. The PSP raises three arguments in support of its motion: (1) plaintiff fails to allege an actionable claim under any title of the ADA because he fails to assert that he is within the ADA’s definition of “disabled;” (2) plaintiff fails to allege a prima facie case of discrimination under Title I and Title V; and (3) the Eleventh Amendment bars plaintiff from asserting a claim under Title I. The Court addresses each argument in turn.

a. All of plaintiff’s ADA claims must be dismissed because plaintiff is not disabled within the meaning of the ADA

Defendant correctly contends that plaintiff fails to allege that he is within the ADA’s definition of disabled, and thus does not have an actionable claim under any title of the ADA. To state a cause of action under the ADA, plaintiff must allege that he is disabled within the meaning of the ADA. Under this statute, plaintiff has a disability if he (1) has “a physical or

⁶ “Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.” Id.

mental impairment which substantially limits one or more of such person's major life activities;" (2) has "a record of such an impairment;" or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994 ed. and Supp. V); see also Toyota Motor Mfg., Kentucky, Inc. v. Williams, 122 S.Ct. 681, 689 (2002). Plaintiff does not argue that he is disabled under either the second or third prong of the definition, and thus the Court only considers whether plaintiff satisfies the first prong of the definition.

Plaintiff claims to be disabled because he has "uncorrected" bilateral 20/200 vision. The question before the Court is whether plaintiff's vision is an impairment that substantially limits plaintiff's major life activities. In making such a determination, "a court must look at [a] plaintiff's impairments *after* corrective measures are taken—e.g., medication, eyeglasses." Marinelli v. City of Erie, Pa., 216 F.3d 354, 362 n.4 (3d Cir. 2000) (citing Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)).

A person whose impairment is corrected by mitigating measures does not have an impairment that substantially limits a major life activity and is not disabled within the meaning of the ADA. See Sutton, 527 U.S. at 481-83. Similar to plaintiffs in Sutton, plaintiff's visual impairment can be corrected to a 20/20 visual acuity level with corrective lenses. See Pl.'s Response, at ¶ 7. Thus plaintiff is not disabled within the meaning of the ADA. For this reason, plaintiff fails to state a claim under any title of the ADA, and plaintiff's claims under Titles I, II, and V of the ADA are dismissed.⁷

⁷ Defendant also argues that it is immune from suit under Title II of the ADA. Neither the Supreme Court nor the Court of Appeals for the Third Circuit has addressed this issue. See Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2000) (expressly declining to decide whether Congress abrogated Eleventh Amendment immunity in the context of suits brought under Title II); Lavia v.

b. *Plaintiff's ADA claims under Title I and Title V must be dismissed for the additional reasons that plaintiff has not alleged an employment relationship and, with respect to Title I, plaintiff's claim is barred by the Eleventh Amendment.*

Defendant asserts as additional grounds for dismissal of plaintiff's ADA claims under Title I and Title V that there are no allegations of an employment relationship, and with respect to Title I, the bar of the Eleventh Amendment. To allege a claim under Title I and Title V, plaintiff must assert an employment relationship with defendant, which he does not. See Garrett, 531 U.S. at 361 (quoting 42 U.S.C. §§ 12112(a), 12111(5)(A)⁸); Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). Thus the Title I and Title V claims are not actionable for this additional reason.

Plaintiff's Title I claim is also barred by the Eleventh Amendment because the Commonwealth's sovereign immunity has not been waived or abrogated for claims under Title I of the ADA. See 42 Pa. C.S.A. § 8521(b); Garrett, 531 U.S. at 373-74 (holding that in Title I of the ADA, Congress did not validly abrogate the states' sovereign immunity from suit by private

Pennsylvania Dept. of Corrections, 224 F.3d 190, 194 n.2 (3d Cir. 2000) (same). Although a number of other lower courts have reached the issue, this Court need not because it has already concluded that plaintiff has failed to allege a disability under the ADA, and thus fails to state an actionable claim under Title II. See Doe v. County of Centre, 242 F.3d 437, 446-47 (3d Cir. 2001) (quoting 42 U.S.C. § 12132) (explaining that Title II "provides, in pertinent part, that: 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'").

⁸ Title I provides that certain employers, including the States may not "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

individuals for money damages.).⁹

3. Dismissal of Plaintiff's Title VII Claim Is Warranted

Finally, defendant moves to dismiss plaintiff's Title VII claim. Title VII "make[s] it unlawful for an employer to 'discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin.'" Weston v. Pennsylvania, 251 F.3d 420, 425 (3d Cir. 2001) (quoting 42 U.S.C. § 2000e-2(a)(1)). Plaintiff fails to allege an employment relationship between himself and defendant, and thus he fails to state a claim under Title VII. On this basis, the Court dismissed plaintiff's Title VII claim.

⁹ The fact that plaintiff in this case seeks not only money damages, but also injunctive relief does not alter the Court's conclusion. See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, 506 U.S. 139, 146 (1993) (holding that prospective, injunctive relief is not available against state agencies, but only against state officials). The only defendant named in this case is the Pennsylvania State Police.

D. CONCLUSION

For the foregoing reasons, the Court dismissed plaintiff's claims under the ADEA, ADA, and Title VII. The Complaint is dismissed without prejudice to plaintiff's right to file an amended complaint, within 45 days of the date of this Order, in which he alleges a claim under 42 U.S.C. § 1983, if warranted by the facts.

BY THE COURT:

JAN E. DUBOIS, J.