UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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OSMUND W. LeVINESS,           :
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     Plaintiff,               :
                              :
v.                            :    Civil No. 3:99CV01647(AWT)
                              :
MARK BANNON and               :
BARBARA A. WATERS,            :
                              :
     Defendants.              :
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RULING ON MOTION TO DISMISS

The plaintiff, Osmund W. LeViness ("LeViness") brings this case pursuant to 42 U.S.C. § 1983 alleging that the defendants, Mark Bannon ("Bannon") and Barbara A. Waters ("Waters") deprived him of his right to equal protection of the law, guaranteed by the Fourteenth Amendment to the United States Constitution. LeVinness claims that the defendants violated his equal protection rights when they forced him to resign from his position as an employee of the Department of Administrative Services for the State of Connecticut ("DAS"). The defendants have moved to dismiss the amended complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the motion is being granted.

I. FACTUAL BACKGROUND

For purposes of this motion, the court accepts as true the allegations of the plaintiff's amended complaint, which are set forth below.

Prior to October 10, 1996, LeViness was employed by DAS as a Data Systems Analyst II. At all relevant times, defendant Waters was Commissioner of DAS and defendant Bannon was a supervisory employee of DAS. On or about October 10, 1996, Bannon and Waters forced the plaintiff to resign his position. The defendants' stated reason for forcing LeViness to resign was their belief that he had improperly used a DAS computer to download stock quotations, shop-at-home services, and lewd photographs. The plaintiff alleges that his "assignment was that of a systems developer and a 'debugger' of computer equipment" and that he "was carrying out authorized procedures at all times." Am. Compl. ¶ 8.

The plaintiff further alleges that five other state employees who were found downloading pornography using state-owned computers did not have their employment terminated. One of these employees worked for the Connecticut State Police, two worked for the legislative branch, and two are identified only by name and not by their department of employment.

Finally, the complaint alleges that the defendants intentionally treated the plaintiff differently from these other

state employees because of a malicious and bad-faith desire to injure the plaintiff, and that the defendants' actions were irrational and unreasonable.

II. LEGAL STANDARD

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See also Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). "This standard is applied with even greater force where the plaintiff alleges civil rights violations . . .." Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994).

"The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Mytych v. May Dept. Store Co., 34 F. Supp. 2d 130, 131 (D. Conn. 1999), quoting Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence

to support his claims." <u>United States v. Yale New Haven Hosp.</u>, 727 F. Supp 784, 786 (D. Conn. 1990) (citing <u>Scheuer</u>, 416 U.S. at 232).

III. DISCUSSION

In order to state a claim for violation of his right to equal protection under the law, the plaintiff must allege that:

> (1) [he], compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

<u>Crowley, Jr. v. Courville, et al.</u>, 76 F.3d 47, 52-53 (2d Cir. 1996). Both of these elements are necessary to state a claim, and "a demonstration of different treatment from persons similarly situated, without more, would not establish malice or bad faith." <u>Id.</u> at 53. <u>See</u> <u>also</u> <u>Zahra v. Town of Southold</u>, 48 F.3d at 684 ("The evidence suggesting that [plaintiff] was treated differently from others does not, in itself, show malice."); <u>A.B.C. Home Furnishings, Inc., v. Town of E. Hampton</u>, 964 F. Supp. 697, 702 (E.D.N.Y. 1997) ("Recent Second Circuit decisions have been careful to apply each prong of the test separately, finding the failure to satisfy either inquiry fatal to the plaintiff's claim.").

A. Selective Treatment

"To establish that he was subject to selective treatment, a plaintiff must plead that he was similarly situated to other

persons but was nevertheless treated differently." A.B.C. Home Furnishings, 964 F. Supp. at 702. See also Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 61 (2d Cir. 1985). The complaint alleges that the plaintiff was treated differently from other state employees. However the plaintiff has not set forth specific allegations that would permit a reasonable inference that the plaintiff was treated differently from "similarly situated" persons. See Koch v. Yunich, 533 F.2d 80, 85 (2d Cir. 1976) ("Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions.").

"To be 'similarly situated', the individuals with whom [the plaintiff] attempts to compare [him]self must be similarly situated in all material respects." Shumway v. Utd. Parcel Serv., 118 F.3d 60, 64 (2d Cir. 1997). In Shumway, the plaintiff brought a sex discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the Shumway decision discusses in detail the definition of "similarly situated" in the context of the plaintiff's burden of establishing a prima facie case under Title VII. The court concludes that the standard for being "similarly situated" set forth in Shumway is appropriate for application by analogy to equal protection cases such as this. See, e.g., LaTrieste

Restaurant v. Village of Port Chester, 188 F.3d 65, 69 (2d Cir. 1999) (applying the "similarly situated" discussion in Shumway to an equal protection case); Hart v. Westchester Cty. Dept. of Social Servs., 160 F. Supp. 2d 570, 578 (S.D.N.Y. 2001) (applying Shumway to an equal protection case); Nichols v. Village of Pelham Manor, 974 F. Supp. 243, 255 (S.D.N.Y. 1997) (same). The plaintiff has not met this standard.

All the plaintiff has alleged is that each of the five named individuals was an employee of the State of Connecticut and that each was accused of downloading inappropriate materials on a state computer. There is, for instance, no allegation that any of these five named employees were subject to the same disciplinary rules, employment policies, or code of conduct as was the plaintiff. To the contrary, the complaint acknowledges that three of the named employees worked in departments other than DAS, and the complaint does not identify which department employed the two remaining named individuals. There is no allegation that any of these five employees had job duties or disciplinary records similar to the plaintiff's. There is no allegation that the scope or nature of the infraction committed by any of these five employees was similar in all material respects to that committed by LeViness; in fact, the complaint states that LeViness was accused of downloading "stock quotations, shop-at-home services and lewd photographs", while the five named employees were accused of downloading

"pornography". Am. Compl. ¶¶ 7, 9. See Yajure v. DiMarzo, 130 F. Supp. 2d 568, 572 (S.D.N.Y. 2001) ("The test for determining whether persons similarly situated were selectively treated is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent.")

Nor is there any allegation that Waters and/or Bannon were involved in the process of disciplining any of the other five state employees. See Shumway, 118 F.3d at 64 (plaintiff's allegations did not meet the "similarly situated" standard where the allegedly similar individuals cited by the plaintiff were not supervised and disciplined by the same person who supervised and disciplined the plaintiff). Nor has LeViness set forth any other allegations that would permit a reasonable inference that he was similarly situated in all material respects to any of these other five state employees. LeViness must allege more than that he was treated differently than other people in other circumstances, and he has failed to do so.

In addition, if the plaintiff voluntarily resigned from his position, he can not state a claim that his rights were violated by virtue of the termination of his employment. The plaintiff alleges that his right to equal protection was violated when the defendants "forced" him to resign from his job. However, he fails to set forth any allegations which support a reasonable inference that he left his employment involuntarily. Nor does he set forth factual allegations that would support a claim of

constructive discharge. Under Connecticut law, constructive discharge occurs

> when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

Brittell v. Dept. of Correction, 717 A.2d 1254, 1270 (Conn. 1998) (internal citations and quotation marks omitted).

Thus, the plaintiff has failed to state a claim under the first prong of the equal protection test.

B. Impermissible Motive

As to the second prong of the equal protection test, impermissible motive, because the plaintiff "does not allege selective treatment based upon his race, religion, or any intentional effort by defendants to punish him for exercising his constitutional rights, [the plaintiff] must demonstrate that defendants maliciously singled [him out] with the intent to injure him." Crowley, 76 F.3d at 53.

The amended complaint alleges that "[t]he defendants intentionally treated the plaintiff differently from others similarly situated because of a malicious and bad-faith desire to injure the plaintiff. The defendants, in subjecting the plaintiff to such different treatment, acted irrationally and unreasonably." Am. Compl. ¶ 10. "Complaints relying on the

civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning." Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987). The Second Circuit "has repeatedly held that complaints containing only conclusory, vague, or general allegations of a conspiracy to deprive a person of constitutional rights will be dismissed. Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (internal quotation marks and citations omitted). See also Koch, 533 F.2d at 85.

Here, the complaint contains no specific factual allegations to support the conclusory statement that the defendants had a "malicious and bad-faith desire to injure" LeViness and acted irrationally and unreasonably. The Second Circuit has held that "a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." Yusuf v. Vassar College, 35 F.3d 709, 713 (2d Cir. 1994) (quoting Martin v. N. Y. State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978) (per curiam)). The complaint in this case does not set forth any facts upon which the court could find that the defendants acted with an impermissible motive. Therefore, the complaint fails to

state a claim under the second prong of the equal protection test.

IV. CONCLUSION

For the reasons set forth above, the Defendants' Motion to Dismiss [Doc. # 34] is hereby GRANTED.

The Clerk shall close this case.

It is so ordered.

Dated this ____ day of December, 2001, at Hartford, Connecticut.

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Alvin W. Thompson
United States District Judge