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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kimberly Fisher,

Plaintiff,

v.

Glendale Elementary School District,

Defendant.

No. CV-14-02083-PHX-ESW

ORDER

Jurisdiction

Plaintiff has filed a First Amended Complaint (Doc. 9) arising from alleged unlawful employment discrimination which occurred while Plaintiff was working for Glendale Elementary School District. Plaintiff's First Amended Complaint asserts the following causes of action: (1) a violation of the Arizona Civil Rights Act (ARIZ. REV. STAT. § 41-1463); (2) a violation of Title VII of the Civil Rights Act of 1964; (3) retaliation in violation of the Arizona Employment Protection Act (ARIZ. REV. STAT. § 23-1501(3)(C)(i), (ii)); (4) constructive discharge (ARIZ. REV. STAT. § 23-1502(A)(1), (2)); (5) intentional infliction of emotional distress; and (6) a violation of 42 U.S.C. § 1981.

Counts One, Three, Four, and Five are state law claims. Counts Two and Six allege violations of federal law.

Defendant has filed a Motion to Dismiss First Amended Complaint (Doc. 17) as to

1 all of Plaintiff's claims. Plaintiff filed a Response (Doc. 23), and Defendant has filed a
2 Reply (Doc. 24). The matter is deemed submitted for decision.¹

3 This Court has federal question jurisdiction over Plaintiff's federal law claims
4 pursuant to 28 U.S.C. § 1331. This Court has supplemental jurisdiction over Plaintiff's
5 related state law claims pursuant to 28 U.S.C. § 1367.

6 **Standard of Review**

7 When reviewing a motion to dismiss a complaint for failure to state a claim upon
8 which relief can be granted, the Court must consider as true all well-pled factual
9 allegations in Plaintiff's complaint and draw all reasonable inferences therefrom in
10 Plaintiff's favor. Rule 12(b)(6), Fed. R. Civ. P.; *Smith v. Jackson*, 84 F.3d 1213, 1217
11 (9th Cir. 1996). All reasonable doubts are resolved in Plaintiff's favor, and the complaint
12 is viewed in a light most favorable to the non-moving party. *See Bell Atlantic Corp. v.*
13 *Twombly*, 550 U.S. 544, 555 (2007). However, the complaint must contain sufficient
14 facts to place the Defendant on notice of the claims made and the grounds upon which
15 each claim is based. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Supreme
16 Court clearly has stated that a complaint must contain "enough facts to state a claim to
17 relief that is plausible on its face." *Twombly*, 550 U.S. at 510. Mere conclusory
18 allegations are insufficient. *Id.* at 562-63. *See also Iqbal*, 556 U.S. at 679 (assessing
19 plausibility is a "context-specific task"); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.
20 1998) ("conclusory allegations of law and unwarranted inferences are not sufficient to
21 defeat a motion to dismiss").

22 The burden of proof on a motion to dismiss, however, lies with the Defendant.
23 *Crugher v. Prelesnik*, 761 F.3d 610, 613 (6th Cir. 2014). A district court may not dismiss
24 a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff
25 can prove no set of facts in support of his claims which would entitle him to relief."
26 *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994). All that is required of Plaintiff are

27
28 ¹ The parties have consented to the exercise of U.S. Magistrate Judge jurisdiction
(Doc. 20).

1 sufficient allegations to put Defendant fairly on notice of the claims against it. *See*
2 *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). Rule 8, Fed. R. Civ. P., requires
3 only “a short and plain statement of the claim showing that the pleader is entitled to relief
4”

5 **State Claims**

6 The Defendant moves to dismiss all of Plaintiff’s state law claims pursuant to
7 ARIZ. REV. STAT. § 12-821.01. ARIZ. REV. STAT. § 12-821.01 provides in pertinent part:

8 A. Persons who have claims against a public entity or a public
9 employee shall file claims with the person or persons authorized to accept
10 service for the public entity or public employee as set forth in the Arizona
11 rules of civil procedure within one hundred eighty days after the cause of
12 action accrues. The claim shall contain facts sufficient to permit the public
13 entity or public employee to understand the basis on which liability is
14 claimed. The claim shall also contain a specific amount for which the
15 claim can be settled and the facts supporting that amount. Any claim that is
16 not filed within one hundred eighty days after the cause of action accrues is
17 barred and no action may be maintained thereon.

18 B. For the purposes of this section, a cause of action accrues when
19 the damaged party realized he or she has been damaged and knows or
20 reasonably should know the cause, source, act, event, instrumentality or
21 condition that caused or contributed to the damage.

22 * * *

23 E. A claim against a public entity or public employee filed pursuant
24 to this section is deemed denied sixty days after the filing of the claim
25 unless the claimant is advised of the denial in writing before the expiration
26 of sixty days.

27 A school district is a public entity within the meaning of ARIZ. REV. STAT. § 12-
28 821.01. *See Deer Valley Unified School Dist. No. 97 v. Houser*, 152 P.3d 490 (Ariz.
2007). Before filing a complaint against a school district, a plaintiff must provide a
notice of claim pursuant to ARIZ. REV. STAT. § 12-821.01. *Id.* at 491. The statute clearly
and unequivocally sets forth both the method and time frame for doing so. If a notice of
claim is not properly filed within the 180 day statutory time limit, the plaintiff’s claim is
barred by statute. *See Falcon, ex rel, Sandoval v. Maricopa County*, 144 P.3d 1254, 1256

1 (Ariz. 2006) (quoting *Salerno v. Espinoza*, 115 P.3d 626, 629 (Ariz. Ct. App. 2005)). As
2 noted by the Arizona Court of Appeals in *Salerno*, “[c]ompliance with the notice
3 provisions of ARIZ. REV. STAT. § 12-821.01(A) is a ‘mandatory’ and ‘essential’
4 prerequisite” to a damages claim against a public entity. *Salerno*, 115 P.3d at 628 (citing
5 *Martineau v. Maricopa County*, 86 P.3d 912, 915-17 (Ariz. Ct. App. 2004)). A plaintiff’s
6 failure to comply with ARIZ. REV. STAT. § 12-821.01(A) bars any claim. *See W. Corr.*
7 *Group, Inc. v. Tierney*, 96 P.3d 1070, 1072 (Ariz. Ct. App. 2004). Substantial
8 compliance is not enough. *Falcon, ex rel, Sandoval*, 144 P.3d at 1256.

9 That Plaintiff filed her notice of claim on September 15, 2014 is undisputed. That
10 Plaintiff filed her original Complaint on September 19, 2014, prior to the expiration of
11 the sixty day denial period set forth in ARIZ. REV. STAT. § 12-821.01(E) and prior to
12 receiving any denial from Defendant in writing before the expiration of sixty days is also
13 undisputed. *Id.* The question, therefore, presented to this Court is whether Plaintiff’s
14 failure to wait for the expiration of the sixty day denial period prior to filing her lawsuit
15 constitutes a failure to comply with the statutory requirements of ARIZ. REV. STAT. § 12-
16 821.01, thereby barring Plaintiff’s state claims. The Court finds that ARIZ. REV. STAT. §
17 12-821.01(E) specifically requires Plaintiff to leave open her settlement offer contained
18 in the notice of claim for sixty days, absent an earlier response from the Defendant public
19 entity. Because Plaintiff filed her lawsuit after only four days, her notice of claim did not
20 comply with the statute. ARIZ. REV. STAT. § 12-821.01(E).

21 The purpose of ARIZ. REV. STAT. § 12-821.01 is to “allow the public entity to
22 investigate and assess liability, . . . permit the possibility of settlement prior to litigation,
23 and . . . assist the public entity in financial planning and budgeting.” *Drew v. Prescott*
24 *Unified School District*, 314 P.3d 1277, 1280 (Ariz. Ct. App. 2013) (quoting *Backus v.*
25 *State*, 203 P.3d 499, 502 (Ariz. 2009)). ARIZ. REV. STAT. § 12-821.01(E) expressly gives
26 public entities sixty days to evaluate and decide whether to respond to a settlement offer
27 made in a notice of claim. Only the public entity itself has the ability to reduce the
28 statutorily granted wait period by denying the claim before the expiration of sixty days.

1 *Id.* As the Court of Appeals in *Drew* noted, the purpose of ARIZ. REV. STAT. § 12-821.01
2 is not solely notice. *Drew*, 314 P.3d at 1281 (“the statute’s purposes include allowing
3 public entities . . . the opportunity to realistically and meaningfully investigate and assess
4 a claim, and determine whether to settle and possibly avoid litigation altogether”).

5 Because Plaintiff’s notice of claim did not fully comply with ARIZ. REV. STAT. §
6 12-821.01, the Plaintiff’s state claims are deemed barred. *See Drew*, 314 P.3d at 1281.
7 Counts One, Three, Four, and Five will be dismissed with prejudice.

8 The Court need not address the timeliness of Plaintiff’s state law claims as they
9 are barred for failure to comply with ARIZ. REV. STAT. § 12-821.01(E).

10 Title VII Claim

11 In Count Two of her First Amended Complaint (Doc. 9), Plaintiff alleges a
12 violation of Title VII by being denied “equal terms, conditions and privileges of
13 employment,” including denial of an opportunity to be considered for the position of
14 Coordinator for Classified to which she applied on April 12, 2014 (Doc. 9 ¶ 14) and a
15 position with the District wellness program which was removed June 21, 2014 (Doc. 9 ¶
16 18). The Court notes that the dates listed by Plaintiff in the First Amended Complaint are
17 internally inconsistent with the date alleged for Plaintiff’s resignation on February 1,
18 2013 (Doc. 9 ¶ 27). Based upon the chronology set forth by Plaintiff, the Court attributes
19 typographical error to acts which likely occurred April 12, 2012 and June 21, 2012.

20 Plaintiff further alleges that she filed two charges against Defendant with the
21 EEOC: (1) on October 11, 2012 for violation of Title VII and the Age Discrimination in
22 Employment Act; and (2) on September 11, 2013 for discrimination due to race, age,
23 retaliation, denial of due process and constructive discharge in violation of Title VII
24 (Doc. 9 ¶¶ 19, 29-30). Plaintiff further described Defendant’s actions as “intentionally
25 discriminat[ing] against Plaintiff on account of her race and gender . . .” (Doc. 9 ¶ 36).

26 Pursuant to 42 U.S.C. § 2000(e)-5(f)(1) and 29 C.F.R. § 1601.28(e), Plaintiff must
27 file a lawsuit within ninety days of receiving each right-to-sue notice. Plaintiff alleges
28 that she received a right-to-sue letter on June 30, 2014 from the EEOC (Doc. 9 ¶ 31).

1 She timely filed her original Complaint on September 19, 2014 (Doc. 1). Plaintiff does
2 not mention a second right-to-sue letter, and no documents are attached to the First
3 Amended Complaint (Doc. 9). The Court will not consider evidence outside of the
4 pleadings on the Motion to Dismiss First Amended Complaint.

5 An EEOC claim also must itself be filed within 300 days after the alleged
6 unlawful employment practice occurred. 42 U.S.C. § 2000(e)-5(e)(1). Therefore, using
7 the September 11, 2013 EEOC claim as the basis for the June 30, 2014 right-to-sue letter,
8 all actionable claims must have occurred on or after November 15, 2012 for Plaintiff to
9 timely assert them in this litigation.

10 Between November 15, 2012 and September 11, 2013, Plaintiff alleges that she
11 was subjected to “unfounded, baseless disciplinary actions” (Doc. 9 ¶ 20), coercive
12 conduct, supervisory interference with completion of work tasks, false information,
13 uncompensated overtime duties, an orchestrated and forced resignation which constituted
14 constructive discharge, a denial of due process, and mistreatment all due to her race and
15 age. (Doc. 9 ¶¶ 20-30). Plaintiff also alleges that the District engaged in continuing
16 discrimination practices against women (Doc. 9 ¶¶ 10-13).

17 Assuming as true all the allegations set forth in Plaintiff’s First Amended
18 Complaint, and drawing all reasonable inferences therefrom in Plaintiff’s favor, the Court
19 finds that Plaintiff has set forth sufficient facts to state a claim for relief pursuant to Title
20 VII of the 1964 Civil Rights Act. 42 U.S.C. § 2000(e). Defendant’s Motion to Dismiss
21 Count Two will be denied.

22 **42 U.S.C. § 1981 Claim**

23 Defendant moves to dismiss Count Six of Plaintiff’s First Amended Complaint on
24 the basis of Plaintiff’s failure to allege a discriminatory policy or practice pursuant to
25 *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1215 (9th Cir. 1996).
26 However, based upon a review of all factual allegations set forth in the First Amended
27 Complaint, the Court finds that Plaintiff has alleged facts which, if true, support notice to
28 Defendant of a discriminatory policy or custom sufficient to state a cause of action under

1 42 U.S.C. § 1981 at this stage of the litigation.

2 **Punitive Damages**

3 The Defendant moves to dismiss Plaintiff's claim for punitive damages under Title
4 VII and § 1981 on the basis of immunity. *See* 42 U.S.C. § 1981a(b)(1) and *Robinson v.*
5 *Runyon*, 149 F.3d 507 (6th Cir. 1998). Plaintiff does not dispute Defendant's motion on
6 this issue.

7 The Court finds that Glendale Elementary School District as a governmental entity
8 is immune from a claim for punitive damages as a matter of law under Title VII of the
9 Civil Rights Act of 1991 and 42 U.S.C. § 1981.

10 **Conclusion**

11 **IT IS ORDERED** granting Defendant's Motion to Dismiss First Amended
12 Complaint (Doc. 17) as to Counts One, Three, Four, and Five. Counts One, Three, Four,
13 and Five are dismissed with prejudice.

14 **IT IS FURTHER ORDERED** denying Defendant's Motion to Dismiss First
15 Amended Complaint (Doc. 17) as to Counts Two and Six.

16 **IT IS FURTHER ORDERED** granting Defendant's Motion to Dismiss First
17 Amended Complaint (Doc. 17) as to Plaintiff's claim for punitive damages. Plaintiff's
18 claim for punitive damages is dismissed with prejudice.

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20 Dated this 22nd day of May, 2015.

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23 _____
24 Eileen S. Willett
25 United States Magistrate Judge
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