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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-ESW **REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

I. Introduction

Plaintiff has failed to plead any viable claims. Her response highlights her misunderstanding of the different purposes and consequences of Arizona's notice of claim statute and the federal government's requirement that plaintiff receive a right-to-sue letter before filing a federal claim. The complaint should be dismissed in its entirety under Rule 12(b)(6).

II. Amendment of the Complaint Did Not Cure Plaintiff's Non-Compliance with the Notice of Claim Statute. Therefore, all State Law Claims Must be Dismissed.

Plaintiff mistakenly argues that nothing precludes her from sending Defendant a notice of claim, filing a complaint four days later and subsequently serving an amended

complaint on the Defendant. (Doc. 23 at 3-4.) The notice of claim statute entitles the school district to analyze a claim for sixty days before it can be sued. Under Plaintiff's interpretation, plaintiffs "could file their lawsuits long before they ever serve public entities or their employee defendants with a notice of claim." *Andress v. City of Chandler*, 198 Ariz. 112, 115, 7 P.3d 121, 124 (Ct. App. 2000). The Arizona Court of Appeals unmistakably held that plaintiff's interpretation "would produce illogical results" and "would clearly defeat the pre-litigation notification and settlement purposes of the notice of claim statute." *Id.*

Plaintiff attempts to excuse her premature filing of the suit by stating that she waited 60 days before amending the complaint and serving it. But, her argument has been rejected by the Arizona Court of Appeals. In *Drew*, the notice of claim stated the settlement offer would remain open for only two weeks. Although the plaintiff argued that defendants could have asked for more time or made a counteroffer, the court rejected this attempt to shift the burden of compliance to the defendant. *Drew v. Prescott Unified Sch. Dist.*, 233 Ariz. 522, 526, 314 P.3d 1277, 1281 (Ct. App. 2013). The statute is clear – only the school district may shorten the sixty-day period, and "the settlement offer contained in the notice of claim must remain open for sixty days to comply with the statute and allow time for investigation and assessment of the claim" before litigation is filed. *Id.* at 525, 314 P.3d at 1280.

"Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial." *Deer Valley Unified Sch. Dist. v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007) (citation omitted). "The notice of claim statute serves to give public entities notice of a claim and thereby provides an opportunity to resolve the claim **before a lawsuit is ever filed**." *Andress*, 198 Ariz. at 114, 7 P.3d at 123 (emphasis added). *See also Houser*, 214 Ariz. at 295, 152 P.3d at 492 (proper notices of claim "allow the public entity to investigate and assess liability, .

. . permit the possibility of settlement prior to litigation, and . . . assist the public entity in financial planning and budgeting"); *Haab v. Cnty. of Maricopa*, 219 Ariz. 9, 12, 191 P.3d 1025, 1028 (Ct. App. 2008) (same). A.R.S. § 12-821.01(E) expressly provides for the length of the period during which the public entity may evaluate the claim before a plaintiff commences an action in court. To hold otherwise would be to render the statutory language meaningless and defeat the legislative purpose behind the notice of claim requirements in the first place.

To allow Plaintiff to "cure" her early filing through a subsequent amended complaint (that relates back to the date of the original filing) would be tantamount to reading section (E) out of the statute altogether. This the Court must not do. Failure to comply with the statute's requirements "is not excused by actual notice or substantial compliance." *Haab*, 219 Ariz. at 12, 191 P.3d at 1028. As plaintiff concedes, a claimant must strictly comply with the statute to ensure that the public entity or employee against whom a claim is asserted has the opportunity to investigate and possibly resolve the claim **before any lawsuit is ever filed in court**. *See Andress*, 198 Ariz. at 114, 7 P.3d at 123 (emphasis added). Once the plaintiff "pulls the trigger" by filing a complaint in court, that opportunity is lost and can never be regained. By Plaintiff's logic, she may file a notice of claim one day, file a lawsuit the next, force the public entity she has sued to defend the premature case, and then file an amended complaint 60 days later to "cure" her early filing. This gamesmanship is foreclosed by the very purpose of the statutory scheme created by the legislature and enforced by Arizona's courts. This Court must not indulge it.

III. The Federal Right-to-Sue Letter Does Not Affect Plaintiff's State Law Claims

Throughout her response, Plaintiff incorrectly asserts that her state claims did not accrue until she received a right-to-sue letter relating to her federal claims from the

Equal Employment Opportunity Commission ("EEOC"). (Doc. 23 at 4, 8, 10.) Plaintiff fails to cite to a single case where a state notice of claim timeline was dependent upon or tolled by a federal law. The timing of the EEOC's authorization to file suit under a federal statute is completely irrelevant to the accrual of Plaintiff's state claims.

Arizona's notice of claim statute does not affect a plaintiff's federal claims. *See Felder v. Casey*, 487 U.S. 131, 147, 108 S. Ct. 2302, 2311 (1988) (state notice of claim statutes may not "place conditions on the vindication of a federal right"). *See also*, *e.g.*, *Gressett v. Cent. Ariz. Water Conservation Dist.*, No. CV 12-00185-PHX-JAT, 2012 WL 3028347, at *4 (D. Ariz. July 24, 2012); *Nored v. City of Tempe*, 614 F. Supp. 2d 991, 998 (D. Ariz. 2008); *Zeigler v. Kirschner*, 162 Ariz. 77, 82, 781 P.2d 54, 59 (Ct. App. 1989). Conversely, EEOC proceedings do not toll the time in which to file a state law notice of claim.

Plaintiff asserts that her state-law causes of action did "not accrue until after administrative remedies have been exhausted." (Doc. 23 at 3.) But Plaintiff erroneously conflates accrual, exhaustion, tolling and federal/state distinctions in her argument. A state law cause of action arises according to Arizona's notice of claim statute when a person has been damaged and knows or has reason to know the cause of the damage. A.R.S. § 12-821.01(B). *See also* Black's Law Dictionary (9th ed. 2009) (to "accrue" means to "come into existence" or "to arise").

The narrow exception built into § 12-821.01 is not applicable to the case at hand. Under subsection (C), a state law claim which must be submitted to arbitration or an administrative claims process or review process shall not accrue until all such processes have been exhausted. § 12-821.01(C). But none of Plaintiff's state claims (infliction of emotional distress, constructive discharge, etc.) were required to be submitted to any such process. No "statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term" forced Plaintiff's state law claims into arbitration or an

administrative review process. *Cf. id.* As a result, her claims accrued when she realized she had been damaged, her notice of claim had to be filed within 180 days of that date, and her claims were not deemed denied until 60 days thereafter.

The *Third & Catalina* case so extensively cited by Plaintiff is inapposite and not to the contrary. First, the case does not even discuss Arizona's notice of claims statute. Second, Plaintiff's tortured application of this Court of Appeals decision is at odds with Arizona Supreme Court and other cases cited herein. Third, the government defendant's dispositive motion in that case was granted by the trial court and affirmed by the Court of Appeals. In *Third & Catalina*, the court simply determined that the statute of limitations for challenging the constitutionality of a municipal fire code ordinance was tolled while the company pursued a mandatory, city-level appeal of the city's new ordinance. *Third & Catalina Assocs. v. City of Phoenix*, 182 Ariz. 203, 207, 895 P.2d 115, 119 (Ct. App. 1994). This unremarkable proposition does not help Plaintiff's case. Neither *Third & Catalina*, nor any case citing it, tolls the statute of limitations for state law claims while a party administratively exhausts separate federal claims.

A plaintiff is required to exhaust federal administrative remedies with the EEOC before filing a federal claim of discrimination under Title VII. 42 U.S.C. § 2000e-5(f)(1). No such exhaustion is required, however, before filing state law claims. The required prerequisite, if the state law claim is against a governmental entity, is proper and timely compliance with Arizona's notice of claim statute. While some of the underlying facts regarding the state and federal claims may overlap, these causes of action address entirely separate harms, rely on completely different standards, provide independent remedies, and are circumscribed by different statutes of limitations and other procedural constraints. The "absurd result" Plaintiff fears will never come to pass because it is premised on her misinterpretation of the law.

IV. Arizona's One-Year Statute of Limitations Ran Before Plaintiff Filed Her Lawsuit

In addition to the mandatory 60 day review window, A.R.S. § 12-821 requires all actions against a public entity to be brought within one year after the cause of action accrues, and § 12-541 limits the statute of limitations for a wrongful discharge claim to one year. Contrary to Plaintiff's argument, her state law claims accrued no later than when she resigned (in February 2013), not when she received a right-to-sue letter from the federal government on her federal Title VII claim (in June 2014). No basis exists upon which to toll these statutes.

It is clearly established that termination, for purposes of the Arizona Employment Protection Act ("AEPA"), occurs when an employee is fired or when she resigns. Numerous cases support this proposition. *See Lopez v. Country Ins. & Fin. Servs.*, 252 F. App'x 142, 145 n.3 (9th Cir. 2007) (in case alleging both Title VII and AEPA claims, AEPA claim filed more than 1 year after termination was untimely); *Haggerty v. Am. Airlines, Inc.*, 102 F. App'x 623, 624 (9th Cir. 2004); *Breeser v. Menta Grp., Inc., NFP*, 934 F. Supp. 2d 1150, 1160 (D. Ariz. 2013) (termination, for AEPA claim, occurs on date of discharge); *McElmurry v. Ariz. Dep't of Agric.*, No. CV-12-02234-PHX-GMS, 2013 WL 2562525, at *5 (D. Ariz. June 11, 2013) (wrongful termination accrues at discharge); *Barth v. Cochise Cnty., Ariz.*, 213 Ariz. 59, 63-64, 138 P.3d 1186, 1190-91 (Ct. App. 2006) (constructive discharge claim did not accrue until employee actually resigned).

Filing a Title VII claim does not toll the limitations period for state tort claims. *See Arnold v. U.S.*, 816 F.2d 1306, 1312-13 (9th Cir. 1987). Plaintiff "was not under an obligation to delay litigation until her Title VII claims were resolved." *Id.* at 1313. No law requires such delay, and federal policy does not mandate asserting Title VII claims before state tort claims.

Nor does filing a notice of claim toll the limitations period in which to commence litigation on tort claims. The Arizona Court of Appeals holds "that the one year statute of limitations to sue a public entity is not tolled while the notice of claim is pending." *Stulce v. Salt River Project Agr. Imp. & Power Dist.*, 197 Ariz. 87, 89, 3 P.3d 1007, 1009 (Ct. App. 1999).

Plaintiff's unsupported request to toll Arizona's statutes of limitations for wrongful discharge and suing a public entity has been rejected by other courts and should be rejected here as well. "The party opposing a motion to dismiss based on a statute of limitations defense 'bears the burden of proving the statute has been tolled.'" *McCloud v. State, Ariz. Dep't of Pub. Safety*, 217 Ariz. 82, 85, 170 P.3d 691, 694 (Ct. App. 2007). Plaintiff has not met her burden. This "is simply a case in which plaintiffs were aware of a claim they failed to pursue in a timely manner." *Stulce*, 197 Ariz. at 95, 3 P.3d at 1015. Plaintiff did not meet her burden, and thus Counts 3 and 4 must be dismissed.

V. Equitable Tolling Does Not Apply to Count 1

Plaintiff asserts that equitable tolling should apply to her claim under the Arizona Civil Rights Act, but she is incorrect. Arizona law is clear that a one year statute of limitations applies. A.R.S. §§ 12-541, 12-821. The right-to-sue letter from the EEOC clearly cautions Plaintiff that while she had 90 days to file suit under Title VII, "[t]he time limit for filing suit based on a claim under state law may be different." The letter did not give Plaintiff inaccurate advice. It did not list an incorrect date by which suit had to be filed. It simply gave her the deadline for filing a federal claim and warned that state deadlines could be different. Plaintiff has been represented by counsel since at least the beginning of these proceedings. This is a far different situation than that presented in *Kyles*, where the letter came directly from the state agency and stated an incorrect deadline for filing a state claim, and plaintiff was unrepresented when he filed

his complaint in court. *See Kyles v. Contractors/Engineers Supply, Inc.*, 190 Ariz. 403, 406, 949 P.2d 63, 66 (Ct. App. 1997). In addition, while Kyles missed only one deadline, Plaintiff failed to comply with A.R.S. § 12-821.01, and missed not only the deadline in A.R.S. § 41-1481(D), but also the deadline in A.R.S. § 12-821.

VI. Title VII

Plaintiff filed two charges with the EEOC, but did not file this lawsuit within 90 days of receiving her right-to-sue notice on the first charge. Therefore, her first charge may not be considered in this action. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(e).

Plaintiff's second charge with the EEOC referred to her first charge only by way of background to ostensibly support the second charge's claim of retaliation and allegation that she was "not Hispanic enough." (Doc. 23-2 at 1.) Nothing within the second charge would have alerted the EEOC or the school district that Plaintiff wished to allege a claim of gender discrimination. In fact, her first charge did not even allege a claim of gender discrimination. Rather, it alleged retaliation based on Plaintiff complaining about age and gender discrimination against two other employees. (Doc. 23-1 at 1.)

In her second charge, Plaintiff's factual statement admits she was replaced by another female. She did not check the box for gender on this form. (Doc. 23-2 at 1.) She did not list gender in her statement where she purported to list all grounds for discrimination. (Doc. 23-2 at 2.) These facts are far different than the ones in the case she cites for support.

In *B.K.B.*, the claimant checked the box indicating she believed she had been discriminated against on the basis of sex and the EEOC was negligent in preparing the charge form. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100, 1102-03 (9th Cir. 2002). Plaintiff did not check the box for gender on her second form, nor does she

allege or show negligence on the part of the agency. Gender discrimination is not like or reasonably related to Plaintiff's charge of retaliation and race discrimination. *Compare Green v. Los Angeles Cnty. Superintendent of Schs.*, 883 F.2d 1472, 1476 (9th Cir. 1989) (denial of benefits and termination not reasonably related to claim of sexual harassment) *with Deppe v. United Airlines*, 217 F.3d 1262, 1267 (9th Cir. 2000) (charge alleging discrimination based on perceived disability was reasonably related to record of disability), *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994) (discriminatory layoff was reasonably related to failure to rehire). A claim of gender discrimination cannot proceed here, where it was never properly exhausted.

Plaintiff also fails to state a claim for race discrimination. Her second charge says absolutely nothing about a wellness program, and would not have fallen within the scope of the EEOC's investigation. There are absolutely no facts (certainly none within the 300 day window prior to the second charge) showing that either of her supervisors (whose races are not alleged) discriminated against her based on her race. She does not allege anything more than unsupported conclusory statements. As the cases cited by Defendant in the Motion to Dismiss show, this falls far short of stating a plausible claim.

VII. Section 1981

A governmental entity may only be liable under § 1981 upon a showing that it had an official policy or custom which harmed the plaintiff. Official policy includes "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). Plaintiff's threadbare allegation that unnamed employees discriminated against women in hiring for a particular position falls far short of showing a widespread policy with the force of law.

In addition, in her complaint, Plaintiff attempts to allege a § 1981 claim based on her Hispanic ethnicity. Yet in her response, she claims to have stated a claim by showing a policy or custom of discrimination against women. Even if her complaint showed a policy of gender discrimination, this hardly helps her claim of racial discrimination. Nothing in the complaint suggests any widespread discriminatory policy, nor is there any suggestion of a policy of discrimination based on race. Plaintiff fails to state a § 1981 claim.

VIII. Punitive Damages

Plaintiff does not dispute that she cannot recover punitive damages from the District. If any of her claims are allowed to proceed, her request for punitive damages must be dismissed.

IX. The Complaint Should Be Dismissed With Prejudice

Any claims Plaintiff alleges to have once had are now barred by the passage of time. Courts have long recognized that a plaintiff either gets the notice of claim requirements right or she doesn't. In *Houser*, for example, the Supreme Court acknowledged: "McDonald can no longer file a notice of claim within the statute's one hundred eighty day time frame. Because McDonald did not file a valid notice of claim within the statutory time limit, her claim is barred by statute." 214 Ariz. at 299, 152 P.3d at 496. Accordingly, the court remanded with instructions to dismiss. *See also Nored v. City of Tempe*, 614 F. Supp. 2d 991, 998 (D. Ariz. 2008) (all state law claims against a city police officer who was not served with a notice of claim "must be dismissed with prejudice" because it was too late to fix what had not been properly done in the first place). Under the circumstances, therefore, it is appropriate to dismiss Plaintiff's claims with prejudice.

X. Conclusion

The prerequisite to filing a Title VII claim is exhaustion with the EEOC. The prerequisite to filing state claims against a school district is filing a notice of claim. These separate, independent requirements do not overlap or affect each other in any way. Plaintiff's failure to strictly comply with the notice of claim statute bars all of her state claims. Equitable tolling does not apply to save her failure to comply with the statutes of limitations. Her federal claims fail to state a plausible claim. Moreover, the federal claims fail because the EEOC level proceeding involved different theories than alleged in the suit and the amended complaint lacks sufficient factual allegations. Plaintiff cannot cure her multiple defects, and thus her complaint should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 26th day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing with electronic transmittal to the following:

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