GUST ROSENFELD P.L.C.
One East Washington Street, Suite 1600
Phoenix, Arizona 85004-2553
Telephone: 602-257-7422
Facsimile: 602-340-1538
Robert D. Haws – 012743
rhaws@gustlaw.com
Shelby M. Lile – 029546
slile@gustlaw.com

Attorneys for Defendants

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 **MOTION TO DISMISS FIRST AMENDED COMPLAINT** (Oral Argument Requested)

Defendants move to dismiss Plaintiff's First Amended Complaint (doc. 9) in its entirety, pursuant to Rule 12(b)(6), Fed. R. Civ. P. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts

Taking Plaintiff's well-pled facts as true, Plaintiff is a Hispanic woman who worked for Defendant Glendale Elementary School District ("District") for approximately two years, beginning in January 2011. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in October 2012. In the next several months, she allegedly received a letter of reprimand and her supervisor made her job more difficult. In February 2013, Plaintiff resigned. In

September 2013, she filed a second EEOC charge. She received a notice of right to sue on her second charge in June 2014. On September 15, 2014, she filed a notice of claim with the District. She commenced this action four days later.

II. The Complaint Fails to State a Claim

Dismissal is appropriate under Rule 12(b)(6), Fed. R. Civ. P. To survive a motion to dismiss under this rule, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 679, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). A legal conclusion couched as a factual allegation is not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

III. All State Law Claims Must Be Dismissed for Failing to Comply with Arizona's Mandatory Notice of Claim Statute

Failure to comply with A.R.S. § 12-821.01, Arizona's notice of claim statute, bars any claim against a public entity. *See Falcon ex rel. Sandoval v. Maricopa Cnty.*, 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (2006). Section 12-821.01(A) requires a person who has a claim against a public entity to file a claim within 180 days after the cause of action accrues. Only after the claim is denied, either through notice or the passage of 60 days, may the claimant proceed to litigation.

"Subsection (E) of the statute plainly states that the claim – which necessarily includes the claimant's specific offer to accept a sum certain in settlement – is not deemed denied until sixty days after filing unless the public entity denies the claim in writing before the sixty-day period expires." *Drew v. Prescott Unified Sch. Dist.*, 233 Ariz. 522, 525, 314 P.3d 1277, 1280 (Ct. App. 2013). Importantly, "only the public entity or employee has the option of reducing the statutory sixty-day period by denying the claim before the expiration of sixty days." *Id.* at 525-26, 314 P.3d at 1280-81. "Compliance with the notice provision of § 12-821.01(A) is a mandatory and essential prerequisite to such an action, and a plaintiff's failure to comply bars *any* claim." *Salerno v. Espinoza*, 210 Ariz. 586, 588, 115 P.3d 626, 628 (Ct. App. 2005) (internal quotation marks and citations omitted).

"Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements of A.R.S. § 12-821.01(A)." *Falcon*, 213 Ariz. at 527, 144 P.3d at 1256. *See also Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007) (describing the notice of claim statute as "clear and unequivocal" and noting that "[c]ompliance with this statute is not difficult"). The statute "clearly places the burden on the claimant to make a statutorily compliant settlement offer." *Drew*, 233 Ariz. at 526, 314 P.3d at 1281.

The purpose of § 12-821.01 is to "allow[] public entities and employees the opportunity to realistically and meaningfully investigate and assess a claim, and determine whether to settle and *possibly avoid litigation altogether*." *Id.* (emphasis added). By allowing 60 days to investigate, the legislature has ensured "that government entities will be able to realistically consider a claim." *Houser*, 214 Ariz. at 296, 152 P.3d at 493.

Plaintiff alleges she filed her notice of claim on September 15, 2014. *See* Complaint at ¶ 32. Yet she filed her original complaint in this action on September 19,

2014. She thus began litigation only 4 days after she notified Defendant of her claims, rather than waiting the 60 days required by statute. Because she failed to comply with A.R.S. § 12-821.01 her "subsequent lawsuit must fall." *Blauvelt v. Cnty. of Maricopa*, 160 Ariz. 77, 80, 770 P.2d 381, 384 (Ct. App. 1988). Plaintiff's failure to comply with the notice of claim statute deprived the District of the opportunity to meaningfully consider the claim before the complaint was filed. *Id.* Her actions thwarted the purpose and express language of the statute by not allowing the District 60 days to investigate her claims and consider a pre-litigation settlement.

The fact that Plaintiff has amended her complaint is irrelevant. The amendment relates back to the premature filing date of the original complaint and changes no facts or legal theories. By filing suit merely 4 days after serving the notice of claim, Plaintiff attempted to unilaterally shorten the statutorily mandated time period the District has to assess the claim before it is dragged into litigation. She thus tried to impermissibly circumvent the "clear language" of the statute. *Drew*, 233 Ariz. at 525, 314 P.3d at 1280. Arizona law is unmistakable: Plaintiff cannot pursue her state law claims after failing to strictly comply with all elements of A.R.S. § 12-821.01. Counts 1, 3, 4, and 5 are barred.

IV. Plaintiff Cannot Allege a Claim Under the Arizona Civil Rights Act ("ACRA")

In addition to Plaintiff's failure to comply with Arizona's notice of claims statute, her ACRA claims are also subject to dismissal for her failure to state a plausible claim. In Count 1, Plaintiff does not state whether she intends to base her ACRA claim on her first or second filing with the EEOC. Regardless, her claim is untimely.

The ACRA requires a party claiming employment discrimination to file a charge within 180 days with the Arizona Civil Rights Division or the EEOC. A.R.S. § 41-1481(A). If the division dismisses the charge, it must notify the charging party, who

then has 90 days to file a civil action. § 41-1481(D). "In no event shall any action be brought pursuant to this article more than one year after the charge to which the action relates has been filed." *Id.*

According to Plaintiff's complaint, she filed charges with the EEOC on October 11, 2012 and September 11, 2013. (Doc. 9 ¶¶ 19, 29). She filed her original complaint on September 19, 2014. This was more than one year after she filed both of her charges, in contravention of § 41-1481(D). Arizona courts have "strictly interpreted the language of this statute as setting an absolute maximum amount of time to file suit . . . ." *Wood v. Univ. Physicians Healthcare*, No. CV-13-00063-PHX-JAT, 2014 WL 3721207, at *13 (D. Ariz. July 28, 2014). Plaintiff's ACRA claim, brought more than one year after the charges, must therefore be dismissed without leave to amend.

V. The Title VII Claim (Count II) Is Not Plausible

Courts look to the elements of a prima facie employment discrimination case "to analyze a motion to dismiss—so as to decide, in light of judicial experience and common sense, whether the challenged complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *U.S. E.E.O.C. v. Farmers Ins. Co.*, 24 F. Supp. 3d 956 (E.D. Cal. 2014). Here, Plaintiff has failed to plead a plausible claim under Title VII.

Plaintiff alleges she filed a claim of discrimination due to race, age, and retaliation. (Doc. 9 ¶ 30.) Yet in Count 2, she alleges a violation of Title VII and claims she was discriminated against due to her race and gender. *Id.* ¶ 36. Plaintiff, by her own admission, did not administratively exhaust a claim of gender discrimination. Therefore, only her claim for race discrimination can be considered here. *See, e.g., B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002) ("In order to establish subject matter jurisdiction over her Title VII claim, Plaintiff was required to exhaust her administrative remedies.").

Next, a charge of discrimination must be filed within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). "All prior discrete discriminatory acts are untimely filed and no longer actionable." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S. Ct. 2061, 2073 (2002). Plaintiff's complaint alleges that she suffered from several separate, unrelated discriminatory actions. Only those acts that occurred on or after November 15, 2012 (300 days before filing the charge on September 11, 2013) are actionable. In Count 2, Plaintiff says she was not considered for the job of Coordinator for Classified or allowed to work with the District's wellness program. (Doc. 9 ¶ 36.) But both of these alleged actions occurred in the spring of 2012. *Id.* ¶¶ 14-18. They cannot be considered in assessing Plaintiff's Title VII claim. Most of the allegations in Plaintiff's complaint occurred before November 15, 2012 and therefore she has lost the ability to recover for them. The only timely allegations are that Plaintiff received a letter of reprimand and she resigned, and the vague contention that Plaintiff's supervisor made her work difficult. *Id.* ¶¶ 20, 23, 27.

Thus narrowed, Plaintiff fails to state a plausible claim of race discrimination. She alleges that she is a member of a protected class (Hispanic), and suffered a few adverse employment actions, but the complaint contains no plausible allegations tying these accusations together. She fails to support the alleged actions "with any facts that would permit an inference that these practices were based on [her] membership in a protected group." *Heyer v. Governing Bd. of Mt. Diablo Unified Sch. Dist.*, 521 F. App'x 599, 601 (9th Cir. 2013); *see also Bradley v. Cnty. of Sacramento*, No. 2:13-CV-2420 TLN DAD, 2014 WL 4078945, at *6 (E.D. Cal. Aug. 14, 2014) (dismissing Title VII claim where "aside from the allegations that she was a member of a protected class, plaintiff's complaint fails to allege any of the elements of a disparate treatment claim with any specificity.").

Moreover, Plaintiff does not indicate the race of her supervisors, nor does she allege that she was treated differently than non-Hispanic employees. *See Heyer*, 521 F. App'x at 601 ("Apart from conclusory statements, Heyer makes no factual assertion in his FAC that he was replaced by a person of another race or that a person of another race was otherwise treated differently than he was."). Plaintiff's complaint contains "merely the kind of 'the-defendant-unlawfully-harmed-me accusation[s]' that are insufficient" to meet her burden. *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949); *see also Jones v. Cmty. Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (dismissing employment discrimination plaintiff's claim where "allegations are conclusional and unsupported by any facts as to how race entered into any decisions."). The few allegations of discrimination that are within the 300 day window fall far short of the standard necessary to state a claim. Count 2 must be dismissed.

VI. The Arizona Employment Protection Act Does Not Apply to Plaintiff

Plaintiff contends that the District retaliated for her "refusal to engage in lawful [sic] conduct . . . in violation of A.R.S. §§ 23-1501(3)(c)(i) and (ii) [sic]." (Doc. 9 ¶ 40.) Presuming Plaintiff intends to allege she resisted *unlawful* conduct, she refers to no facts in her complaint to explain what actions she believes she took and what purported retaliation occurred. Even if she had, she would fail to state a claim because § 23-1501 simply does not apply to Plaintiff.

Section 23-1501(A)(3)(b) expressly states that if another statute provides a remedy to an employee, the remedies in that statute are "the exclusive remedies". This provision then lists the "statutes governing disclosure of information by public employees" as some of those providing exclusive remedies. § 23-1501(A)(3)(b)(v).

Pursuant to the statutes that apply to public employees like Plaintiff, an employee with control over personnel actions may not retaliate against another employee who

discloses information on a matter of public concern to a public body. A.R.S. § 38-532(A). This law provides that an employee who believes a prohibited personnel action is taken against her as the result of her disclosure may make a complaint to the governing board within the specified time and may appeal an unfavorable decision to the superior court. A.R.S. § 38-532(H)-(I).

Plaintiff does not plead that she ever – let alone timely – complained to the District's governing board about retaliation after notifying the board of her concerns in November 2011. She chose not to utilize the procedures outlined in § 38-532 that provided her exclusive remedy. Although she now claims she was subject to retaliation for whistleblowing, she did not complain to the school board or appeal to the superior court at any time. She cannot sidestep these provisions now. The Employment Protection Act specifically excludes whistleblowing claims of public employees from its coverage. Plaintiff's sole remedy was the remedy provided by § 38-532. She cannot state a claim under the Employment Protection Act.

VII. The Statute of Limitations Bars Count 4

A plaintiff claiming damages for wrongful termination must commence suit within one year after the cause of action accrues. A.R.S. § 12-541(4). The statute of limitations begins to run when the employer gives notice of termination to the employee. *Daniels v. Fesco Div. of Cities Serv. Co.*, 733 F.2d 622, 623 (9th Cir. 1984); *Haggerty v. Am. Airlines, Inc.*, 102 F. App'x 623, 624 (9th Cir. 2004).

Here, Plaintiff gave notice of her resignation on February 1, 2013. (Doc. 9 ¶ 27.) She claims she was constructively discharged. Since constructive discharge is just one form of wrongful discharge, the date of discharge triggers the statute of limitations. *See Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998). As a result, the one-year statute of limitations began running on February 1, 2013. Plaintiff's claim of

constructive discharge is untimely, since her complaint was filed more than 7 months late.

VIII. Plaintiff Failed to Meet the Preconditions for a Constructive Discharge Claim

Besides failing to file a notice of claim and asserting an untimely claim, Plaintiff's constructive discharge cause of action must be dismissed for a third reason. "Before an employee may file a constructive discharge action, the employee must first have given the employer an opportunity to address the issue." *Barth v. Cochise Cnty.*, 213 Ariz. 59, 63, 138 P.3d 1186, 1190 (Ct. App. 2006). Pursuant to A.R.S. § 23-1502(B), an employee must notify the employer in writing that she feels compelled to resign, allow the employer 15 days to respond in writing, and consider the employer's response. These actions are "a precondition to the right of an employee to bring a constructive discharge claim". § 23-1502(B).

A public employee is required to comply with both § 23-1502 and § 12-821.01 (the notice of claim statute) before filing a constructive discharge action against her employer. *Barth*, 213 Ariz. at 63, 138 P.3d at 1190. Plaintiff has failed to comply with the terms of both statutes. Nowhere in her complaint does she allege that she ever gave written notification to the District that she felt compelled to resign or intended to resign. *See* § 23-1502(B)(1). She does not allege that she provided the District 15 days to consider her complaints. *See* § 23-1502(B)(2). And as explained above, she failed to comply with the notice of claim statute. Accordingly, this claim must be dismissed.

IX. Not a Single Fact Supports Plaintiff's Claim for Intentional Infliction of Emotional Distress

The notice of claim statute limits the scope of claims to actions occurring within 180 days before the claim is filed. A.R.S. § 12-821.01(A). Since Plaintiff did not file her notice of claim until September 15, 2014, only events occurring after March 19,

2014 may be considered in assessing her claims. Plaintiff's last day of work was February 21, 2013. (Doc. 9 ¶ 28.) She does not have a single factual allegation in her complaint which could sustain a cause of action for intentional infliction of emotional distress, as she does not allege the District took any actions against her after March 19, 2014.

Even if any of her allegations could be considered, they would fall far short of the standard necessary to state a claim. "[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (Ct. App. 1995) (quotation omitted).

Besides being barred by the notice of claim statute, this count must be dismissed because Plaintiff has not pled a single fact which comes within the time frame that could be considered for this claim or which rises to the level necessary to state a viable claim.

X. Plaintiff's § 1981 Claim Fails for Lack of an Identified Policy or Custom

A "school district may not be held liable for its employees' violation of the rights enumerated in § 1981 under a theory of *respondeat superior*." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738, 109 S. Ct. 2702, 2724 (1989). Congress amended § 1981 after the *Jett* decision, but the amendment "preserves the 'policy or custom' requirement in suits against state actors." *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1215 (9th Cir. 1996). To succeed on this cause of action, a plaintiff must establish that the local government "had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered." *Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007).

Plaintiff omits any allegations of a discriminatory policy or custom in her complaint. Since "there is no allegation of a *specific* policy implemented by the Defendants or a *specific* event or events instigated by the Defendants that led to these purportedly unconstitutional [acts]," her claims cannot survive. *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012). The District cannot be vicariously liable for its employees' actions under § 1981 and Plaintiff has failed to show that it had a specific policy, custom, or practice which was the moving force behind her alleged constitutional violations.

XI. Punitive Damages Are Not Recoverable

Dismissal of Plaintiff's entire complaint is appropriate. Should the Court determine not to dismiss all causes of action against Defendant, though, Plaintiff's request for punitive damages must be dismissed. The District is immune from punitive damages under Title VII, *see* 42 U.S.C. § 1981a(b)(1), and § 1981. *See, e.g., Poolaw v. City of Anadarko, Okl.*, 738 F.2d 364, 366 (10th Cir. 1984), *overruled on other grounds by Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988). The District is also immune from punitive damages for state law claims. A.R.S. § 12-820.04.

XII. Conclusion

The complaint should be dismissed with prejudice because a third attempt to draft a viable complaint would be futile. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Dismissal without leave to amend is proper where, as here, it is clear that no amendment could cure the defect. *See Bailey v. I.R.S.*, 188 F.R.D. 346, 348 (D. Ariz. 1999), *aff'd*, 232 F.3d 893 (9th Cir. 2000). The complaint fails to state a claim upon which relief can be granted. Accordingly, Defendant respectfully requests the Court to dismiss Plaintiff's First Amended Complaint in its entirety, with prejudice.

RESPECTFULLY SUBMITTED this 5th day of January, 2015.

GUST ROSENFELD P.L.C.

By */s/ Robert D. Haws – 012743*
Robert D. Haws
Shelby M. Lile
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 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:

Jessica J. Burguan
Brian M. Strickman
Burguan Clarke Law Office, PLLC
2910 N. 7th Ave.
Phoenix, Arizona 85013
Attorneys for Plaintiff

/s/ Pauletta J. Seitz

SL2:sl2 2290457.1 1/2/2015