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IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ALICIA PETERSON fka ALICIA WRIGHT and PHILLIP PETERSON,
husband and wife, *Plaintiffs/Appellants*,

v.

CITY OF SURPRISE, *Defendant/Appellee*.

No. 1 CA-CV 12-0812
FILED 12-3-2013

Appeal from the Superior Court in Maricopa County
No. CV2011-055776
The Honorable Alfred M. Fenzel, Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Peter B. Swann joined. Judge Margaret H. Downie concurred in part and dissented in part.

N O R R I S, Judge:

¶1 Alicia Peterson appeals from the superior court's grant of summary judgment in favor of the City of Surprise. On appeal, Peterson argues the superior court should not have found her constructive discharge and breach of contract claims against the City time-barred. Because the record reflects a genuine dispute of material fact as to when her claims accrued, we reverse summary judgment in the City's favor and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 The City's police department employed Peterson as a detective. After Peterson learned of a vacant sergeant position within the Department,[1] she tested for it, and her score placed her in first place for what would have been a promotion. According to a declaration Peterson filed with the superior court in opposing the City's summary judgment motion, almost immediately thereafter she began to be harassed by other Department employees. Peterson followed her chain of command and reported the harassment. On August 17, 2010, Peterson submitted a notice to the Department announcing her resignation; the Department accepted her notice the same day. Peterson's notice read as follows:

> This memorandum is to notify the command of my resignation. This decision has come after much deliberation. I have appreciated all that I have gained from the Surprise Police Department and its employee's [sic]. My last day will be September 1, 2010. I thank those who have supported me and helped me along the way.

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[1]In the superior court, Peterson referred to the City and the Department interchangeably. As relevant to discussing the events pertinent to her claims, we refer to the Department instead of the City.

¶3 On August 25, 2010, the interim police chief issued a memorandum to all police employees ("Chief's memo") and stated he was not going to fill the vacant sergeant position, noting that in the "midst of [the promotional] process . . . such a negative environment had been created . . . that an employee felt ridiculed, felt undermined and felt subjected to personal attack by fellow members of this Department."

¶4 Peterson terminated her employment on September 1, 2010. On November 30, 2010, Peterson filed a notice of claim with the City pursuant to Arizona Revised Statutes ("A.R.S.") section 12-821.01 (Supp. 2012). In her notice of claim, Peterson alleged the Department had constructively discharged her because it had created and failed to rectify a hostile work environment that had forced her to resign. Peterson identified August 25, 2010 -- the date of the Chief's memo -- as the date her claims accrued.

¶5 On August 25, 2011, Peterson sued the City for constructive discharge and breach of contract. The City moved for summary judgment, arguing her claims were time-barred under A.R.S. § 12-821 (2003), because they had accrued on August 17, 2010 -- the day she submitted her resignation notice to the Department. The superior court granted the City's motion.

DISCUSSION

¶6 We review a grant of summary judgment de novo, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). A party moving for summary judgment must show both the absence of a genuine dispute of material fact and that the evidence entitles [the movant] to judgment as a matter of law. Ariz. R. Civ. P. 56(a). "The moving party's burden is a 'heavy' one: all reasonable inferences from the evidence are made in the non-moving party's favor." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 17, 292 P.3d 195, 199 (App. 2012) (citation omitted).

¶7 The fundamental issue on appeal is whether, as a matter of law, Peterson's claims accrued on August 17, 2010 as the City argued in the superior court. Because Peterson sued the City, a public entity, A.R.S. § 12-821 required her to bring her action within one year after her causes of action accrued.

¶8 A cause of action accrues under A.R.S. § 12-821 "when the damaged party realizes . . . she has been damaged and knows or

reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage."[2] A.R.S. § 12-821.01(B) (accrual for notice of claim); *see also Dube v. Likins*, 216 Ariz. 406, 421, ¶ 2, 167 P.3d 93, 108 (App. 2007) (supplemental opinion) ("[T]he legislature's objective in enacting § 12–821.01(B) was to ensure that the accrual date for purposes of the notice of claim, § 12–821.01, and filing the action, § 12–821, were the same."). Additionally, the legal elements or requirements of a cause of action bear on when it accrues. *Thompson v. Pima County*, 226 Ariz. 42, 45, ¶ 10, 243 P.3d 1024, 1027 (App. 2010) ("'To determine when a cause of action accrues, an analysis of the elements of [the cause of action] is necessary.'" (quoting *Dube*, 216 Ariz. at 411, ¶ 7, 167 P.3d at 98 (alteration in original))).

I. Constructive Discharge

¶9 In Arizona, and as relevant here, to prevail on a claim for constructive discharge, an employee is required to present evidence the "'working conditions were so intolerable that a reasonable person would have been compelled to resign.'" *MacLean v. State Dep't of Educ.*, 195 Ariz. 235, 245, ¶ 35, 986 P.2d 903, 913 (App. 1999) (quoting *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir. 1996)).[3] As the Ninth Circuit has colorfully put it, a constructive discharge claim accrues when the "individual has simply had enough; she can't take it anymore." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998).

¶10 Despite the City's contention that the constructive discharge claim accrued when Peterson submitted her resignation notice on August 17, Peterson presented evidence to the superior court that raised a reasonable inference her constructive discharge claim accrued only after the Chief's memo on August 25. As she explained in her declaration, she submitted

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[2]Citing cases from other jurisdictions, the parties on appeal debate whether, as a matter of law, an action for constructive discharge accrues when an employee gives notice of resignation or when the employee actually terminates employment. We need not decide this issue as Arizona law establishes the standard for determining when a claim accrues against a public entity.

[3]At oral argument before this court, counsel for Peterson and the City agreed A.R.S. § 23-1502 (Supp. 2012), a statute that also concerns constructive discharge claims, was inapplicable to the accrual issue before us.

the notice hoping it would cause the Department to "finally act and take action against the horrible acts of City/[Department] employees." This statement raises the inference that when she submitted the notice to the Department she had not yet reached the point where she "[couldn't] take it anymore," and it was only after the Department failed to correct the situation and then announced it was terminating the promotional process did she find the situation so intolerable that she had "simply had enough." *Draper*, 147 F.3d at 1110.

¶11 We conclude that the fact Peterson submitted her letter of resignation on August 17 is not dispositive. Peterson's employment did not end until September 1, and the record before us suggests she could have elected to retract her resignation and continue her employment before that date. Whether Peterson had "had enough" on August 17 or after August 25 for her constructive discharge claim, therefore, turns on her credibility. This is an issue more appropriately reserved for resolution by a jury. *Braillard v. Maricopa County*, 224 Ariz. 481, 489, ¶ 19, 232 P.3d 1263, 1271 (App. 2010); *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 23, 44 P.3d 990, 996 (2002) ("[D]eterminations of the time when discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." (quoting *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32, 955 P.2d 951, 961 (1998))). Accordingly, the superior court should not have granted summary judgment as to Peterson's constructive discharge claim.

II. Breach of Contract

¶12 In an action for breach of contract, the claimant must prove the existence of a contract, its breach, and resulting damage. *Thunderbird Metallurgical, Inc. v. Ariz. Testing Labs.*, 5 Ariz. App. 48, 50, 423 P.2d 124, 126 (1967). "The term 'accrual' [in A.R.S. § 12-821.01(B)] is construed in accordance with the common law discovery rule." *Little v. State*, 225 Ariz. 466, 469, ¶ 9, 240 P.3d 861, 864 (App. 2010). Thus, Peterson's cause of action for breach of contract accrued when she discovered, or should have discovered, she had been damaged. *Id.*; *see also Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588-91, 898 P.2d 964, 966-69 (1995) (under discovery rule cause of action does not accrue until plaintiff knows or, in exercise of reasonable diligence, should know of the facts underlying the cause).

¶13 As discussed, Peterson submitted her notice to the City hoping it would cause the City to act and remedy the harassment. Instead, the City failed to act and terminated the promotional process, thus depriving her of a chance to compete for the promotion. On this record, a finder of fact

could find her breach claims only accrued when the chief announced he was terminating the promotional process.

¶14 To be sure, as the City points out, Peterson's notice gave no indication she was resigning because of a hostile work environment or using it to give the City an opportunity to remedy the situation, which suggests Peterson had by then realized she was not going to receive the promotion. But, as with her constructive discharge claim, whether Peterson knew or should have known she was not going to receive the promotion when she submitted the notice or when the chief issued his memo turns on Peterson's credibility, and this issue is not suitable for resolution on summary judgment.

III. Equitable Tolling

¶15 In opposing the City's motion for summary judgment, Peterson also argued the Chief's memo equitably tolled the limitation period. Because this issue may come up on remand, we address it here. Even if we were to assume the Chief's memo could simultaneously accrue and toll Peterson's causes of action, as a matter of law, the Chief's memo did not equitably toll the limitation period.

¶16 The Chief's memo was not an "affirmative act[] of fraud or concealment" which misled Peterson "from either recognizing a legal wrong or seeking timely legal redress." *Porter v. Spader*, 225 Ariz. 424, 428, ¶ 11, 239 P.3d 743, 747 (App. 2010). Even if the Chief's memo was in some way misleading, when Peterson filed her notice of claim with the City on November 30, 2010, she was clearly on notice of the City's alleged legal wrongs and her right to seek "redress" for those wrongs. As of then, Peterson still had more than enough time to sue the City without running afoul of A.R.S. § 12-821. *See Certainteed Corp. v. United Pac. Ins. Co.*, 158 Ariz. 273, 277, 762 P.2d 560, 564 (App. 1988) (equitable remedy of estoppel is inappropriate when a party has adequate time to institute action). The Chief's memo thus did not cause Peterson to "forego litigation[] by leading [her] to reason and believe a settlement [would] be effected without the necessity of bringing suit." *Id.*

CONCLUSION

¶17 For the foregoing reasons, we reverse summary judgment in the City's favor and remand this case to the superior court for further proceedings consistent with this decision.[4]

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[4]Because we reverse the judgment in the City's favor, we do not need to address Peterson's argument on appeal that the superior court should not have awarded the City attorneys' fees under A.R.S. § 12-341.01 (Supp. 2012).

D O W N I E, Judge, concurring in part; dissenting in part.

¶18 I concur with the majority's resolution of the equitable tolling issue. I respectfully dissent, though, from the remainder of its analysis. I would affirm the grant of summary judgment to the City because, as a matter of law, Peterson filed her complaint more than one year after her claims accrued.

¶19 "A constructive discharge occurs *when a person quits his job* under circumstances in which a reasonable person would feel that the conditions of employment have become intolerable." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998) (emphasis added). Consistent with this principle, virtually every jurisdiction with constructive discharge elements similar to Arizona's has held that a constructive discharge claim accrues when the aggrieved employee tenders his or her resignation. *See, e.g., Maluo v. Nakano*, 125 F. Supp. 2d 1224, 1236 (D. Haw. 2000) (statute of limitations on constructive discharge claim "begins to run on the date of the employee's resignation"); *Patterson v. State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) (constructive discharge cause of action accrues on date employee provides "definitive notice of her intent to resign"); *Whye v. City Council for the City of Topeka*, 102 P.3d 384, 387 (Kan. 2004) ("[C]onsistent with the nature of a claim for constructive discharge, *i.e.,* that the plaintiff has been *forced* to leave an intolerable workplace, we hold that the cause of action accrues and the statute of limitations begins to run when the plaintiff tenders his or her resignation or announces a plan to retire."); *Jeffery v. City of Nashua*, 48 A.3d 931, 936 (N.H. 2012) ("[A]n action for constructive discharge accrues when the employee tenders the resignation . . . ."); *Daniels v. Mut. Life Ins. Co.*, 773 A.2d 718, 719 (N.J. Super. Ct. App. Div. 2001) ("[I]n a constructive discharge situation, the period of limitations begins to run on the date that the resignation is tendered."); *cf. Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000) ("We think that the date that Flaherty's claim accrued was the date when she gave definite notice of her intention to retire, and the rule should be the same in all cases of constructive discharge.").

¶20 Research suggests that California is one of the only jurisdictions to reach a contrary conclusion in the context of constructive discharge claims. *See, e.g., Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1253 (Cal. 1997). However, the elements of a constructive discharge cause of action in California differ materially from our own. California, for example, more broadly defines such claims to include an employer's failure to "remedy objectively intolerable working conditions that actually are

known to the employer," *id.* at 1249, a circumstance arguably incompatible with a bright line rule based on resignation date.

¶21 I would adopt the clear majority view for constructive discharge claims in Arizona, leading to the conclusion that Peterson's unequivocal resignation ("This memorandum is to notify the command of my resignation"), tendered and accepted on August 17, 2010, triggered the limitations period. Peterson's undisclosed, subjective hope that the City might "finally act and take action against the horrible acts of City employees," which she asserts could have prompted retraction of her non-contingent (and accepted) resignation, is insufficient, in my view, to forestall accrual of her claims or to create any factual issue for the trier of fact. *See Weber v. Moses,* 938 S.W.2d 387, 392 (Tenn. 1996) ("An employee's hope for rehire, transfer, promotion, or a continuing employment relationship cannot toll the statute of limitations absent some employer conduct likely to mislead an employee into sleeping on his rights.").

¶22 Nor can the police chief's memorandum, written eight days after Peterson's resignation was tendered and accepted, somehow reset the accrual date. "Commencement of the statute of limitations 'will not be put off until one learns the full extent of his damages.'" *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 255, 902 P.2d 1354, 1359 (App. 1995). "Rather, the statute commences to run when the plaintiff incurs 'some injury or damaging effect . . . .'" *Id.* A person clearly incurs "some injury or damaging effect" when he or she is forced to resign due to objectively intolerable working conditions. *See, e.g., Daniels*, 773 A.2d at 721 ("The harm has been done when the employee feels compelled to resign."). The police chief's memorandum may have reinforced Peterson's belief about her working conditions, and the memo might have been of evidentiary value to her. But that post-resignation act did not affect the accrual date.[5]

[5]The majority states, *supra* ¶ 11, that "the record before us suggests [Peterson] could have elected to retract her resignation and continue her employment" before her stated last day of September 1. I conclude otherwise. The record unequivocally establishes that Peterson's resignation was accepted on August 17 -- the same day it was tendered. I find nothing in the record suggesting she could have withdrawn her resignation and unilaterally decided to remain in the City's employ. But even if the record could be so interpreted, it would not alter the fact that Peterson's claims accrued on the date she resigned, even if those claims could have effectively been mooted by a retraction.

See id. at 722 ("Obviously, subsequent conduct by the employer cannot bring about a resignation that has already been tendered.").

¶23 Because I conclude that Peterson's claims accrued as a matter of law on August 17, 2010, her August 25, 2011 complaint was untimely, and I would affirm the grant of summary judgment to the City.