IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

HEIDI WASIELEWSKI, a single woman, *Plaintiff/Appellant*,

v.

THE KROGER CO. dba FRY'S FOOD STORES, a corporation,
Defendant/Appellee.

No. 1 CA-CV 15-0697
FILED 2-9-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-001687
The Honorable Colleen L. French, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Heidi Wasielewski, Avondale
Plaintiff/Appellant

Littler Mendelson, PC, Phoenix
By Frederick C. Miner, Barry H. Uhrman
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Heidi Wasielewski appeals from the superior court's dismissal of her claims against The Kroger Co. d/b/a Fry's Food Stores ("Fry's"). For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 While working as a customer service representative for Fry's in 2010, Wasielewski suffered a workplace injury when she was struck on the head. Wasielewski alleges that she took medically-prescribed leave, but that Fry's "refused to fill workman's compensation prescribed medicine" and "generally impeded recovery," and that she attempted but was unable to resolve her issues with Fry's through union grievance procedures.

¶3 Wasielewski further alleges that when she returned to work from medical leave, an assistant manager began to sexually harass her by "suggestive innuendoes" and actions calculated to frighten and intimidate her. She asserts that she attempted to address this issue through union grievance procedures, but Fry's nevertheless did not take steps to stop the harassment. Wasielewski alleges that the resulting stress and exhaustion led to her taking unpaid medical leave beginning in May 2014.

¶4 Wasielewski filed multiple charges with the Equal Employment Opportunity Commission ("EEOC") and the Arizona Civil Rights Division ("ACRD") alleging employment discrimination. She later resigned her employment and brought this complaint in superior court asserting claims for workplace sexual harassment in violation of federal law, retaliation in violation of state and federal employment law, and disability discrimination in violation of the Americans with Disabilities Act.[1]

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[1] Wasielewski's complaint also alleged constructive termination, but she later withdrew this claim.

¶5 Fry's moved to dismiss the complaint under Arizona Rule of Civil Procedure 12(b)(6), asserting federal preemption, failure to comply with grievance procedures under a collective-bargaining agreement, failure to exhaust administrative remedies or comply with the requisite administrative procedures, and failure to state a claim. The superior court granted the motion, denied Wasielewski's request for leave to amend, and dismissed the complaint with prejudice.

¶6 Wasielewski timely appealed, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).[2]

DISCUSSION

¶7 We review de novo dismissal under Rule 12(b)(6) for failure to state a claim for which relief can be granted. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). Dismissal under Rule 12(b)(6) is appropriate "only if 'as a matter of law [ ] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Id.* at 356, ¶ 8 (citation omitted and alteration in original). We "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts," but statements of legal conclusions without supporting factual allegations are insufficient to form a basis for relief. *Id.* at ¶ 9.

¶8 Under the employment discrimination provisions of both Title VII of the Civil Rights Act of 1964[3] and the Arizona Civil Rights Act,[4] filing an administrative charge with the EEOC and/or the ACRD is a statutory prerequisite to bringing a civil action asserting employment discrimination. *See* 42 U.S.C. § 2000e-5(e)*; Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)*; see also* A.R.S. § 41-1481(A)*; Madden-Tyler v. Maricopa County*, 189 Ariz. 462, 468 (App. 1997). The same statutorily-

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[2] Absent material revisions after the relevant date, we cite a statute's current version.

[3] *See* 42 U.S.C. §§ 2000e to 2000e-17, 12111 to 12117 (prohibiting employment discrimination including retaliation under 42 U.S.C. § 2000e-3(a), sexual harassment or sexual discrimination under 42 U.S.C. § 2000e-2(a), and disability discrimination under 42 U.S.C. § 12112).

[4] *See* A.R.S. §§ 41-1461 to -1468, 41-1481 to -1485 (prohibiting employment discrimination including retaliation under A.R.S. § 41-1464(A), sexual harassment or sexual discrimination under A.R.S. § 41-1463(B), and disability discrimination under A.R.S. § 41-1463(F)).

required procedures apply to employment discrimination claims under the Americans with Disabilities Act. *See* 42 U.S.C. § 12117(a) (incorporating Title VII procedures). If the EEOC and/or the ACRD dismiss the charge, the employee may bring a civil action within 90 days after notice of the dismissal, which is generally accompanied by a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1); A.R.S. § 41-1481(D). This 90-day restriction acts as a limitations period for statutory employment discrimination claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 n.3 (1983); *Kyles v. Contractors/Engineers Supply, Inc.*, 190 Ariz. 403, 405 (App. 1997).

¶9 Here, the record reflects three possible administrative charges that might form the factual basis for Wasielewski's January 7, 2015 complaint, but none satisfies the statutory requirements. First, the complaint states that Wasielewski received an EEOC right-to-sue letter dated October 10, 2010, presumably related to an earlier-filed charge. The complaint was filed more than four years after expiration of the 90-day window triggered by that determination, and thus was untimely.

¶10 Next, Wasielewski filed a charge in August 2013, which the ACRD dismissed in April 2014 (nine months before the complaint) with a right-to-sue letter on September 19, 2014 (110 days before the complaint). The complaint was thus untimely as to the August 2013 charge as well because it was filed more than 90 days after both the notice of dismissal and the notice of right to sue regarding this charge.

¶11 Wasielewski filed an additional charge in July 2014. Although the record does not reflect whether this charge had been resolved by the time Wasielewski filed her complaint, the alleged unlawful employment practices described in the charge were different than those set forth in the complaint. In the July 2014 charge, Wasielewski alleged discrimination based on retaliation and disability, stating specifically that "due to my medical condition, I asked . . . for a reasonable accommodation to work a modified schedule. However, [Fry's] refused to engage in the interactive process and denied my request. In addition, since my request for a reasonable accommodation, I have been written up without cause." Unlike the complaint, the charge did not allege sexual harassment by a fellow employee. While both charge and complaint alleged some form of retaliation, the complaint alleged retaliation for (1) Wasielewski's grievance regarding Fry's actions "imped[ing] recovery" from her 2010 industrial injury and/or (2) her grievance asserting sexual harassment, but the charge alleged retaliation for requesting accommodation of a disability. Finally, although both charge and complaint asserted disability discrimination, the complaint's allegations focused on Fry's immediate response to the 2010

injury (which caused Wasielewski to take "a medically prescribed leave of absence from her employment in order to recover" before returning to work), whereas the charge asserts a failure to offer reasonable accommodation in 2013 and 2014. Because the unlawful employment practices alleged in the July 2014 charge differed from those set forth in the complaint, this charge cannot form the administrative basis for the complaint. *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002) (as amended); *Ariz. Civil Rights Div., Dep't of Law v. Olson*, 132 Ariz. 20, 27–28 (App. 1982).

¶12 Accordingly, because Wasielewski's civil claims are not timely or are not based on a properly asserted administrative charge, the superior court did not err by dismissing the complaint. Because we affirm dismissal on this basis, we do not address the alternative grounds of federal preemption, mandatory grievance procedures under the collective bargaining agreement, or factual insufficiency. And because amendment of the claims actually presented would be futile given the lack of a timely and sufficient underlying administrative charge, the superior court did not err by declining Wasielewski's request for leave to amend the complaint.

¶13 Fry's seeks an award of attorney's fees incurred on appeal. In an exercise of our discretion, we deny its request.

CONCLUSION

¶14 The superior court's judgment is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA