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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Jodi Strand, an Arizona resident,

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No. CV-10-02112-PHX-NVW

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Plaintiff,

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ORDER

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vs.

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John C. Lincoln Health Network, Inc., an
Arizona corporation; and John C. Lincoln,
LLC, an Arizona limited liability
company,

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Defendants.

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17 Before the Court is Defendant John C. Lincoln Health Network, Inc.’s Partial Motion
18 to Dismiss. (Doc. 6.) The Court will grant the motion.

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I. Legal Standard

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21 To state a claim for relief under Rule 8, a plaintiff must make “‘a short and plain
22 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
23 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atl.
24 Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This “short and plain
25 statement” must also be “plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
26 (2009). A claim is plausible if it contains sufficient factual matter to permit a reasonable
27 inference that the defendant is liable for the conduct alleged. *Id.* A proper complaint needs
28 no “formulaic recitation of the elements of a cause of action,” *see Twombly*, 550 U.S. at 555,
but the plaintiff must at least “allege sufficient facts to state the elements of [the relevant]

1 claim,” *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1122 (9th Cir. 2008).
2 All of the plaintiff’s plausible factual allegations are accepted as true and the pleadings are
3 construed in a light most favorable to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072
4 (9th Cir. 2005).

5 **II. Alleged Facts**

6 Plaintiff Jodi Strand has worked as a registered nurse at Defendant Lincoln Health’s
7 North Mountain Hospital since August 2005. At the time she was hired, she informed
8 Lincoln Health that she is allergic to latex. She has never had an allergic reaction to latex
9 at North Mountain Hospital, however, because it provides latex-free alternatives to products
10 that would normally contain latex.

11 In March 2008, while receiving physical therapy for an injury to her wrist, Strand was
12 exposed to latex products and suffered an allergic reaction requiring hospitalization. She
13 returned to work soon after, but was called into a meeting with human resources personnel
14 in April 2008 to discuss the extent of her allergy. At that meeting, one of Strand’s
15 supervisors asked Strand to submit a “Reasonable Accommodation Request Form,”
16 apparently as formal documentation of her need to avoid latex. Strand refused to submit a
17 Reasonable Accommodation Request Form at that time. Since then, some of Strand’s
18 coworkers and supervisors have commented or asserted that she should be “looking for
19 another job.”

20 In November 2008, Strand suffered chest pain while on duty, requiring hospitalization
21 to ensure that Strand was not suffering a heart attack. Strand does not state what caused this
22 chest pain, but claims that it was not a heart attack, and it was unrelated to her latex allergy.
23 When she returned to work, however, she was again called into a human resources meeting
24 and informed that she would be placed on administrative leave. At that meeting, Strand was
25 “coerced” to fill out the Reasonable Accommodation Request Form, requesting “latex free
26 gloves which are already available on the unit.”

27 Strand’s administrative leave began on or about November 21, 2008. For the next
28 several weeks, Lincoln Health required additional documentation on Strand’s allergy. This

1 additional information apparently satisfied Lincoln Health, and it permitted Strand to return
2 to work on January 14, 2009, by which time she had suffered economic injuries such as loss
3 of wages and loss of vacation and sick leave time. Strand remains employed with Lincoln
4 Health to this day.

5 **III. Procedural History**

6 Strand filed a discrimination charge with the EEOC on January 13, 2009, claiming
7 that her treatment at work, especially the forced administrative leave, violated her rights
8 under the Americans With Disabilities Act (ADA). On the same day, she filed a similar
9 charge with the Arizona Attorney General’s Civil Rights Division.¹ On May 7, 2010, the
10 EEOC issued a right-to-sue letter. The record contains no information about what the Civil
11 Rights Division chose to do.

12 Strand filed this lawsuit in Maricopa County Superior Court on August 9, 2010,
13 asserting six causes of action: (1) violation of the ADA; (2) violation of the Arizona Civil
14 Rights Act (ACRA); (3) breach of contract, based on the otherwise unsubstantiated allegation
15 that “her employment with [Lincoln Health] constitutes an enforceable contract”; (4) breach
16 of the covenant of good faith and fair dealing implied in the alleged employment contract;
17 (5) “false light” invasion of privacy, based on the allegation that Lincoln Health “unlawfully
18 intercepted, disclosed, and used [Strand’s] private [medical] information”; and (6) “unlawful
19 disclosure of private information,” based on the same allegation. Lincoln Health removed
20 to this Court and has moved to dismiss causes of action two through six (*i.e.*, everything
21 except Strand’s ADA claim).

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26 ¹Strand’s complaint says that she filed with the Civil Rights Division on January 13,
27 2010, rather than January 13, 2009. In response to Lincoln Health’s motion to dismiss,
28 Strand asserted “2010” was a typo, and should have been “2009” — the same day she filed
with the EEOC.

1 **IV. Analysis**

2 **A. Strand’s ACRA Claim**

3 The Court agrees with Lincoln Health that Strand’s ACRA claim is time-barred.
4 ACRA requires parties to file suit within one year of filing a discrimination charge with the
5 Civil Rights Division. A.R.S. § 41-1481(D) (“In no event shall any action be brought
6 pursuant to this article more than one year after the charge to which the action relates has
7 been filed.”). Strand filed with the Civil Rights Division on January 13, 2009. She did not
8 bring suit until August 9, 2010. Her ACRA claim must therefore be dismissed without leave
9 to amend.

10 **B. Strand’s Contract Claims**

11 As noted above, Strand’s contract-based claims rely on the allegation that “her
12 employment with [Lincoln Health] constitutes an enforceable contract.” In response to
13 Lincoln Health’s motion to dismiss, Strand clarifies that “Defendant’s actions and statements
14 created an express or implied contract.” Lincoln Health counters that the Arizona
15 Employment Protection Act, A.R.S. § 23-1501, renders all alleged employment contracts
16 unenforceable unless in writing and signed by both parties. Lincoln Health also argues that
17 Strand’s contract claims are time-barred by Arizona’s one-year statute of limitations for
18 employment contract actions. A.R.S. § 12-541(3).

19 The Court will not reach the issue of whether the Arizona Employment Protection Act
20 defeats Strand’s claim. That act specifically addresses whether a terminated employee can
21 sue for breach of contract. Strand was never terminated. The act might still apply, but the
22 Court has received no briefing on this issue. Accordingly, the Court will not decide it.

23 The Court will, however, dismiss Strand’s contract causes of action for failure to meet
24 the pleading requirements established in Fed. R. Civ. P. 8(a). “To bring an action for the
25 breach of the contract, the plaintiff has the burden of proving the existence of the contract,
26 its breach and the resulting damages.” *Graham v. Asbury*, 112 Ariz. 184, 185, 540 P.2d 656,
27 657 (1975). Further, in Arizona, “employment contracts without express terms are
28 presumptively at will,” and it is the employee’s burden to overcome that presumption.

1 *Demasse v. ITT Corp.*, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999). Although Strand
2 need not prove these elements at the motion-to-dismiss phase, she must at least plausibly
3 allege them.

4 Here, Strand has not plausibly alleged the existence of a contract implied by words
5 or conduct. She has alleged only that “her employment with [Lincoln Health] constitutes an
6 enforceable contract” and that “Defendant’s actions and statements created an express or
7 implied contract.” Such “[t]hreadbare recitals of the elements of a cause of action, supported
8 by mere conclusory statements,” are “not entitled to the assumption of truth.” *Iqbal*, 129 S.
9 Ct. at 1949, 1951. Strand has therefore not alleged “enough facts to state a claim to relief
10 that is plausible on its face.” *Twombly*, 550 U.S. at 570.

11 This is not a case in which the facts necessary to make her claim plausible are in the
12 defendant’s sole possession. *See, e.g., Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d
13 Cir. 2010) (“[t]he *Twombly* plausibility standard . . . does not prevent a plaintiff from
14 pleading facts alleged upon information and belief where the facts are peculiarly within the
15 possession and control of the defendant” (internal quotation marks and citations omitted));
16 *Brenes-Laroche v. Toledo Davila*, 682 F. Supp. 2d 179, 187 (D.P.R. 2010) (“We understand
17 the difficulty faced by many civil rights litigants in Plaintiff’s position who are not armed
18 with sufficient facts, more likely to be found in Defendants’ possession, to survive *Iqbal*’s
19 pleading standard at this pre-discovery stage of litigation.”). If “actions and statements
20 created an express or implied contract,” as Strand alleges, then Strand should specify those
21 actions and statements, describe the contractual terms they created, and identify how Lincoln
22 Health breached those terms. Absent such specifics, she has not stated a plausible breach of
23 contract claim, especially in the context of an unwritten employment contract created by
24 words or conduct. The Court will dismiss that cause of action. And because the covenant
25 of good faith and fair dealing is implied in contracts, and therefore depends on the existence
26 of a contract, the Court will dismiss Strand’s good faith and fair dealing cause of action.

27 The Court will also dismiss Strand’s contract-based claims for failure to sue within
28 the one-year limitations period set forth in A.R.S. § 12-541(3). Strand obviously filed her

1 complaint more than one year after returning from administrative leave — and being placed
2 on administrative leave is the only supposed breach of contract that the Court can discern
3 from the complaint — but she argues that her claim should be equitably tolled on account of
4 her pending civil rights charges with the EEOC and state Civil Rights Division. However,
5 *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), resolves this issue, laying down
6 the principle that EEOC proceedings, although a prerequisite to bring suit for employment
7 discrimination, do not toll the statute of limitations for separate causes of action arising from
8 the same facts. The Court will therefore dismiss Strand’s contracts claims. This dismissal
9 will be without leave to amend because the failure to file within the limitations period makes
10 any attempted amendment to this claim futile.

11 **C. Strand’s False Light Cause of Action**

12 According to the Restatement (Second) of Torts:

13 One who gives publicity to a matter concerning another that
14 places the other before the public in a false light is subject to
15 liability to the other for invasion of his privacy, if
16 (a) the false light in which the other was placed would be highly
17 offensive to a reasonable person, and
18 (b) the actor had knowledge of or acted in reckless disregard as
19 to the falsity of the publicized matter and the false light in which
20 the other would be placed.

21 *Restatement (Second) of Torts* § 652E (1977). Arizona has adopted this Restatement section,
22 *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 342, 783 P.2d 781, 788 (1989), with
23 one important difference. According to the Restatement, “it is essential to the [false light
24 cause of action] that the matter published concerning the plaintiff is not true.” *Restatement*
25 *(Second) of Torts* § 652E cmt. a. In Arizona, however, “[a] false light cause of action may
26 arise when something untrue has been published about an individual, *or* when the publication
27 of true information creates a false implication about the individual.” *Godbehere*, 162 Ariz.
28 at 341, 783 P.2d at 787 (citation omitted; emphasis in original).

Strand relies on the true information/false implication theory for her false light claim.
Strand alleges that, soon after her April 2008 hospitalization, certain coworkers began

1 suggesting that she should look for a new job. Strand therefore infers that her employer
2 disseminated information about her allergy to those who had no need to know, leading
3 certain coworkers to conclude that Strand was not qualified for her job. Lincoln Health
4 argues that Strand’s cause of action fails because her allergy was not published to the
5 “public,” but at most (taking Strand’s allegations as true) to a few members of the hospital
6 staff. Lincoln Health also argues that any such publication was qualifiedly privileged
7 because some coworkers had a legitimate need to know.

8 The Court finds as a matter of law that Lincoln Health’s dissemination of Strand’s
9 latex allergy to a small number of hospital employees was not to the “public,” and in any
10 event, it was justified — a latex allergy in a hospital could be a matter of life and death.
11 Also, publicization of a latex allergy is not “highly offensive” as a matter of law. A latex
12 allergy is a far cry from a venereal disease, for example. The Court will therefore dismiss
13 Strand’s false light claim without leave to amend.

14 **D. Strand’s Public Disclosure of Private Information Cause of Action**

15 Strand’s final cause of action relies on a tort that Arizona courts apparently have not
16 recognized explicitly: public disclosure of private facts. However, Arizona courts have
17 generally shown favor toward to the Restatement’s “invasion of privacy” torts, such as false
18 light. Public disclosure of private facts is also an invasion of privacy tort, and the Court
19 therefore assumes that Arizona would adopt the Restatement test:

20 One who gives publicity to a matter concerning the private life
21 of another is subject to liability to the other for invasion of his
22 privacy, if the matter publicized is of a kind that
23 (a) would be highly offensive to a reasonable person, and
24 (b) is not of legitimate concern to the public.

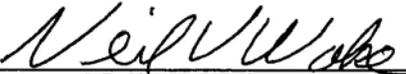
24 *Restatement (Second) of Torts* § 652D.

25 Similar to her false light claim, Strand claims that Lincoln Health illegitimately
26 publicized her medical conditions to coworkers. Lincoln Health argues that such publication,
27 if it happened, could not be highly offensive to a reasonable person. The Court has already
28 ruled as a matter of law that publicization of a latex allergy is not highly offensive, and that

1 Lincoln Health did not disseminate information to the “public.” The Court will therefore
2 dismiss this claim without leave to amend.

3 IT IS THEREFORE ORDERED that John C. Lincoln Health Network, Inc.’s Partial
4 Motion to Dismiss (Doc. 6) is GRANTED.

5 DATED this 31st day of March, 2011.

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Neil V. Wake
United States District Judge

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