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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Dorene O. Zozaya,

10 Plaintiff,

11 v.

12 State of Arizona; James Tidwell; et al.,

13 Defendants.

No. CV12-1932 PHX DGC

ORDER

14 Before the Court is the motion to dismiss filed by Defendants James Tidwell and
15 Karen Tidwell (Doc. 36) and the motion for partial judgment on the pleadings filed by
16 Defendant the State of Arizona (Doc. 42). The motion to dismiss is fully briefed.¹ The
17 Parties have not requested oral argument. For reasons stated below, the Court will grant
18 in part and deny in part the Tidwells' motion, and grant the State's motion.

19 **I. Background.**

20 Plaintiff's claims arise from incidents that occurred when Defendant James
21 Tidwell was Plaintiff's supervisor at the Arizona Department of Transportation. Doc. 1,
22 ¶¶ 10, 12, 17. The complaint alleges that Tidwell made repeated and unwelcome sexual
23 comments and demands for sexual favors (*id.*, ¶¶ 13, 15, 16), and that he told Plaintiff

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25 ¹ The motion for partial judgment on the pleadings is not fully briefed. The Court
26 finds, however, that further briefing will not aid its decision regarding the State's
27 assertion of its Eleventh Amendment immunity with respect to one claim. "[A] federal
28 court may dismiss *sua sponte* if jurisdiction is lacking." *Fiedler v. Clark*, 714 F.2d 77, 78
(9th Cir. 1983) (citing *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884));
see also Freeman v. Oakland Unified Sch. Dist., 179 F.3d 846, 847 (9th Cir. 1999) ("The
Eleventh Amendment is a limit on federal courts' jurisdiction.").

1 that her rejection of these demands would result in unfavorable employment treatment
2 (*id.*, ¶ 14). The complaint alleges that Tidwell made unwelcome physical sexual contact
3 with Plaintiff in the workplace and during working hours. *Id.*, ¶ 15. The complaint
4 alleges that Tidwell repeatedly subjected Plaintiff to offensive comments about her race
5 and age. *Id.* The complaint alleges that other State managing agents knew about
6 Tidwell’s treatment of Plaintiff, and that no one took action to stop it. *Id.*, ¶¶ 18-19.

7 **II. The Tidwells’ Motion to Dismiss.**

8 **A. Legal Standard.**

9 When analyzing a complaint for failure to state a claim to relief under Rule
10 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
11 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
12 Cir. 2009). The complaint must contain enough facts to state a claim to relief that is
13 plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is
14 plausible if the facts pled allow the court to make the reasonable inference that the
15 defendant is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under Federal Rule of
16 Civil Procedure 8(a)(2), a pleading must contain “a short and plain statement of the claim
17 showing that the pleader is entitled to relief.” But “[s]pecific facts are not necessary; the
18 statement need only give the defendant fair notice of what . . . the claim is and the
19 grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal
20 quotation marks and citations omitted).

21 **B. Discussion.**

22 **1. Counts One through Five: Title VII and the ADEA.**

23 The Tidwells move to dismiss counts one through five, claims based on Title VII
24 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2, 2000e-3 and the Age
25 Discrimination and Employment Act of 1967 (“ADEA”), 29 U.S.C. § 623. Doc. 36 at 3.
26 In response, Plaintiff concedes that the claims against the defendants Tidwell are limited
27 to those asserted under 42 U.S.C. § 1983. Doc. 40 at 3-4; *see also id.*, at 4, n. 16 (“None
28 of the counts One to Five were intended to be, or are asserted against the defendants’

1 Tidwell.”). Accordingly, the Court grants the Tidwells’ motion with respect to counts
2 one through five.

3 **2. Count Six: Equal Protection Violation under § 1983.**

4 Count six asserts a claim under 42 U.S.C. § 1983 for violation of the Equal
5 Protection Clause. Doc. 1, ¶¶ 39-41. “To state a claim for relief in an action brought
6 under § 1983, [plaintiffs] must [allege] that they were deprived of a right secured by the
7 Constitution or laws of the United States, and that the alleged deprivation was committed
8 under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999).
9 “Section 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method
10 for vindicating federal rights elsewhere conferred.’” *Albright v. Oliver*, 510 U.S. 266,
11 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979)). The Court must
12 consider whether the complaint alleges conduct that violates the Fourteenth Amendment.
13 *See Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009).

14 “[S]exual harassment of a governmental employee can violate the Equal
15 Protection Clause[.]” *Id.*; *see also Bator v. Hawaii*, 39 F.3d 1021, 1027 (9th Cir. 1994)
16 (noting that allegations of persistent and unwelcome physical and verbal abuse motivated
17 by gender can state a claim of sexual harassment, “which can be impermissible sex
18 discrimination in violation of the Equal Protection Clause.” (citing *Lindsey v. Shalmy*, 29
19 F.3d 1382, 1385-86 (9th Cir. 1994); *Sischo-Nownejad v. Merced Comty. Coll. Dist.*, 934
20 F.2d 1104, 1109, 1112-13 (9th Cir. 1991))). Plaintiff alleges that Tidwell made
21 unwelcome “sexual comments” (Doc. 1, ¶ 15) and “repeated demands for sexual favors”
22 (*id.*, ¶ 13), which, if rejected, “would result in unfavorable treatment” at work (*id.*, ¶ 14).
23 This alleged conduct, if true, would constitute intentional sexual discrimination in
24 violation of the Equal Protection Clause.²

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26 ² In her response, Plaintiff refers to Title VII and cites Title VII cases in support of
27 her argument that the complaint alleges a plausible § 1983 claim. Doc. 40 at 5-7.
28 “Violations of rights *created* by Title VII cannot form the basis of section 1983 claims.”
Learned v. City of Bellevue, 860 F.2d 928, 933 (9th Cir. 1988) (emphasis in original).
For this reason, the Court has construed the complaint as alleging a § 1983 sexual

1 The Tidwells argue that the complaint fails to allege that Tidwell acted under the
2 color of state law. Doc. 36 at 5. “[G]enerally, a public employee acts under color of state
3 law while acting in his official capacity or while exercising his responsibilities pursuant
4 to state law.” *West v. Atkins*, 487 U.S. 42, 49-50 (1988). The complaint alleges that
5 Tidwell “was a managing agent of the defendant State of Arizona” (Doc. 1, ¶ 17), that
6 Tidwell was “[Plaintiff’s] supervisor or acted with the authority of her supervisor/
7 management official” (*id.*, ¶ 12), and that Tidwell abused his authority in sexually
8 harassing Plaintiff (*id.*, ¶ 14). Although the complaint alleges that Tidwell abused his
9 state law authority, it is enough that the challenged conduct relates to the performance of
10 his supervisory duties. *West*, 487 U.S. at 49-50 (“It is firmly established that a defendant
11 in a § 1983 suit acts under color of state law when he abuses the position given to him by
12 the State.”); *see also Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480 (9th Cir.
13 1991) (“For conduct to relate to state authority, it must bear some similarity to the nature
14 of the powers and duties assigned to the defendant[.]”) (citations omitted); *Anderson v.*
15 *Warner*, 451 F.3d 1063, 1068-69 (9th Cir. 2001). Because Tidwell’s alleged state
16 supervisory authority enabled him to accomplish the offensive acts, this element of
17 Plaintiff’s § 1983 claim is satisfied.

18 Throughout their motion, the Tidwells generally argue that Plaintiff’s complaint is
19 “too vague and conclusory” to state a claim (Doc. 36 at 4, 6), “fails to identify any
20 specific comments allegedly made by Tidwell” (*id.* at 5), and “offers no specifics” (*id.*).
21 The Court finds these arguments unpersuasive. Notice pleading does not require specific
22 facts, *Erickson*, 552 U.S. at 93-94, and Plaintiff’s complaint gives fair notice that the
23 claim rests upon Tidwell’s alleged sexual harassment: sexual comments and demands for
24 sexual favors, the rejection of which resulted in unfavorable employment treatment.
25 Doc. 1, ¶¶ 13-16. These allegations state a plausible § 1983 claim. Accordingly, the

26
27 harassment claim based on purported violations of the Equal Protection Clause and not
28 Title VII.

1 Court denies the Tidwells' motion with respect to count six.

2 **3. Qualified Immunity.**

3 The Tidwells argue that they are entitled to qualified immunity. Doc. 36 at 5. A
4 defendant is entitled to qualified immunity if his or her conduct "does not violate clearly
5 established statutory or constitutional rights of which a reasonable person would have
6 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity involves
7 two inquiries: whether the facts alleged or shown by the plaintiff establish a
8 constitutional violation, and whether the right at issue was clearly established at the time,
9 *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Pearson v. Callahan*, 555 U.S. 223,
10 235-42 (2009) (noting that courts have discretion as to which inquiry to address first).

11 As to the first prong, the Tidwells argue that Plaintiff has not alleged an Equal
12 Protection violation. The Court disagrees. Sexual harassment can constitute an Equal
13 Protection violation, *see Alaska*, 564 F.3d at 1068, and the Court found above that the
14 complaint clearly alleges sexual harassment. Next, the Tidwells argue that there is no
15 clearly established law governing "the contours of the right" to be free from
16 discrimination in public employment, and specifically that there is no clear law that
17 "verbal harassment in a government workplace violates equal protection," or "that age
18 discrimination or retaliation in public employment is a violation." Doc. 36 at 6. Again,
19 the right to be free from sexual harassment in public employment is clear. *See Alaska*,
20 564 F.3d at 1068; *see also Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir. 1980) ("The
21 constitutional right to be free from such invidious discrimination is so well established
22 and so essential to the preservation of our constitutional order that all public officials
23 must be charged with knowledge of it."). In light of this case law and Plaintiff's
24 allegations, the Tidwells are not entitled to qualified immunity at this stage.

25 **III. Motion for Partial Judgment on the Pleadings.**

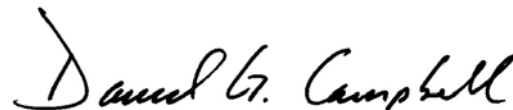
26 The State argues that Plaintiff's ADEA claim (count four) is barred by the
27 Eleventh Amendment to the United States Constitution. Doc. 42 at 3. "Under the
28 Eleventh Amendment, a state is immune from suit under state or federal law by private

1 parties in federal court absent a valid abrogation of that immunity or an express waiver
2 by the state.” *In re Mitchell*, 209 F.3d 1111, 1115-16 (9th Cir. 2000) (citing *Coll. Sav.*
3 *Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-71 (1999);
4 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64-68 (1996)). The State contends that it
5 has not waived its Eleventh Amendment immunity and that Congress has not abrogated it
6 under the ADEA. Doc. 42 at 2-3. The Court agrees. The State’s answer and this motion
7 assert the Eleventh Amendment (Doc. 9 at 3; Doc. 42 at 3), and Congress did not
8 abrogate states’ Eleventh Amendment immunity through the enactment of the ADEA, *see*
9 *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78-83 (2000); *see also Katz v. Regents of the*
10 *Univ. of Cal.*, 229 F.3d 831, 834 (9th Cir. 2000) (“[*Kimel*] held that on account of
11 Eleventh Amendment immunity the states cannot be compelled to submit to the
12 jurisdiction of the federal courts in [ADEA] suits.”). As a result, the Court must dismiss
13 Plaintiff’s ADEA claim against the State.

14 **IT IS ORDERED:**

- 15 1. The Tidwells’ motion to dismiss (Doc. 36) is **granted** with respect to
16 counts one through five, and **denied** with respect to count 6.
- 17 2. The State’s motion for partial judgment on the pleadings (Doc. 42) is
18 **granted**.

19 Dated this 21st day of May, 2013.

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24 David G. Campbell
25 United States District Judge
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