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

8
9 Wilbert M. Charley,

10 Plaintiff,

11 v.

12 Arizona Public Service Co., an Arizona
13 corporation,

14 Defendant.

No. CV-12-2068-PHX-DGC

ORDER

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16 On September 10, 2012, Plaintiff filed a complaint in Maricopa Superior Court.
17 Doc. 1-1. Plaintiff alleged that Defendant fired him on the basis of race, age, and
18 disability, and asserted claims under Title VII of the Civil Rights Act, the Age
19 Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act
20 (“ADA”). Doc. 1-1. Defendant promptly removed the case to this Court on
21 September 28, 2012. Doc. 1. Defendant has now filed a motion to dismiss under
22 Rule 12(b)(6), arguing that Plaintiff’s claims are barred by the applicable statute of
23 limitations. Doc. 5. The motion has been fully briefed, and the Court will grant in part
24 Defendant’s motion to dismiss.¹

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28 ¹ Defendant’s request for oral argument is denied because the issues have been
fully briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. Pr.
78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 **I. Legal Standard.**

2 “If the running of the statute [of limitations] is apparent on the face of the
3 complaint, the defense may be raised by a motion to dismiss.” *Jablon v. Dean Witter &*
4 *Co.*, 614 F.2d 677, 682 (9th Cir. 1980). However, “[d]ismissal on statute of limitations
5 grounds can be granted pursuant to Fed. R. Civ. P. 12(b)(6) ‘only if the assertions of the
6 complaint, read with the required liberality, would not permit the plaintiff to prove that
7 the statute was tolled.’” *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (quoting
8 *Vaughan v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991)).

9 **II. Analysis.**

10 Before a claimant can file a civil action under Title VII, ADEA, or ADA, he must
11 file a timely charge of discrimination with the Equal Employment Opportunity
12 Commission (“EEOC”). *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393
13 (1982). If the EEOC dismisses the charge, the claimant has ninety days to file a civil
14 action. 42 U.S.C. § 2000e–5(f)(1) (adopting ninety-day time limit for suits under Title
15 VII); 42 U.S.C. § 12117 (ADA); 29 U.S.C. § 626 (ADEA). This ninety-day period is a
16 statute of limitations. *Scholar v. Pacific Bell*, 963 F.2d 264, 266–67 (9th Cir. 1992). The
17 Ninth Circuit has also adopted a rule allowing for a rebuttable presumption that a plaintiff
18 received notice of dismissal from the EEOC within three days of it being mailed, thereby
19 permitting suits commenced within 93 days of when the notice was mailed. *Payan v.*
20 *Aramark Mgmt. Services Ltd. P’ship*, 495 F.3d 1119, 1126 (9th Cir. 2007). If a claimant
21 fails to file the civil action within this period, the action is barred. *Scholar*, 963 F.2d at
22 267.

23 In this case, Plaintiff filed a charge of discrimination with the EEOC. *See Doc. 5-*
24 *1 at 12.* The EEOC dismissed the charge on March 27, 2012, and notified Plaintiff that if
25 he wished to sue he must file his lawsuit within ninety days of receipt of the notice.
26 *Doc. 5-1 at 16.* Plaintiff filed his complaint in Maricopa Superior Court on
27 September 10, 2012, more than 150 days after the EEOC dismissed the charge of
28 discrimination. *Doc. 1-1.* Therefore, Plaintiff’s claims are barred.

1 A statute of limitations is subject to the doctrine of equitable tolling. *See Scholar*,
2 963 F.2d at 266. Equitable tolling generally arises “when the statute of limitations was
3 not complied with because of defective pleadings, when a claimant was tricked by an
4 adversary into letting a deadline expire, and when the EEOC's notice of the statutory
5 period was clearly inadequate.” *Id.* (citing *Irwin v. Veterans Admin.*, 498 U.S. 89, 111
6 (1990), and *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)). These
7 situations do not apply here, and equitable tolling is not appropriate due to Plaintiff’s
8 failure “to exercise due diligence in preserving his legal rights.” *Irwin*, 498 U.S. at 96.

9 **III. Arizona Civil Rights Act Claim.**

10 Plaintiff asserts that he has adequately pled a claim under ACRA. If this is
11 correct, the Court has discretion under 28 U.S.C. § 1367(c) to remand the claim to state
12 court because this case was removed from state court and all federal claims have now
13 been dismissed. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350–52 (1988);
14 *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000–01 (9th Cir. 1997). Since the ACRA
15 claim is a purely state law claim to which Arizona law should be applied, it is better
16 litigated in state court. *See Carnegie-Mellon*, 484 U.S. at 350 n.7 (finding that in the
17 usual case “the balance of factors . . . will point toward declining to exercise jurisdiction
18 over the remaining state law claims”). Moreover, because any ACRA claim was timely
19 when filed and now appears to be time-barred, a remand is preferable to dismissal. *Id.* at
20 351–52.²

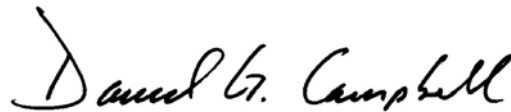
21 Defendant argues that Plaintiff failed to state in his complaint that he was suing
22 under ACRA. Doc. 11 at 3. While this is true, there appears to be at least a colorable

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24 ² On September 9, 2011, Plaintiff filed a charge of discrimination with Arizona’s
25 Civil Rights division. Doc. 5-1 at 5. On August 17, 2012, the Civil Rights division
26 mailed to Plaintiff a “Notice of Right to Sue.” *Id.* This notice informed Plaintiff that he
27 may initiate a civil action “within 90 days of the date you receive this Notice or within
28 one year of the date you filed the charge, whichever comes first. A.R.S. § 41-1481(D).”
Id. Because Plaintiff filed this complaint on September 10, 2012, exactly one year after
Plaintiff filed a charge of discrimination, Plaintiff’s suit under ACRA is not time barred.
See Ariz. R. Civ. P. 6(a) (stating that “in computing any period of time . . . the day of the
act, event or default from which the designated period of time begins to run shall not be
included”).

1 argument that Plaintiff placed Defendant on notice that an ACRA claim was being
2 asserted, and the Court concludes that the adequacy of Plaintiff's ACRA pleading should
3 be addressed by the state court under state pleading rules.³

4 **IT IS ORDERED** that Defendant's motion to dismiss (Doc. 5) is **granted** to the
5 extent that the federal law claims are dismissed because they are barred by the statute of
6 limitations. The case is remanded to Maricopa County Superior Court pursuant to
7 28 U.S.C. § 1367(c).

8 Dated this 1st day of March, 2013.

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13 David G. Campbell
14 United States District Judge
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25 ³ In his complaint Plaintiff stated that he was suing under Title VII, ADEA, and
26 ADA. Doc. 5-1 at 4. As the very first attachment to his complaint, however, Plaintiff
27 included a copy of a "Notice of Right to Sue." Doc. 5-1 at 5. This notice was issued by
28 Arizona's Civil Rights Division and informed Plaintiff of his right to sue under Arizona
law. *Id.* It also referenced ACRA and cited its provisions. *Id.* By including a copy of
this notice, Plaintiff arguably showed his intent to pursue a claim under ACRA. Whether
such a showing is sufficient to state an ACRA claim under state law is a matter that is
better decided by the state court on remand.