



1 The Court will grant the motion in part and deny it in part.<sup>1</sup>

2 **I. Background.**

3 Plaintiff alleges the following facts in her complaint, which are assumed true for  
4 the purposes of this motion. Plaintiff was employed by the City of Phoenix Police  
5 Department on November 18, 1991. Doc. 1, ¶ 6. Plaintiff had medical disabilities  
6 involving both sleep issues and a right ankle injury. *Id.* at ¶ 15. Plaintiff provided her  
7 employer with medical documentation of these disabilities, and requested the  
8 accommodations of allowing her “to work a dayshift and . . . a sedentary desk position.”  
9 *Id.*, ¶ 15; Doc. 24-2.

10 On February 27, 2012, the City placed Plaintiff on limited work status and  
11 assigned her to the dayshift. Doc. 1, ¶ 8; Doc. 24 at 2. Before Plaintiff reported to her  
12 new placement, Plaintiff’s younger male boss, Lt. Lopez, divulged Plaintiff’s personal  
13 and medical information to the employees of the office assigned under Plaintiff’s  
14 command. Doc. 1, ¶ 16. Lt. Lopez made additional derogatory comments to the office  
15 about her likelihood of reporting to her new post. *Id.* Plaintiff was assigned job duties  
16 outside her doctor’s restrictions for weight-bearing activities. *Id.* at ¶ 50. Plaintiff was  
17 also assigned responsibilities previously assigned to a male coworker, and was blamed  
18 for the coworker’s failings. *Id.*, ¶ 24-25. Lt. Lopez would treat Plaintiff differently than  
19 male coworkers; specifically, he would minimize her job performance when talking to  
20 her coworkers, exclude her from activities, and give her negative feedback for conduct he  
21 ignored when committed by male coworkers. *Id.*, ¶ 27.

22 Plaintiff complained to Lt. Lopez and management on multiple occasions  
23 regarding Lt. Lopez’s poor management style, professionalism, and bullying. *Id.*, ¶ 28.  
24 Plaintiff’s complaints to management also included allegations of younger Hispanic male  
25 coworkers destroying her work and taking credit for her work. *Id.*, ¶ 29. These  
26 complaints “fell on deaf ears.” *Id.* Management conducted no investigation and took no

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28 <sup>1</sup> 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 action to correct the problems. *Id.* Plaintiff was performing well according to  
2 supervisory notes. *Id.*, ¶ 33. Plaintiff filed a complaint with the Equal Employment  
3 Opportunity Commission (“EEOC”) on July 1, 2012. *Id.*, ¶ 9. Plaintiff was taken off  
4 work by her physician on July 13, 2012. *Id.*, ¶ 45.

5 Plaintiff was terminated on July 30, 2012. *Id.*, ¶ 12. Steps outlined in the Police  
6 Department Human Resources Management guide were not followed. *Id.*, ¶ 22.

7 On October 13, 2012, Plaintiff filed an updated EEOC charge containing the  
8 following particulars:

9 I was hired on 11/18/1991 as a Police Recruit. My last job title was Police  
10 Sergeant.

11 My Badge Number was 5589.

12 My employer was aware of my medical condition(s) and the need for  
13 accommodation.

14 I was terminated on 07/30/2012.

15 Statement of Discrimination: I believe I was discriminated against in  
16 violation of Title VII . . . the [ADA], and the [ADEA].  
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18 Doc. 24 at 17. The charge also contained checked boxes for discrimination based on sex,  
19 age, disability, retaliation, and other. *Id.* Plaintiff received a ‘right to sue’ letter from the  
20 EEOC on August 15, 2013. Doc. 1 at ¶ 10.

21 In September or October 2013, Plaintiff attended the Mayor’s Commission on  
22 Disabilities and was denied the opportunity to ask questions regarding her termination.  
23 Doc. 1, ¶¶ 59, 83. When Plaintiff further attempted to contact the Mayor, she “was told  
24 to quit harassing city employees and management.” *Id.*, ¶¶ 60-61, 84.

25 On November 13, 2013, Plaintiff brought this action alleging (1) sex  
26 discrimination; (2) age discrimination; (3) disability discrimination; (4) unlawful  
27 retaliation. Doc. 1.

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1     **II.     Standard.**

2             When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the  
3 well-pled factual allegations are taken as true and construed in the light most favorable to  
4 the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal  
5 conclusions couched as factual allegations are not entitled to the assumption of truth,  
6 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and therefore are insufficient to defeat a  
7 motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103,  
8 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the complaint must plead  
9 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
10 *Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not akin to a  
11 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant  
12 has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).  
13 “[W]here the well-pleaded facts do not permit the court to infer more than the mere  
14 possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the  
15 pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

16     **III.    Analysis.**

17             **A.     Phoenix Police Department.**

18             The City moves to dismiss the Police Department as a non-jural entity. Doc. 21 at  
19 8. Plaintiff does not dispute the request in her response brief. This Court has held that  
20 the Phoenix Police Department is a subpart of the City of Phoenix, not a separate entity  
21 for purposes of suit. *See Gotbaum v. City of Phoenix*, 617 F. Supp.2d 878, 886-87 (D.  
22 Ariz. 2008); *see also Flores v. Maricopa Cnty.*, No. CV-09-0945-PHX-DGC, 2009 WL  
23 2169159, at \*3 (D. Ariz. July 1, 2009). Claims against the Police Department will  
24 therefore be dismissed.

25             **B.     Chief of Police.**

26             The City also moves to dismiss Chief of Police Daniel Garcia from the lawsuit.  
27 Doc. 21 at 8. Plaintiff again does not dispute the request. The Ninth Circuit has held that  
28 Title VII, ADA, and ADEA actions do not include civil liability for employees or

1 supervisors in their individual capacities. *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583,  
2 587–88 (9th Cir.1993) (deciding that Congress did not intend to allow civil liability to  
3 run against individual employees); *Walsh v. Nev. Dep't. of Human Res.*, 471 F.3d 1033,  
4 1038 (9th Cir. 2006) (holding that individual defendant's cannot be held personally liable  
5 for violations of the ADA). The Court will dismiss Defendant Garcia.

6 **C. Failure to Exhaust Administrative Remedies.**

7 The City moves to dismiss Plaintiff's claims for sex discrimination under Title  
8 VII, age discrimination under the ADEA, and retaliation, contending that the Court lacks  
9 subject matter jurisdiction because Plaintiff failed to exhaust her administrative remedies.  
10 Doc. 21 at 10. The Court will consider Plaintiff's EEOC charge and "right to sue" letter  
11 attached to the City's motion and Plaintiff's response.<sup>2</sup>

12 To pursue a civil action for discrimination claims under Title VII, the ADA, or the  
13 ADEA, a plaintiff must first file a timely charge with the EEOC. 42 U.S.C. § 2000e-5(e);  
14 42 U.S.C. § 12117; 29 U.S.C. § 626(d); *Walsh*, 471 F.3d at 1038; *Albano v. Schering-*  
15 *Plough Corp.*, 912 F.2d 384, 386 (9th Cir. 1990). This requirement serves the important  
16 purpose of providing the EEOC an opportunity to investigate discriminatory practices  
17 and perform its roles of obtaining voluntary compliance and promoting conciliation. *See*  
18 *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002).

19 "The jurisdictional scope of a Title VII claimant's court action depends upon the  
20 scope of both the EEOC charge and the EEOC investigation." *Sosa v. Hiraoka*, 920 F.2d  
21 1451, 1456 (9th Cir. 1990). The Court's jurisdiction extends over all allegations of  
22 discrimination falling within the scope of the actual EEOC investigation, or an

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24 <sup>2</sup> "Generally, the scope of review on a motion to dismiss for failure to state a claim  
25 is limited to the contents of the complaint." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.  
26 2006). The Court may, however, consider evidence on which the complaint necessarily  
27 relies if "(1) the complaint refers to the document; (2) the document is central to the  
28 plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the  
12(b)(6) motion." *Id.* A court may also consider documents of which it takes judicial  
notice, including those that are matters of public record such as charges filed with the  
EEOC. *Gallo v. Bd. of Regents of Univ. of Cal.*, 916 F. Supp. 1005, 1007 (S.D. Cal.  
1995). Plaintiff's complaint refers to the EEOC charge and the "right to sue" letter  
(Doc.1, ¶¶9-10), the documents are central to Plaintiff's claim, and the authenticity of the  
documents is not contested.

1 investigation which can reasonably be expected to grow out of the charge. *Vasquez v.*  
2 *Cnty. of L.A.*, 349 F.3d 634, 644 (9th Cir. 2003); *B.K.B.*, 276 F.3d at 1100. To determine  
3 whether a plaintiff exhausted allegations not specified in her administrative charge, the  
4 Court should consider such factors as (1) alleged basis of discrimination, (2) dates of  
5 discrimination specified in the charge, (3) perpetrators of discrimination named in the  
6 charge, (4) locations at which discrimination is alleged to have occurred, and (5) the  
7 original theory of the case presented in the charge. *B.K.B.*, 276 F.3d at 1100.

8 EEOC charges should be construed “with the utmost liberality since they are made  
9 by those unschooled in the technicalities of formal pleading.” *Id.* “The substance of the  
10 administrative charge, rather than its label, is the concern of Title VII.” *Ong v. Cleland*,  
11 642 F.2d 316, 319 (9th Cir. 1981). “The EEOC charge must at least describe the facts  
12 and legal theory with sufficient clarity to notify the agency that employment  
13 discrimination is claimed.” *Id.* at 319 (quoting *Cooper v. Bell*, 628 F.2d 1208, 1211 (9th  
14 Cir. 1980)); *see also Pripilitsky v. Corp. Serv. Co.*, No. CV-10-2222-PHX-GMS, 2011  
15 WL 1884798 (D. Ariz. May 18, 2011). The mere formality of checking a box on the  
16 EEOC charge form is not dispositive of administrative exhaustion. *See Pripilitsky*, 2011  
17 WL 1884798 (finding a plaintiff had not exhausted her administrative remedies regarding  
18 a retaliation claim despite having checked the retaliation box on her administrative  
19 charge).

20 In *B.K.B.*, the Ninth Circuit considered whether a plaintiff had exhausted her  
21 administrative remedies despite providing “exceedingly sparse” facts in the  
22 administrative charge. 276 F.3d at 1100. The plaintiff had checked the appropriate  
23 boxes and had completed a pre-complaint questionnaire with specific examples of  
24 discrimination. *Id.* In addition, an agency employee provided a declaration suggesting  
25 that the factual deficiencies in the charge should be attributed to the agency. *Id.*  
26 Although finding it a close question, the court held that the plaintiff had exhausted her  
27 administrative remedies and reversed the grant of summary judgment. *Id.* at 1103.

28 The Ninth Circuit has also made clear, however, that a federal court should not

1 consider a plaintiff's claim if the facts of the complaint differ from the facts contained in  
2 the administrative charge to such an extent that consideration by the court would  
3 circumvent the policies behind the exhaustion requirement. *Ong*, 642 F.2d at 319; *see*  
4 *also Pripilitsky*, 2011 WL 1884798 at \*4. In *Ong*, the plaintiff took disability retirement  
5 in the midst of her ongoing EEOC claim. 642 F.2d at 318. The plaintiff thereafter filed  
6 suit for constructive discharge. *Id.* The Ninth Circuit held the plaintiff had not exhausted  
7 her administrative remedies because she did not provide facts regarding a constructive  
8 discharge claim in her EEOC charge, nor did she amend the EEOC charge to include  
9 such facts. *Id.* at 320.

10 Plaintiff similarly provided no facts in her administrative charge regarding sex  
11 discrimination, age discrimination, or retaliation. And like the claimant in *Ong*, Plaintiff  
12 had opportunities to amend her charge to include additional facts. Indeed, she amended  
13 her charge three times, filing the final charge more than three months after her first  
14 charge and some ten weeks after her termination.<sup>3</sup> Unlike the charge in *B.K.B.*, where the  
15 sparse facts were found sufficient only when considered alongside a detailed pre-  
16 complaint questionnaire and evidence of agency negligence, Plaintiff's charge was not  
17 accompanied by a factual supplement or other explanatory document, nor does Plaintiff  
18 claim that agency negligence caused her deficient charge.

19 Even when construed with the utmost liberality, Plaintiff's EEOC charge simply  
20 does not contain allegations of sex discrimination, age discrimination, and retaliation.  
21 Nor can the Court find that an investigation of such wrongdoing reasonably could have  
22 grown out of her charge – the charge does not provide a single circumstance, name, or  
23 fact that could provide a basis for such an investigation. *See* Doc. 24 at 17. Additionally,  
24 when asked when the discrimination occurred, Plaintiff's charge notes only "07-30-  
25 2012," the date of her termination, and leaves blank the box indicating a continuing  
26 offense. Her complaint, by contrast, details allegations of discrimination occurring over

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28 <sup>3</sup> Plaintiff filed her initial EEOC charge on July 1, 2012; Plaintiff was terminated  
on July 30, 2012; and Plaintiff amended her charge on September 15, September 26, and  
October 13, 2012. Doc. 24 at 17.

1 an extended period of time, beginning even before Plaintiff reported to her reassignment  
2 position in February 2012. *Id.*; Doc. 1, ¶¶ 16-33.

3 Plaintiff contends that the City’s motion should be denied because she filed an  
4 EEOC charge and received a “right to sue” letter. Doc. 24 at 4. But mere filing of a  
5 charge and receipt of a “right to sue” letter do not establish this Court’s jurisdiction.

6 Plaintiff’s claims of sex discrimination in violation of Title VII, age discrimination  
7 in violation of the ADEA, and retaliation will be dismissed for lack of exhaustion.

8 **D. Motion to Dismiss Other Claims**

9 The City moves to preclude Plaintiff for seeking relief on behalf of third parties  
10 mentioned in the complaint. Doc. 21 at 9. Courts typically do not allow third parties to  
11 litigate the rights of others. *Singleton v. Wulff*, 428 U.S. 106, 108 (1976); *Isaacson v.*  
12 *Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013). While Plaintiff’s complaint does mention a  
13 fellow officer and describes acts of alleged discrimination against that officer, Plaintiff  
14 does not request relief or damages on behalf of the officer. Doc 1, ¶38-40. Because the  
15 Court does not read Plaintiff’s complaint as asserting the rights of a third party, the issue  
16 is moot.

17 The City moves to dismiss Plaintiff’s claims of harassment and retaliation  
18 allegedly following the incident in “September or October 2013.” Doc. 21 at 21.  
19 Plaintiff’s complaint does not detail how the incident supports a claim for harassment or  
20 retaliation under Title VII, the ADA, or the ADEA; nor does Plaintiff address the issue in  
21 her response brief. To avoid a Rule 12(b)(6) dismissal, the complaint must plead  
22 “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at  
23 570. Plaintiff’s complaint falls well short of this standard with regard to the harassment  
24 and retaliation claims. Additionally, Plaintiff has not exhausted her administrative  
25 remedies with regard to these claims if they are being presented under Title VII, the  
26 ADA, or the ADEA. Accordingly, the claims must be dismissed.

27 The City moves to dismiss Plaintiff’s request for attorney’s fees because Plaintiff  
28 was a self-represented party at the time of the motion. A *pro se* litigant may not be




1 awarded attorney's fees under a federal statute, *Kay v. Ehrler*, 499 U.S. 432, 435 (1991),  
2 but Plaintiff is now represented by Council. Doc. 23. A present determination on  
3 attorney's fees would be premature, and as such the City's motion is denied.

4 Finally, the City also moves to dismiss potential § 1983 claims not yet made by  
5 Plaintiff. Doc. 21 at 19. The Court will not give an advisory opinion.

6 **IT IS ORDERED** that the City's motion to dismiss (Doc. 21) is **granted in part**  
7 **and denied in part** as set forth above.

8 Dated this 6th day of October, 2014.

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David G. Campbell  
United States District Judge