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

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Dianne G. Rivera,  
  
Plaintiff,  
  
v.  
  
Coventry Health and Life Insurance  
Company, et al.,  
  
Defendants.

No. CV-15-02213-PHX-GMS

**ORDER**

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Pending before the Court is the Motion to Dismiss of Defendant (“Aetna”).<sup>1</sup> (Doc. 9). For the following reasons, the Court grants Aetna’s motion to dismiss with leave for Rivera to amend.

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**BACKGROUND**

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Plaintiff Dianne Rivera is a resident and citizen of the State of Arizona. She brings claims against Coventry/Aetna Health Care and/or Aetna Inc. for age and race discrimination, retaliation, hostile work environment, slander and unjust enrichment.

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Rivera was employed as a Concierge Specialist at Aetna from June 3, 2013 until August 4, 2014. She alleges that she was hired at a lower wage than others with less experience. However, according to her complaint, Aetna indicated that she would receive bonuses as a material component of her salary resulting in a rate of pay

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<sup>1</sup> Erroneously named Coventry Health and Life Insurance Company, et al.in the court filings. Defendant’s correct name is Aetna Health Management, LLC.

1 equivalent to \$15.00 per hour. She further alleges she was assured she would receive  
2 opportunities for advancement before others received such opportunities and that she  
3 would receive monetary contributions to make up for the higher deductible that  
4 accompanied her medical insurance benefits. Rivera claims she accepted the job because  
5 Aetna assured her of the bonus plan and the opportunity to advance.

6 Rivera claims that in October or November of 2013, her supervisor, Aisha  
7 Bennett, threatened to terminate her because she left work five minutes early on ten  
8 occasions. However, Rivera alleges that on those ten occasions she began work  
9 sufficiently early to make up her required time. Rivera complained about this in a letter  
10 to Human Resources. In the letter, Rivera also informed Human Resources that shortly  
11 after she was hired, she questioned her instructors and apparently received some form of  
12 reprimand for doing so. Rivera claims a younger African-American coworker behaved in  
13 a similar way but was not reprimanded.

14 In or around January 2014, some incident occurred in which Rivera raised her  
15 voice to a customer. The complaint implies but does not state that Rivera received a  
16 written reprimand for this.

17 Approximately three months later, Rivera wrote a letter complaining that her  
18 supervisors had failed to give her a bonus. She alleges that she was “written up” in  
19 retaliation for submitting this complaint. In turn, she raised the matter with Von Young,  
20 the director of her program. Shortly thereafter, she was written up by Mr. Young.

21 Finally, Rivera recounts a department meeting on July 18, 2014, at which she  
22 alleges her supervisor stated that Rivera refused to help her fellow employees.<sup>2</sup> During  
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24 <sup>2</sup> Rivera vaguely seems to allege that this comment was slanderous in her complaint.  
25 Complaint. ¶ 35. However, while Rivera claims this statement was offensive, she fails to allege  
26 it is false. Therefore, she does not properly raise a slander claim. *See Snyder v. HSBC Bank,*  
27 *USA, N.A.*, 913 F. Supp. 2d 755, 770. (“Under Arizona law, elements of slander of title are the  
28 uttering and publication of the slanderous words by the defendant, the falsity of the words,  
malice and special damages.”) (internal citations omitted). *Zandonatti v. MERS*, 2011 WL  
7553523, at \*7 (D.Ariz. Dec. 16, 2011) (citing *City of Tempe v. Pilot Properties, Inc.*, 527 P.2d  
515 (Az. Ct. App. 1974) (citing 50 Am.Jur.2d, Libel and Slander § 541, p. 1060 (1970))); *see*  
*also In re Mortgage Electronic Registration Systems (MERS) Litigation*, 2011 WL 4550189 at \*9  
(D.Ariz. Oct. 3, 2011).

1 the same meeting, Rivera alleges that her supervisor explained to the present employees  
2 that Rivera was “always hot because she was going through her personal summer.”  
3 Rivera alleges that this statement singled her out for her age, which humiliated her.

4 It is unclear from the complaint as to why Rivera’s employment terminated.

## 5 DISCUSSION

### 6 I. Legal Standard

#### 7 A. Pleading Standard: Rule 8 and *Iqbal/Twombly*

8 On a motion to dismiss under Federal Rule of Civil Procedure (“F.R.C.P.”)  
9 12(b)(6), all allegations of material fact are assumed to be true and construed in the light  
10 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th  
11 Cir. 2009). To survive dismissal for failure to state a claim pursuant to F.R.C.P. 12(b)(6),  
12 a complaint must contain more than “labels and conclusions” or a “formulaic recitation of  
13 the elements of a cause of action”; it must contain factual allegations sufficient to “raise a  
14 right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
15 (2007). While “a complaint need not contain detailed factual allegations . . . it must plead  
16 ‘enough facts to state a claim to relief that is plausible on its face.’” *Clemens v.*  
17 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550  
18 U.S. at 570). A claim is plausible when Rivera presents factual content which “allows  
19 the court to draw the reasonable inference that [Aetna] is liable for the misconduct  
20 alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at  
21 556). The plausibility standard “asks for more than a sheer possibility that a defendant  
22 has acted unlawfully. Where a complaint pleads facts which are ‘merely consistent with’  
23 a defendant’s liability, it ‘stops short of the line between possibility and plausibility of  
24 entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 555) (internal citations  
25 omitted). Similarly, legal conclusions couched as factual allegations are not given a  
26 presumption of truthfulness, and “conclusory allegations of law and unwarranted  
27 inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d  
28 696, 699 (9th Cir. 1998). Rivera must “nudge [her] claims” of invidious discrimination

1 “across the line from conceivable to plausible.” *Iqbal*, 556 U.S. at 680 (citing *Twombly*,  
2 550 U.S. at 547.

3 **B. Lower Pleading Standard for Pro Se Litigants**

4 However, pro se litigants will not be held to the same pleading standards as  
5 lawyers. “A document filed *pro se* is ‘to be liberally construed,’ and ‘a *pro se* complaint,  
6 however inartfully pleaded, must be held to less stringent standards than formal pleadings  
7 drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v.*  
8 *Gamble*, 429 U.S. 97, 106 (1976) (internal quotation marks omitted); *cf.* F.R.C.P. 8(f)  
9 (“All pleadings shall be so construed as to do substantial justice”). *Twombly* and *Iqbal*  
10 did not alter the treatment of pro se pleadings, so the Court’s obligation to construe pro se  
11 pleadings liberally remains. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

12 **II. ANALYSIS OF CLAIMS**

13 As a preliminary matter, Rivera represents that she was an exceptional customer  
14 service representative and that another employee, who was hired at a higher rate of pay  
15 than was Rivera and who received all of her bonuses, required much coaching and did not  
16 conform with job requirements. (Complaint at ¶ 33.) Rivera states that this constitutes  
17 “discrimination and retaliation,” (*id.*) but she failed to allege that the alleged disparate  
18 treatment was based on her race, age, or membership in any other protected class. As  
19 such, the facts in paragraph 33 of Rivera’s complaint fail to raise a plausible  
20 discrimination claim under any legal theory.

21 **A. Unjust Enrichment**

22 To plead a claim of unjust enrichment, Rivera must allege “(1) an enrichment, (2)  
23 an impoverishment, (3) a connection between the enrichment and impoverishment, (4)  
24 the absence of justification for the enrichment and impoverishment, and (5) the absence  
25 of a remedy provided by law.” *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz.  
26 314, 318 (Ariz. Ct. App. 2012).

27 “[W]here there is a specific contract which governs the relationship of the parties,  
28 the doctrine of unjust enrichment has no application.” *Brooks v. Valley Nat. Bank*, 113

1 Ariz. 169, 174, 548 P.2d 1166, 1171 (1976). Because a specific contract governed the  
2 terms of Rivera’s employment with Aetna, her unjust enrichment claim fails.

3 **B. Hostile Work Environment**

4 Construing the complaint liberally, Rivera attempts to raise an age-related hostile  
5 work environment claim. (See Complaint at ¶ 35.) Even if such a claim is cognizable,<sup>3</sup>  
6 Rivera fails to allege plausible facts that give rise to such a claim.

7 To raise a hostile work environment claim, Rivera must show harassing behavior  
8 “sufficiently severe or pervasive to alter the conditions of [her] employment.” *Meritor*  
9 *Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, (1986) (internal quotation marks omitted).  
10 “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)”  
11 fail to rise to the level of severity necessary to sustain a hostile work environment claim.  
12 *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Here, Rivera alleges one  
13 occasion where her supervisor, Ms. Bennet, publically announced that Rivera “was going  
14 through a personal summer,” a comment that Rivera interpreted as singling her out due to  
15 her “age and health conditions.” (Complaint at ¶ 35.) This isolated comment does not  
16 establish severe or pervasive harassing behavior.

17 **C. Retaliation**

18 Title VII “prohibits retaliation against an employee ‘because [she] has opposed  
19 any practice made an unlawful employment practice’” by Title VII. *Nelson v. Pima*  
20 *Cnty. College*, 83 F.3d 1075, 1082 (9th Cir. 1996) (quoting 42 U.S.C. § 2000e-3(a)).  
21 “The elements of a Title VII retaliation claim include: (1) the employee was engaged in a  
22 protected activity, (2) the employee was thereafter subjected by his employer to an  
23 adverse employment action, and (3) establishment of a causal link between the protected  
24 activity and the adverse employment action.” *Busby v. Kramer*, 22 F. App’x 758, 760  
25 (9th Cir. 2001).

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27 <sup>3</sup> See *Stevens v. Cty. of San Mateo*, 267 F. App’x 684, 685 (9th Cir. 2008) (“Although we  
28 have never definitively recognized an age-related hostile work environment claim . . .  
even if such a claim is cognizable, Stevens failed to provide sufficient evidence to  
support [any] hostile environment claim.”).

1 Rivera alleges that shortly after she was hired in June 2013, she was reprimanded  
2 for questioning her instructors, and a “younger African American female” behaved  
3 similarly but was not reprimanded. (Complaint at ¶ 28.) Rivera alleges that she reported  
4 this “discrimination” to Human Resources in a letter written months later (drafted  
5 primarily to complain that her supervisor was reprimanding her for leaving work early),  
6 although it is not clear from her complaint whether she believed she was treated  
7 differently from the other employee due to her age, race, or another factor. (*Id.*)

8 Rivera further alleges that in or around January 2014, she wrote another letter  
9 stating that her supervisors had denied her a bonus to which she was entitled. Rivera  
10 alleges that she was “written up” after making this complaint and further alleges that her  
11 supervisor suggested that Rivera should have expected repercussions after making  
12 complaints about a supervisor. (Complaint at ¶ 30.)

13 Construing the allegations in Rivera’s complaint liberally, she nonetheless fails to  
14 make out a claim for retaliation because her letter faulting her supervisors for denying her  
15 a bonus was unrelated to any allegation of discrimination. (*See* Complaint at ¶ 30.) As  
16 such, that letter did not constitute protected activity under Title VII.

17 Assuming arguendo that the complaint Rivera had made approximately six months  
18 earlier (alleging that upon being hired, she was reprimanded for questioning her  
19 instructors when a “younger African American female” was not reprimanded for similar  
20 behavior) constituted protected activity, and also assuming arguendo that a written  
21 reprimand can constitute an adverse employment action, Rivera failed to allege any  
22 causal link between this earlier complaint and the adverse employment action six months  
23 later. (*See* Complaint at ¶¶ 28-30.) Therefore, Rivera fails to properly allege a claim of  
24 retaliation under Title VII.

25 **D. Age Discrimination**

26 Rivera claims Aetna discriminated against her on the basis of her age and seeks to  
27 recover damages, presumably under the Age Discrimination in Employment Act of 1967  
28 (“ADEA”). To allege a disparate treatment claim under the ADEA, Rivera must allege

1 facts demonstrating that she: “1) was a member of the protected class [age 40-70]; 2) was  
2 performing [her] job in a satisfactory manner; 3) was discharged; and 4) was replaced by  
3 a substantially younger employee with equal or inferior qualifications.” *Rose v. Wells*  
4 *Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990).

5 Rivera fails to establish a prima facie case of disparate treatment age  
6 discrimination. Rivera satisfies the first two prongs by alleging that she is a “person  
7 above the age of 40,” (Complaint at ¶ 35,) and that she was “an exceptionally good  
8 customer service representative” according to her performance review. (Complaint at  
9 ¶ 33.) However, Rivera fails to satisfy the third and fourth prong, as she does not allege  
10 how her employment with Aetna came to end, and she fails to allege that she was  
11 replaced by “a substantially younger employee with equal or inferior qualifications.”  
12 *Rose*, 902 F.2d at 1421. The Court therefore dismisses Rivera’s age discrimination  
13 claim.

#### 14 **D. Race Discrimination**

15 To make a claim for race discrimination under Title VII, Rivera must properly  
16 allege she (1) belongs to a protected class; (2) was qualified for the position; (3) was  
17 subject to an adverse employment action; and (4) similarly situated individuals outside  
18 her protected class were treated more favorably. *Moran v. Selig*, 447 F.3d 748, 753 (9th  
19 Cir. 2006).

20 Other than listing “race discrimination” among her claims in the first paragraph of  
21 her Complaint, Rivera references race only once, noting that shortly after being hired, she  
22 was reprimanded for questioning her instructors when a “younger African American  
23 female” was not reprimanded for similar behavior. (Complaint at ¶ 28.)

24 Nowhere in the Complaint does Rivera declare her own race, and as such, Rivera  
25 fails to allege that she is in a protected class. Moreover, assuming as true that Rivera was  
26 reprimanded for questioning her instructors, and that one other employee engaged in  
27 similar behavior and was not reprimanded, this does not “plausibly suggest an entitlement  
28 to relief.” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). One isolated incident

1 of a supervisor handling a similar matter differently with two different employees, with  
2 no pleaded facts that connect the inconsistency to race, does not give rise to a plausible  
3 race discrimination claim. Supervisors handle similar matters differently with different  
4 employees, due to differences in the employees' attitudes and myriad other variables that  
5 affect managerial decisions. Without facts from which the Court could reasonably infer  
6 that the discrepancy was based on race, the claim cannot stand. *See id.* at 1136 (“[The]  
7 Complaint does not allege sufficient facts from which to infer [tortious behavior].”).

8 The Court therefore dismisses Rivera's race discrimination claim.

### 9 **III. LEAVE TO AMEND**

#### 10 **A. Leave to Amend the Complaint.**

11 “A pro se litigant must be given leave to amend his or her complaint unless it is  
12 absolutely clear the deficiencies of the complaint could not be cured by amendment.”  
13 *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). In this case,  
14 Rivera could cure the defect by asserting plausible claims under applicable laws. The  
15 Court will dismiss the complaint without prejudice and allow Rivera to file an amended  
16 complaint which properly invokes this Court's jurisdiction. Rivera shall have until July  
17 30, 2016 to file an amended complaint.

#### 18 **B. Plaintiff's Obligations.**

19 Rivera must become familiar with, and follow, the Federal Rules of Civil  
20 Procedure and the Rules of the United States District Court for the District of Arizona  
21 (“Local Rules”), which may be obtained in the Clerk of Court's office. For purposes of  
22 the amended complaint, Rivera is directed to Rule 8 of the Federal Rules of Civil  
23 Procedure. Rule 8(a) provides that a complaint must contain:

24 (1) a short and plain statement of the grounds for the court's jurisdiction,  
25 unless the court already has jurisdiction and the claim needs no new  
jurisdictional support;

26 (2) a short and plain statement of the claim showing that the pleader is  
27 entitled to relief; and

28 (3) a demand for the relief sought, which may include relief in the  
alternative or different types of relief.

1 The Supreme Court in *Twombly* and *Iqbal* explained the “short and plain  
2 statement” required by Rule 8(a)(2) needs to be plausible. *Iqbal*, 129 S. Ct. at 1949  
3 (citing *Twombly*, 550 U.S. at 555). These pleading requirements shall be set forth in  
4 separate and discrete paragraphs. “Each allegation must be simple, concise, and direct.”  
5 F.R.C.P. 8(d)(1).

6 Rivera is further advised that if she fails to prosecute this action or comply with  
7 the rules or any Court order, the Court may dismiss the action with prejudice pursuant to  
8 Rule 41(b). See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992).

9 **CONCLUSION**

10 Liberally construed, Rivera’s complaint fails to allege facts that state a plausible  
11 claim for unjust enrichment, age-related hostile work environment, retaliation, age  
12 discrimination, or race discrimination.

13 **IT IS THEREFORE ORDERED** that Defendant’s Motion to Dismiss (Doc. 9) is  
14 **GRANTED** and the case is dismissed without prejudice with leave to amend **within 30**  
15 **days** of the date of this Order.

16 **IT IS FURTHER ORDERED** that if Plaintiff elects not to file an amended  
17 complaint **WITHIN 30 DAYS** of the date of this Order, the Clerk of Court shall dismiss  
18 without prejudice and terminate this action without further Order of the Court.

19 Dated this 30th day of June, 2016.

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Honorable G. Murray Snow  
22 United States District Judge