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

Maria Orozco Gonzalez,  
Plaintiff,  
v.  
City of Glendale, et al.,  
Defendants.

No. CV-17-04593-PHX-DWL  
**ORDER**

Pending before the Court is Defendants’ motion to dismiss under Rule 41(b). (Doc. 17.) As explained below, the motion will be denied. Additionally, the Court will construe Plaintiff’s recent filings as a request under Rule 15(a)(2) to file a second amended complaint, will grant that request, and will order Doc. 19 to be treated as her second amended complaint.

**BACKGROUND**

On December 12, 2017, Plaintiff Maria Orozco Gonzalez filed a *pro se* complaint. (Doc. 1.) The complaint was difficult to follow. For example, although the complaint asserted that Plaintiff had suffered “harassment due to my Disabilities and my Gender,” it did not specifically identify or assert any causes of action. (Doc. 1 at 1-2.) Similarly, although the complaint identified, by name, several different employees of the City of Glendale and seemed to be accusing each of them of wrongdoing, the introductory paragraph of the complaint identified only a single party as a defendant: “The defendant, City of Glendale C/O Nancy Mangone.” (Doc. 1 at 1.)

1 On December 12, 2017, soon after the complaint was filed, the Court provided  
2 Plaintiff with a document entitled “Notice to Self-Represented Litigant.” (Doc. 4.) Among  
3 other things, this document identified various manuals and resources that were available to  
4 Plaintiff.

5 On April 3, 2018, the City of Glendale and Nancy Mangone (collectively,  
6 “Defendants”) filed a motion for a more definite statement. (Doc. 11.) This motion argued  
7 the complaint was “ambiguous as to who is suing, under what theories of liability, why  
8 Plaintiff sues Nancy Mangone, and if Plaintiff is suing the City of Glendale.” (Doc. 11 at  
9 2.)

10 On June 29, 2018, the Court issued an order granting the motion for a more definite  
11 statement. (Doc. 15.) The order concluded that additional clarification was needed  
12 because (1) “Plaintiff names both the City of Glendale and Nancy Mangone as Defendants,  
13 but her allegations fail to make clear precisely why the alleged acts in the Complaint give  
14 rise to liability for either the City or Mangone”; (2) “although the Complaint contains  
15 allegations about Plaintiff’s husband’s own disabilities, it is unclear whether Plaintiff  
16 purports to bring suit on behalf of her husband as well” and (3) “Plaintiff fails to allege the  
17 precise cause of action which would give rise to Defendants’ liability.” (Doc. 15 at 2.)  
18 Thus, the order required Plaintiff to file an amended complaint and specified that the  
19 “Amended Complaint shall set out in separately numbered paragraphs the factual basis for  
20 each claim that Plaintiff alleges and the precise legal theory supporting that claim. The  
21 Amended Complaint shall also make clear who Plaintiff is suing—and in what capacity—  
22 and how Plaintiff’s allegations give rise to liability for each Defendant named in the  
23 Amended Complaint.” (Doc. 15 at 3.)

24 On July 19, 2018, Plaintiff filed a first amended complaint (“FAC”). (Doc. 16.)  
25 The FAC did not comply with the Court’s previous order. Among other things, (1) the  
26 caption of the FAC suggested Plaintiff was suing more than one defendant but did not  
27 identify each defendant with precision (“City of Glendale, et al., Defendants”); (2) the FAC  
28 did not contain separately-numbered paragraphs, which the Court had expressly required

1 in its previous order; and (3) although the FAC broadly alluded to several different statutes  
2 and types of misconduct (the FMLA, the “American with Disability ACT,” and  
3 harassment), it did not attempt to funnel these allusions into discrete causes of action.

4 On August 3, 2018, Defendants filed a motion to dismiss under Rule 41(b). (Doc.  
5 17.) In it, Defendants argued that (1) the FAC remains deficient under Rules 8 and 10—  
6 and, in fact, “is more deficient than her original Complaint”—because it fails to identify  
7 the parties, damages, and causes of action with any precision; (2) because the FAC was  
8 submitted after the Court ordered Plaintiff to supply a more definite statement, its  
9 submission should be deemed a violation of a court order; and (3) under Rule 41(b), the  
10 Court may dismiss a complaint for failure to comply with court orders. (Doc. 17 at 2-7.)

11 On August 7, 2018, the Court issued an order requiring Plaintiff to “file with the  
12 Clerk of the Court and serve on opposing counsel a responsive memorandum to [the motion  
13 to dismiss] no later than August 24, 2018.” (Doc. 18.)

14 On August 24, 2018, Plaintiff filed a document entitled “Complaint (Amended) For  
15 A Civil Case.” (Doc. 19.) On the one hand, this pleading was not a responsive  
16 memorandum (as required by the Court’s August 7, 2018 order). On the other hand, this  
17 pleading finally supplied the details that were missing in Plaintiff’s original complaint and  
18 Plaintiff’s FAC. It identified two defendants with precision (City of Glendale and Carl  
19 Westbrooks), asserted that “[t]he basis for federal court jurisdiction is Federal question,”  
20 identified three causes of action with prevision (first, “Violation of the FMLA Act”;  
21 second, “Violation of the Americans with Disabilities Act of 1990”; and third, “Gender  
22 Discrimination, Title VII of the Civil Rights Act of 1964”), used numbered paragraphs to  
23 supply the factual allegations supporting each cause of action, and concluded with a  
24 detailed claim for relief. (Doc. 19 at 1-9.)

25 On August 24, 2018, Plaintiff also filed a separate document entitled “Answer to  
26 Order.” (Doc. 20.) The purpose of this document isn’t clear.

27 On August 31, 2018, Defendants filed a reply in support of the motion to dismiss.  
28 (Doc. 21.) In it, Defendants argued that (1) Plaintiff’s two submissions on August 24 were

1 inadequate because neither constituted a “responsive memorandum” to the motion to  
2 dismiss; and (2) Plaintiff’s attempt to submit a new complaint also violated Rule 15(a)(2)  
3 because she didn’t “first seek[] leave of the Court or consent of opposing counsel.” (Doc.  
4 21 at 2.)

5 On September 13, 2018, Plaintiff submitted a document entitled “Response to Rule  
6 41 Motion to Dismiss.” (Doc. 22.) This pleading includes the following passage: “I have  
7 filed an Amended Complaint. I followed the sample provided in the form on the United  
8 States Federal Court’s website. I listed, in my Statement of Claim, my facts regarding each  
9 of the counts. As per the information, I followed the instructions and I did not make legal  
10 arguments.” (Doc. 22 at 2.)

## 11 ANALYSIS

### 12 A. Motion to Dismiss

13 Defendants have moved to dismiss under Rule 41(b) of the Federal Rules of Civil  
14 Procedure. Although the Court shares Defendants’ frustration with Plaintiff’s litigation  
15 conduct to date, the Court will decline to order dismissal.

16 As background, Rule 41(b) allows the Court to dismiss an action for failure “to  
17 comply with . . . a court order.” Before dismissal on this ground, the Court must weigh  
18 “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to  
19 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring  
20 disposition of cases on their merits; and (5) the availability of less drastic alternatives.”  
21 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

22 The first Rule 41(b) factor—the public’s interest in expeditious resolution of  
23 litigation—“always favors dismissal.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th  
24 Cir. 1999).

25 As to the second factor, the Ninth Circuit has recognized that district courts have  
26 inherent power to manage their dockets without being subject to noncompliant litigants.  
27 *Ferdik*, 963 F.2d at 1261. Where “dilatatory conduct greatly impede[s] resolution of the case  
28 and prevent[s] the district court from adhering to its trial schedule,” this factor favors

1 dismissal. *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987). Here, although  
2 Plaintiff has arguably violated the Court’s orders on two different occasions—first, by  
3 filing a deficient FAC in response to the Court’s June 29, 2018 order; and second, by failing  
4 to timely file a responsive memorandum to Defendants’ motion to dismiss, as required by  
5 the Court’s August 7, 2018 order—the Court cannot say these failures have greatly  
6 impeded the resolution of this case. It is notable that Defendants haven’t challenged, on  
7 the merits, the sufficiency of the new complaint that Plaintiff attempted to file on August  
8 24, 2018. Had Plaintiff simply filed this document on July 19, 2018—instead of filing the  
9 admittedly deficient FAC—this whole matter would have been resolved. The one-month  
10 delay has not “consumed large amounts of the court’s valuable time that it could have  
11 devoted to other major and serious criminal and civil cases on its docket.” *Ferdik*, 963  
12 F.2d at 1261. Consequently, the second factor does not favor dismissal.

13 The third factor considers prejudice to the defendant. “A defendant suffers  
14 prejudice if the plaintiff’s actions impair the defendant’s ability to go to trial or threaten to  
15 interfere with the rightful decision of the case.” *Adriana Int’l Corp. v. Thoeren*, 913 F.2d  
16 1406, 1412 & n.4 (9th Cir. 1990). Here, Defendants do not suggest the delay in this action  
17 will impair their ability to make their case. Furthermore, their main theory of prejudice—  
18 that Plaintiff’s earlier filings deprived them of their “right to know what, if any,  
19 wrongdoing Plaintiff alleges against each of them and what relief she seeks from them”—  
20 was cured by the August 24 filing. Accordingly, this factor weighs against dismissal.

21 Public policy favors disposition of cases on the merits, so the fourth factor weighs  
22 against dismissal. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002).

23 The final factor requires the Court to consider the impact of dismissal and whether  
24 a less drastic alternative is available. *Malone*, 833 F.2d at 131-32. Here, although Plaintiff  
25 was warned that failing to comply with court orders could result in dismissal (*see* Doc. 18),  
26 it’s possible to chalk up her recent procedural missteps to negligence rather than something  
27 more extreme. Specifically, it appears she diligently tried to address Defendants’ concerns  
28 about the inadequacy of the FAC by supplying a new version of the complaint that was far

1 more structured and definitive than the two previous iterations. Admittedly, she didn't  
2 follow the correct procedural steps when doing so—she should have filed a memorandum  
3 that addressed Defendants' Rule 41(b) arguments on the merits and, separately, sought  
4 leave or consent under Rule 15(a)(2) before filing the new version of the complaint—but  
5 such missteps by a *pro se* litigant do not rise to the level of extreme circumstances.  
6 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). (“Dismissal is a harsh penalty  
7 and is to be imposed only in extreme circumstances.”).

8 In sum, the five-factor analysis does not support dismissal under Rule 41(b).

9 B. Motion For Leave To Amend

10 As Defendants correctly point out in their motion, Plaintiff's effort to file a new  
11 version of her complaint on August 24, 2018 (*see* Doc. 19) was procedurally improper.  
12 Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, “a party may amend its  
13 pleading only with the opposing party's written consent or the court's leave.” *Id.* That  
14 said, “[t]he court should freely give consent when justice so requires.” *Id.*

15 Here, the Court finds that “justice so requires” it to construe Plaintiff's recent filings  
16 as a request under Rule 15(a)(2) to file a second amended complaint, to grant that request,  
17 and to order Doc. 19 to be treated as Plaintiff's second amended complaint. *Edwards v.*  
18 *Occidental Chemical Corp.*, 892 F.2d 1442, 1445 n.2 (9th Cir. 1990) (plaintiff's failure to  
19 call her request a “motion for leave to amend” or to tender a formal amendment did not  
20 preclude district court from granting leave to amend).

21 Plaintiff is further advised that service of the summons and complaint on defendant  
22 Carl Westbrook (who was not named as a defendant in the original complaint or the FAC  
23 and who, according to the docket, has not been served or made an appearance) must occur  
24 within 90 days of today's date. *See* Fed. R. Civ. P. 4(m). Proof of service must be filed  
25 with the Clerk of Court, in the form of an affidavit, promptly after service has been made.  
26 *See* Fed. R. Civ. P. 4(l). This order serves as an express warning that the Court will dismiss  
27 this action with respect to defendant Carl Westbrook, without further notice to Plaintiff,  
28 if he is not timely served. *See* Fed. R. Civ. P. 4(m).

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Accordingly,

**IT IS ORDERED** that

1. Defendants’ motion to dismiss (Doc. 24) is **DENIED**; and
2. Plaintiff’s “Complaint (Amended) For A Civil Case” (Doc. 19) is deemed Plaintiff’s Second Amended Complaint.

Dated this 30th day of November, 2018.



Dominic W. Lanza  
United States District Judge