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

8 Kimberly Warmack,

9 Plaintiff,

10 vs.

11 Michael Riveria, et al.,

12 Defendants.
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No. CV-20-02298-PHX-SPL

ORDER

15 Pro se Plaintiff Kimberly Warmack is a former employee of Defendant Alhambra
16 Elementary School. (Doc. 1 at 4). Plaintiff alleges Defendants discriminated against her
17 based on her disability as well as her race. (Doc. 1 at 4). First, Plaintiff alleges she was
18 wrongfully terminated because of her race since she was the “[o]nly African American
19 Teacher at Andalucia when fired my job was given to a hisspanic [sic] substitute.” (Doc. 1
20 at 4). Plaintiff further alleges that she uses a wheelchair, but that Defendants did not make
21 the school handicap accessible, causing an injury to her hand. (Doc. 1 at 5).

22 Before the Court is Defendants’ Motion to Dismiss in which Defendants assert the
23 Complaint “must be dismissed for insufficient service of process and failure to state a claim
24 upon which relief can be granted.” (Doc. 9 at 1). The Court will focus on the service of
25 process.

26 “[E]ven as lawyers must, pro se litigants must become familiar, and comply, with
27 the Rules of Civil Procedure and the Local Rules of Practice for the District Court for the
28 District of Arizona.” *Oliver v. Long*, No. CV-06-2429PCTLOA, 2007 WL 623783, at *1

1 (D. Ariz. Feb. 23, 2007) (citing *Carter v. Commissioner of Internal Revenue*, 784 F.2d
2 1006, 1008 (9th Cir.1986)); *King v. Atiyeh*, 814 F.2d 56, 567 (9th Cir.1987) (“Pro se
3 litigants must follow the same rules of procedure that govern other litigants.”).

4 On December 4, 2020, this Court issued a Preliminary Order directing Plaintiff to
5 serve the summons and complaint on each defendant within ninety (90) days of the date of
6 filing the complaint or to otherwise request an extension. (Doc. 6 at 1). Pursuant to this
7 Order, Plaintiff was to serve each defendant by February 23, 2021. On February 16, 2021,
8 Plaintiff served Defendant Alhambra Elementary School and Defendant Michael Riveria
9 by providing a copy of the summons and complaint to Dana Lucero. (Docs. 7 & 8). Though
10 Plaintiff’s proof of service documents do not specify who Dana Lucero is, Defendants
11 assert in their Motion that she is “an administrative assistant assigned to the District office.”
12 (Doc. 12 at 2).

13 Defendants argue “it is unclear who [Plaintiff] is attempting to sue” and that
14 “Plaintiff has only completed service of process on Defendant Michael Rivera.” (Doc. 9 at
15 3-4). However, as explained above, Plaintiff has attempted to serve both Michael Riveria
16 and Alhambra School District. Further, in her initial Complaint she lists both Michael
17 Riveria and Alhambra School District as defendants. (Doc. 1 at 2). Plaintiff also clarifies
18 in her Response to Defendants’ Motion to Dismiss that she is “attempting to sue Michael
19 Riveria [sic] Defendant 1 and Alhambra School District Defendant 2.” (Doc. 11 at 8). And
20 Michael Riveria and Alhambra Elementary School are both listed as defendants on the
21 record in this Court. The Court therefore finds that the defendants in this case are Michael
22 Riveria and Alhambra School District.

23 Because he is an individual located within the United States, Plaintiff was required
24 to serve Defendant Michael Riveria pursuant to Federal Rule of Civil Procedure 4(e).
25 Under that rule, an individual may be served by:

- 26 (1) following state law for serving a summons in an action brought in courts of
27 general jurisdiction in the state where the district court is located or where
28 service is made; or

1 (2) doing any of the following:

2 (A) delivering a copy of the summons and of the complaint to the individual
3 personally;

4 (B) leaving a copy of each at the individual's dwelling or usual place of abode
5 with someone of suitable age and discretion who resides there; or

6 (C) delivering a copy of each to an agent authorized by appointment or by law
7 to receive service of process.

8 Arizona's rule for serving an individual mirrors the federal rule. *See* Ariz. R. Civ. P. 4(d).
9 Here, Plaintiff has attempted to serve Michael Riveria by delivering a copy of the summons
10 and complaint to Dana Lucero, an administrative assistant at Alhambra. Plaintiff did not
11 serve Mr. Riveria personally or leave a copy of the summons and complaint at his dwelling,
12 nor has she provided any documentation supporting that Dana Lucero is an agent
13 authorized by appointment or by law to receive service on behalf of Mr. Riveria.
14 Accordingly, Defendant Riveria has not been properly served.

15 Further, because it is a local government entity, Plaintiff was required to serve
16 Defendant Alhambra Elementary School District pursuant to Federal Rule of Civil
17 Procedure 4(j). Under that rule, any state-created governmental organization may be served
18 by:

19 (A) delivering a copy of the summons and of the complaint to its chief executive
20 officer; or

21 (B) serving a copy of each in the manner prescribed by the state's law for serving a
22 summons or like process on such a defendant.

23 Arizona's rule for serving government entities provides that the entity may be served by
24 delivering a copy of the summons and complaint to:

25 (A) the individual designated by the entity, as required by statute, to receive service
26 of process; or

27 (B) if the entity has not designated a person to receive service of process, then the
28 entity's chief executive officer(s), or, alternatively, its official secretary, clerk,

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or recording officer.

Ariz. R. Civ. P. 4(h)(4). Here, Dana Lucero is not Defendant Alhambra’s chief executive officer, so service has not been executed properly pursuant to the federal rule. Further, as explained above, Plaintiff does not provide any information as to whether Dana Lucero has been designated as an agent of Defendant Alhambra to receive service on its behalf, nor has Plaintiff indicated that Lucero is an official secretary, clerk, or recording officer of Defendant Alhambra. Accordingly, Defendant Alhambra Elementary School District has not been properly served.

“Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant,” and “in the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant.” *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). However, in its discretion, this Court “may treat a motion to dismiss for insufficient service of process as a motion to quash service instead.” *Dillard v. Red Canoe Fed. Credit Union*, No. C14-1782JLR, 2015 WL 1782083, at *3 (W.D. Wash. Apr. 17, 2015) (citing *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006) (“The choice between dismissal and quashing service of process is in the district court’s discretion.”)). “Where it appears that effective service can be made and there is no unfair prejudice to the defendant, quashing service rather than dismissing the action, and leaving the plaintiff free to effect proper service, is the appropriate course.” *Dillard*, 2015 WL 1782083, at *3.

Further, although Federal Rule 4(m) requires service within 90 days after the complaint is filed, it “contemplates the possibility of an extension of time which, . . . is . . . left to the court’s discretion. See *S.J.*, 470 F.3d at 1293; Fed. R. Civ. P. 4(m). The rule specifically provides that “if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” *Id.* Even absent good cause, however, the Court has broad discretion to extend the time for service. *Efaw v. Williams*, 473 F.3d 1038, 1040–41 (9th Cir. 2007). In exercising this discretion, the Court may

1 consider factors such as the length of delay in proper service, the statute of limitations,
2 prejudice to the defendant, actual notice of the lawsuit, and eventual service. *Id.*

3 Here, Plaintiff is pro se. Her Complaint was filed on November 25, 2020, which
4 was only 153 days ago. Furthermore, Plaintiff attempted service within the 90-day timeline,
5 although the attempted service was insufficient. And Defendants are actually on notice of
6 the lawsuit as they have jointly filed the instant Motion to Dismiss. This Court will
7 therefore exercise its broad discretion to extend the time for Plaintiff to properly serve
8 Defendants consistent with this Order.

9 Until Defendants are properly served, this Court does not have personal jurisdiction
10 over them, and the Court therefore will not address the merits of Plaintiff's Complaint. *See,*
11 *e.g., Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688
12 (9th Cir. 1988) ("A federal court does not have jurisdiction over a defendant unless the
13 defendant has been served properly under Fed. R. Civ. P. 4."); *Atkins v. Creighton*
14 *Elementary Sch. Dist.*, No. CV 11-729-PHX-SRB, 2012 WL 12893446, at *4 (D. Ariz.
15 June 26, 2012) ("The Court concludes that Plaintiff did not properly serve Defendant and
16 therefore that the Court lacks personal jurisdiction over Defendant. Accordingly, the Court
17 does not reach the other issues raised in Defendant's Motion."). Accordingly,

18 **IT IS ORDERED** that this Court, in its discretion, treats the portion of Defendants'
19 Motion to Dismiss (Doc. 9) pursuant to Federal Rule of Civil Procedure 12(b)(5) as a
20 motion to quash service of process, and the Court **grants** the request, and **denies** the Motion
21 **without prejudice** in all other respects.

22 **IT IS FURTHER ORDERED** that Plaintiff must file proof of service of the
23 summons and complaint or of waiver of service with the Clerk of Court no later than **May**
24 **28, 2021.**

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