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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Mary H. Lombardi, a single woman, )

No. 09-CV-8146-PCT-PGR

10

Plaintiff, )

11

v. )

**ORDER**

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Copper Canyon Academy, LLC, et al., )

13

Defendants. )

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Currently before the court is Defendants’ Motion to Dismiss Plaintiff Mary H. Lombardi’s (“Ms. Lombardi”) state law claims (Claims Six through Twelve in the Second Amended Complaint) pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).<sup>1</sup> This case arises out of allegations made by Plaintiff of improper conduct by Defendants leading up to Plaintiff’s discharge from employment. The motion is fully briefed and ready for disposition.

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**I. FACTUAL BACKGROUND**

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Copper Canyon Academy, LLC ( the “Academy”) operates a behavioral school for teen-aged girls who have difficulties with drugs, alcohol, and other behaviors. The Academy is located in Rimrock and Camp Verde, Arizona, and has three housing dormitories used as living quarters. The Academy is the legal subsidiary of CRC Health Group, Inc. (“CRC”) and Aspen Educational Group, Inc. (“Aspen”).

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<sup>1</sup> Defendants do not seek to dismiss Plaintiff’s federal causes of action (Plaintiff’s First through Third Claims for Relief) or state law equivalents under the Arizona Civil Rights Statutes (Plaintiff’s Fourth and Fifth Claims).

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1           On November 10, 2003, Plaintiff was hired by the Academy as a residential coach and  
2 was assigned to work in the Juniper House dormitory. Ms. Lombardi, as well as other  
3 employees, were hired to provide treatment to adolescent girls at the Academy. Ms.  
4 Lombardi's annual job performance evaluations "were generally excellent with overall  
5 ratings which mostly indicated she was a very good employee who exceeded expectations  
6 and objectives."

7           On June 4, 2008, Ms. Lombardi met with executive director of the Academy, Paul  
8 Taylor ("Taylor") and presented him with a letter dated June 2, 2008, which was signed by  
9 Ms. Lombardi and some other employees of the Academy. The letter documented  
10 complaints pertaining to violations by the Academy of the Family Medical Leave Act  
11 ("FMLA") regarding her supervisor Jerry Dorrington ("Dorrington") and his requested  
12 FMLA leave, as well as complaints regarding the replacement of Dorrington (who was over  
13 age 40) with a younger, inexperienced, 23 year old employee as Ms. Lombardi's new  
14 supervisor. Taylor read the letter in a meeting with Plaintiff, but he refused to comment on  
15 it or any factual allegations therein. The Academy did not change its decisions. On June 12,  
16 2008, Ms. Lombardi sent a letter signed by herself, as well as other employees, to CRC  
17 management complaining about the selection of the 23-year old female as the replacement  
18 for Dorrington. Thereafter, CRC management sent a Human Resources Department  
19 employee to the Academy to interview Ms. Lombardi and other employees. Subsequent to  
20 receiving the letter and conducting the interview, neither CRC nor the Academy made any  
21 changes in personnel or otherwise.

22           According to Ms. Lombardi, also in June 2008, subsequent to submitting her  
23 complaints, she, as an individual, was subjected to increased scrutiny and harassment by  
24 Taylor, Josh White ("White"), program director of the Academy, and Anne Harmes  
25 ("Harmes"), supervisor of the Juniper House. They allegedly participated in acts of  
26 harassment against Ms. Lombardi, including, *inter alia*, closely monitoring her, reporting  
27 false job performance corrective action complaints, defaming her, and instituting unfair  
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1 schedule assignments with the intent to force her to quit her job. Plaintiff further alleges that  
2 White instructed Harmes and other management to keep a file on her, “hoping to catch some  
3 sort of violation.” White stated that Ms. Lombardi was the ringleader regarding complaints  
4 to management and it would only be a matter of time before she would no longer be working  
5 for the Academy. He also stated that “Mary (Lombardi) needs to go, she’s kinda getting up  
6 there and she needs to just go.” Plaintiff further reports that White made statements that  
7 older female employees should never have been hired because of their age.

8         On September 30, 2008, Ms. Lombardi wrote a letter to White and Harmes stating that  
9 she believed “management was following a plan to force her to resign because she authored  
10 letters to management in June and was considered a ringleader of disgruntled employees by  
11 management.” On November 5, 2008, Ms. Lombardi was transferred to the Willow House  
12 dormitory which, unlike the Juniper House dormitory, required the use of staircase for  
13 access. Ms. Lombardi alleges that the transfer to Willow House dormitory “was designed to  
14 make [her] work place unpleasant so that she would quit because White and Taylor knew  
15 [she] had blood flow problems in her legs and joint arthritis which would make it difficult  
16 for her to walk up and down stairs.” Ms. Lombardi contends that this was part of their  
17 overall plan designed to force her to quit her job.

18         On December 18, 2008, Defendants fired Ms. Lombardi, age 74 years, citing  
19 “reduction in force” as the reason. Ms. Lombardi contends that this reason is merely  
20 pretextual for Defendants’ discriminatory animus because (1) on December 5, 2008, three  
21 similarly situated employees were hired to do the same work that Ms. Lombardi did and  
22 Academy advertised for residential coach positions in November and December 2008, as  
23 well as January 2009; (2) two of the employees hired on December 5, 2008 were under the  
24 age of 40 years old and significantly younger than Ms. Lombardi; (3) two additional  
25 residential coaches were hired by Academy in January and February 2009; and (4) two other  
26 employees who signed letters of complaint in June 2008 were also fired at the same time as  
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1 Ms. Lombardi. They too received unjustified, false job performance evaluations in an effort  
2 to force them to quit.

3 Ms. Lombardi filed charges of age discrimination and retaliation for opposing age  
4 discrimination with the Federal Equal Employment Opportunities Commission (“EEOC”)  
5 on June 15, 2009. On the same day, she filed the same charges with the Arizona Civil Rights  
6 Division (“ACRD”) of the Arizona Attorney General’s Office. On December 11, 2009, the  
7 EEOC issued Ms. Lombardi a notice of right to sue. On December 23, 2009, the ACRD  
8 issued Ms. Lombardi a notice of right to sue.

9 **II. PROCEDURAL BACKGROUND**

10 On August 3, 2009, Plaintiff filed suit against Defendants in the Superior Court of  
11 Arizona, Yavapai County. Thereafter, on September 1, 2009, Defendants properly removed  
12 the action to the United States District Court for the District of Arizona and it is now before  
13 this Court. Plaintiff’s original Complaint and First Amended Complaint were dismissed  
14 (Docs. 27 and 42) with leave to file amended complaints.

15 Ms. Lombardi filed the Second Amended Complaint (“SAC”) alleging twelve causes  
16 of action<sup>2</sup> against six different defendants (“Defendants”).<sup>3</sup> Defendants filed a Motion to  
17 Dismiss seeking to dismiss Plaintiff’s state law claims for Wrongful Discharge in violation  
18 of A.R.S. § 23-1501(3)(b), Wrongful Discharge in violation of public policy established in

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20 <sup>2</sup> Ms. Lombardi’s causes of action are as follows: Retaliation for Exercise of Rights  
21 protected by FMLA, 29 U.S.C. § 2615(a)(2); Violation of the ADEA, 29 U.S.C. § 623(a)(1);  
22 Violation of the ADEA, 29 U.S.C. § 623(d); Violation of Arizona Civil Rights Act, A.R.S.  
23 § 41-1463; Violation of Arizona Civil Rights Act, A.R.S. § 41-1464; Wrongful Discharge  
24 in violation of A.R.S. § 23-1501(3)(b); Wrongful Discharge in violation of public policy  
25 established in Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370 (1985); Breach of  
the Implied Covenant of Good Faith and Fair Dealing; Intentional Interference with  
Contractual Relations; Breach of Contract; Intentional Infliction of Emotional Distress; and  
Negligent Infliction of Emotional Distress.

26 <sup>3</sup> Ms. Lombardi brings the state and federal claims against Copper Canyon, LLC, CRC  
27 Health Group, Inc., Aspen Educational Group, Inc., Paul Taylor and “Jane Doe” Taylor, Josh  
28 White and “Jane Doe” White, and Anne Harmes and “John Doe” husband.

1 Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370 (1985), Breach of the Covenant  
2 of Good Faith and Fair Dealing, Intentional Interference with Contractual Relations, Breach  
3 of Contract, Intentional Infliction of Emotional Distress, and Negligent Infliction of  
4 Emotional Distress. Defendants seek dismissal of the aforementioned state claims under Fed.  
5 R. Civ. P. 12(b)(1), arguing that this Court lacks subject matter jurisdiction because all  
6 claims are preempted by the National Labor Relation Act, 29 U.S.C. § 151 *et seq.* (“NLRA”)  
7 and the Family and Medical Leave Act, 29 U.S.C. § 2615 (a)(2) (“FMLA”). In the  
8 alternative, Defendants contend that Ms. Lombardi has failed to state a claim for which relief  
9 can be granted and therefore, the state claims should be dismissed pursuant to Fed.R.Civ.P  
10 12(b)(6). At this time, Defendants do not seek dismissal of Plaintiff’s federal claims  
11 (Plaintiff’s First through Third Claims for Relief) or state law equivalents under the Arizona  
12 Civil Rights Statutes (Plaintiff’s Fourth and Fifth Claims).

13 **III. LEGAL STANDARD AND ANALYSIS**

14 **Fed.R.Civ.P.12(b)(1)**

15 Federal courts have limited subject matter jurisdiction. The authority of federal courts  
16 to assert jurisdiction to hear a particular case extends only to subject matter authorized by the  
17 Constitution or by statute. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).  
18 In federal court, the burden of establishing subject matter jurisdiction is on the party asserting  
19 jurisdiction. See Id. A Rule 12(b)(1) motion will be granted if the complaint fails to allege  
20 grounds for federal subject matter jurisdiction, as required by rule 8(a) of the Federal Rules  
21 of Civil Procedure. See Warren v. Fox Family Worldwide, 328 F.3d 1136, 1139 (9th  
22 Cir.2003).

23 A motion to dismiss under Rule 12(b)(1) can be facial or factual. Safe Air For  
24 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.2003). A facial challenge asserts that the  
25 complaint, on its face, fails to allege facts that would invoke federal jurisdiction. Id. A  
26 factual attack disputes the veracity of allegations in the complaint that would, if true, invoke  
27 federal jurisdiction. Id. In a factual challenge, the court may consider evidence outside the  
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1 pleadings to determine whether it has subject matter jurisdiction. Autery v. United States,  
2 424 F.3d 944, 956 (9th Cir.2005).<sup>4</sup>

3 **Fed.R.Civ.P.12(b)(6)**

4 Pursuant to Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a “short  
5 and plain statement of the claim showing that the pleader is entitled to relief.” As the  
6 Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), Rule 8 does  
7 not require detailed factual allegations. However, “it demands more than an unadorned,  
8 the-defendant-unlawfully-harmed-me accusation.” Id. at 555 (citing Papasan v. Allain, 478  
9 U.S. 265, 286 (1986). A pleading that merely provides “labels and conclusions” or “a  
10 formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S.  
11 at 555. Furthermore, a complaint that provides strictly “naked assertion[s]” devoid of  
12 “further factual enhancement” will not suffice.<sup>5</sup> Id. at 557. Thus, to survive a 12(b)(6)  
13 motion to dismiss, a complaint must contain sufficient factual matter, that when accepted  
14 as true, states “a claim to relief that is plausible on its face.” Id. at 570. “A claim has facial  
15 plausibility when the plaintiff pleads factual content that allows the court to draw the  
16 reasonable inference that *the defendant is liable for the misconduct alleged.*” Id. at 556.  
17 (Emphasis added). The plausibility standard requires showing more than a sheer possibility  
18 that a defendant has acted unlawfully. Ibid. Despite having to take all of the factual  
19 allegations in the complaint as true for the purposes of a motion to dismiss, the court is not

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21 <sup>4</sup> Where a factual challenge is asserted, “no presumptive truthfulness attaches to  
22 plaintiff's allegations, and the existence of disputed material facts will not preclude the trial  
23 court from evaluating for itself the merits of jurisdictional claims.” Roberts, 812 F.2d at 1177  
24 (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983)) (internal  
quotations omitted).

25 <sup>5</sup> While legal conclusions can provide the framework of a complaint, they must be  
26 supported by factual allegations. When there are well-pleaded factual allegations, a court  
27 should assume their veracity and then determine whether they plausibly give rise to an  
entitlement to relief. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

1 “bound to accept as true a legal conclusion couched as a factual allegation.” (internal  
2 quotation marks omitted). *Id.* at 555.

3 **A. National Labor Relation Act, 29 U.S.C. § 151 *et seq.* (“NLRA”)**

4 In her SAC, Plaintiff asserts state law claims for Wrongful Discharge in Violation of  
5 A.R.S. § 23-1501(3)(b) (Count Six); Breach of Implied Covenant of Good Faith and Fair  
6 Dealing (Count Eight), Intentional Interference with Contractual Relations (Count Nine); and  
7 Breach of Contract (Count Ten). In response, Defendants contend that the National Labor  
8 Relation Act, 29 U.S.C. § 151 *et seq.*, preempts all such claims. Thus, the Court will examine  
9 the NLRA as it pertains to the pending matters.

10 The NLRA preempts any claim for relief in federal or state court based on conduct  
11 which is prohibited by its provisions. San Diego Bldg. Trades Council v. Garmon, 359 U.S.  
12 236 (1959). In Garmon, the Supreme Court declared the general rule concerning the  
13 preemptive effect of the NLRA and the jurisdiction of the National Labor Relations Board  
14 (“NLRB”).

15 When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as  
16 well as the federal courts must defer to the exclusive competence of the  
17 National Labor Relations Board if the danger of interference with national  
18 labor policy is to be averted.

19 Id. at 245. The Garmon court explained that:

20 To leave the States free to regulate conduct so plainly within the central aim  
21 of federal regulation involves too great a danger of conflict between power  
22 asserted by Congress and requirements imposed by state law. Nor has it  
23 mattered whether the States have acted through laws of broad general  
24 application rather than laws specifically directed towards the governance of  
25 industrial relations. Regardless of the mode adopted, to allow the states to  
26 control conduct which is the subject of national regulation would create  
27 potential frustration of national purposes.

28 Id. at 244. State law claims are not preempted where the activity regulated is merely a  
peripheral concern of the NLRA or “where the regulated conduct touched interests so deeply  
rooted in local feeling and responsibility that, in the absence of compelling congressional  
direction, it could not infer that Congress deprived the states of the power to act.” Id. at 243-  
44.

1           In deciding a preemption issue under the NLRA, a court must first determine “whether  
2 there is an arguable case for preemption; if there is, it must defer to the Board, and only if  
3 the Board decides that the conduct is not protected or prohibited may the court entertain the  
4 litigation.” Int’l Longshoreman’s Ass’n v. Davis, 476 U.S. 380, 397(1986). The NLRA  
5 protects employees who engage in “concerted activities” for the purpose of “mutual aid or  
6 protection.” 29 U.S.C. § 157. Accordingly, if the Plaintiff has participated in a concerted  
7 activity for the mutual aid or protection of others and that is what has caused her termination  
8 and thereby given rise to this lawsuit, the NLRA is triggered.

9           Thus, the Court must determine whether Plaintiff was and is participating in a  
10 concerted activity. Although the term “concerted activities” is not defined in the statute, case  
11 law explains that “it clearly enough embraces the activities of employees who have joined  
12 together to achieve common goals.” NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 830  
13 (1984). An employee must act “with or on behalf of other employees, and not solely by and  
14 on behalf of the . . . employee himself” in order for the action to be considered a concerted  
15 activity. NLRB. v. Mike Yurosek & Son, Inc., 53 F.2d 261, 264 (9th Cir. 1995) (citing Pac.  
16 Electric Co. v. NLRB, 261 F.2d 310, 310 (9th Cir. 1966)). More specifically, Ms.  
17 Lombardi’s claims for discrimination, retaliation, and termination are not based on her  
18 exercise of rights protected by the NLRA. She does not contend that Defendants terminated  
19 her because she and her co-workers collectively complained about the alleged mistreatment  
20 in the workplace. She has alleged that she, as an individual, was terminated because she  
21 opposed FMLA violations and because of age discrimination she experienced. She has not  
22 asserted any rights or claims on behalf of any other individuals, group(s), or otherwise.  
23 These claims are not grounded in labor disputes protecting the right to act as a group for the  
24 benefit of a collective unit or even another employee. Rather, they are based upon Ms.  
25 Lombardi’s rights as an individual not to be discriminated against, retaliated against, or  
26 unjustly terminated. Plaintiff has not filed this action before the NLRB for concerted  
27 activities, lost, and then “artfully re-pled” her action for concerted activities as state claims.

1 Moreover, such state claims of age discrimination and FMLA retaliation may involve deeply  
2 rooted local interests which are often reserved for the courts.

3 Furthermore, the Court finds significant that the Supreme Court held NLRA  
4 preemption under Garmon does not act to preempt state law claims if the claims would affect  
5 union and non-union employees equally and neither encourage nor discourage the collective  
6 bargaining processes that are the subject of the NLRA. Metropolitan Life Ins. Co. v.  
7 Massachusetts, 471 U.S. 724, 755-58 (1985). The NLRA does not preempt state laws and  
8 claims that are not incompatible with the general objectives of the NLRA. Id. at 753-58.  
9 The objectives of the NLRA are to protect the freedom of workers to practice collective  
10 bargaining and protect workers' rights to freedom of association, self-organization, and  
11 designation of representatives of their own choosing for the purposes of negotiating terms  
12 of employment or other mutual aid or protection. Id. See also Fort Halifax Packing Co. v.  
13 Coyne, 482 U.S. 1, 20 (1987) ("NLRA is concerned with ensuring an equitable bargaining  
14 process, not with the substantive terms that may emerge from such bargaining." The NLRA  
15 does not provide for a statutory preemption. The Court specifically held in Metropolitan  
16 Life,

17 Where the preemptive effect of federal enactments is not explicit, 'courts  
18 sustain a local regulation unless it conflicts with federal law or would frustrate  
19 the federal scheme, or unless the courts discern from the totality of the  
circumstances that Congress sought to occupy the field to the exclusion of the  
States.'

20 Metropolitan Life Ins. Co., 471 U.S. at 747, quoting Allis-Chalmers Corp. v. Lueck, 471 U.S.  
21 202, 209 (1985); Malone v. White Motor Co., 435 U.S. 497, 504 (1978).

22 As accurately noted by Plaintiff, the relevant state law claims at issue involve statutes  
23 and state common law which provide for *individual* causes of action for discrimination,  
24 retaliation, and discharge. They are based on allegations that Defendants engaged in  
25 wrongful conduct against Plaintiff as an individual, including discrimination and retaliation  
26 for opposing age discrimination and violations of FMLA, as well as discriminatory  
27 discharge. Said claims do not involve activity related to the NLRA such as organizing,  
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1 collective bargaining, or concerted activities on behalf of another, nor do they “purport to  
2 regulate any conduct subject to regulation by the NLRB.” Fort Halifax Packing Co., 482  
3 U.S.1 at 22. With regards to the relevant state law claims, the Court finds that they do not  
4 implicate the NLRA. It has not been established that Congress intended to preempt the  
5 relevant state laws raised by Plaintiff, and the state laws do not conflict with or frustrate the  
6 objectives of the NLRA. Accordingly, the Defendants’ Motion to Dismiss Counts 6 and 8-  
7 10 on the ground that they are preempted by the NLRA is DENIED.

8 **B. Family and Medical Leave Act, 29 U.S.C. § 2615 (a)(2)**

9 Defendants contend that all of Plaintiff’s state law claims are preempted by the Family  
10 and Medical Leave Act, 29 U.S.C. § 2615 (a)(2). Defendants cite to numerous district courts  
11 cases (*inter alia*, O’Hara v. Mt. Vernon Bd. of Educ., 16 F. Supp. 2d 868, 894 (S.D. Ohio  
12 1998); Kiely v. Univ. of Pittsburgh Med. Center, 2000 U.S. Dist. LEXIS 3156 (W.D. Pa.  
13 2000); See also Alvarez v. Hi-Temp Inc., 2004 U.S. Dist. LEXIS 4755 (N.D. Ill. 2004)) to  
14 support their contention that Congress intended that the specific remedies set forth in § 2167  
15 of the FMLA would be the exclusive remedies for a violations of the FMLA. However,  
16 Defendants have wholly failed to provide this Court with any binding or persuasive authority  
17 supporting their position that this Court should dismiss all of Plaintiff’s state law claims on  
18 the basis of FMLA preemption and Congressional intent. There is no indication that this  
19 Court or any Court in this district or circuit subscribes to the minority view as espoused by  
20 Defendants or the cases proffered by Defendants. The Motion to Dismiss all of Plaintiff’s  
21 state law claims on the grounds of preemption under FMLA is DENIED.

22 **C. Wrongful Discharge**

23 **1. Wrongful Discharge in Violation of A.R.S. § 23-1501(3)(b) (Count Six)**

24 In her sixth claim for relief - wrongful discharge in violation of the Arizona  
25 Employment Protection Act (“AEPA”), A.R.S. § 23-1501, Ms. Lombardi contends that she  
26 was wrongfully discharged contrary to the public policies of Arizona for her opposition to  
27 Defendants’ violations of the FMLA.

1           The AEPA sets forth the public policies of this state<sup>6</sup> and enumerates the distinct  
2 circumstances under which an employee may bring a wrongful discharge action in Arizona.  
3 See A.R.S. § 23-1501. One such circumstance is when an employer violates “a statute of this  
4 state” or “the public policy set forth in or arising out of the statute.” A.R.S. § 23-1501(3)(b).  
5 Another is when the employer discharges someone from employment in retaliation for  
6 refusing to violate Arizona law or for reporting violations of Arizona law to the employer’s  
7 management or other investigative authority. A.R.S. § 23-1501(3)(c)(i),(ii).

8           Defendants first argue that Plaintiff cannot maintain this claim because the AEPA  
9 does not encompass violations of federal regulations. Thus, the first issue is whether Ms.  
10 Lombardi has stated a claim under the AEPA with regard to her claim grounded in  
11 oppositions to violations of the FMLA. More specifically, whether allegations of violations  
12 of the FMLA are necessarily violations of Arizona public policy for purposes of the AEPA.  
13 The Court turns to Galati v. America West Airlines, Inc., a case in which the Arizona Court  
14 of Appeals considered whether the legislature intended to include federal regulations in the  
15 public policy to be vindicated by the AEPA. Galati v. America West Airlines, Inc., 205 Ariz.  
16 290 (2003).

17           The Court in Galati explained that the language chosen by our legislature for the  
18 AEPA is clear and unequivocal. Section 23-1501(3)(b) provides a remedy if “[t]he employer  
19 has terminated the employment relationship of an employee in violation of a *statute of this*  
20 *state.*” (Emphasis added). Section 23-1501(3)(c)(i) provides a remedy if the employee is  
21 terminated in retaliation for refusing to commit an act or omission “that would violate the  
22 *Constitution of Arizona or the statutes of this state.*” (Emphasis added). Section  
23 23-1501(3)(c)(ii) provides a remedy if the employee is terminated for disclosing to the  
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25           <sup>6</sup>Pursuant to the AEPA, it is the public policy of Arizona that employment  
26 relationships are contractual in nature. Absent a contract complying with the requirements  
27 outlined in the AEPA, an employment relationship is severable at the pleasure of either party.  
28 A.R.S. § 23-1501(1), (2).

1 employer, its representative, or an investigatory body a violation of “the *Constitution of*  
2 *Arizona or the statutes of this state.*” (Emphasis added). There is no mention of any federal  
3 provision, statute, or regulation. The language contemplates only transgressions of Arizona  
4 law as violative of Arizona public policy. Accordingly, in Galati, the court did not find that  
5 a statutory public policy exception exists for whistle-blowing associated with federal  
6 regulations. Moreover, it affirmed the trial court’s finding that the legislature did not violate  
7 the Arizona Constitution by excluding federal regulations from public policy under the  
8 AEPA. Galati, 205 Ariz. at 294, citing Cronin v. Sheldon, 195 Ariz. 531 (1999) (The  
9 Arizona supreme court addressed the constitutionality of the AEPA holding that employees  
10 asserting wrongful termination claims against their employers for violating the Arizona Civil  
11 Rights Act were limited under the AEPA to the statutory remedies set forth that act.) The  
12 Cronin Court also found that the AEPA does not violate the equal privileges clause, the  
13 impairment of contract clause, the anti-abrogation clause, the non-limitation clause or the  
14 separation of powers clause. Cronin v. Sheldon, 195 Ariz. 531 (1999). Accordingly,  
15 Plaintiff’s allegations involving FMLA violations are not within the parameters of the AEPA  
16 and therefore fail to state a claim upon which relief may be granted.<sup>7</sup>

17 Next, Defendants argue that Plaintiff cannot maintain her sixth claim under the AEPA  
18 based upon violations of the Arizona Civil Rights Act (“ACRA”) either because “the [A]EPA  
19 does not provide a back door method of suing [employers] in tort for the wrongful  
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22 <sup>7</sup> The Court notes that when determining whether claims survive a motion to dismiss,  
23 the Court looks to the SAC in its entirety, not merely to the count as articulated. Thus, the  
24 Court must consider if there are *any plausible claims* that can be maintained from the  
25 allegations asserted, not just the specific statute alleged. For example, in the case *sub judice*,  
26 Plaintiff alleged violations of FMLA in Count Six as the basis for her claim under AEPA.  
27 However, if the SAC as a whole demonstrates a violation of AEPA, the claim should not be  
28 dismissed for failure to cite the correct section of the AEPA that was violated or failure to  
state which source statute was violated under the AEPA. Based on the SAC in its entirety,  
the Plaintiff has alleged sufficient facts to state a claim for wrongful discharge under A.R.S.  
§ 23-1501.

1 termination in violation of ACRA or its public policy.” Taylor v. Graham County Chamber  
2 of Commerce, 201 Ariz. 184, 188 (2001). To determine whether Plaintiff’s claims are  
3 authorized under the AEPA, the Court must look to the pertinent language of the statute.  
4 Pursuant to AEPA, an employee has a claim in tort for wrongful termination<sup>8</sup> against an  
5 employer if “the employer has terminated the employment relationship of an employee in  
6 violation of a statute of this state.” But note that, “if the statute provides a remedy to an  
7 employee for a violation of the statute, the remedies provided to an employee for a violation  
8 of the statute are the exclusive remedies for the violation of the statute or the public policy  
9 set forth in or arising out of the statute, including the following: (i) The civil rights act  
10 prescribed in title 41, chapter 9. \*\*\* ” § 23-1501(3)(b). The question then becomes, does  
11 this language prohibit a plaintiff from bringing the cause of action at all or does it merely  
12 limit a plaintiff’s remedies. The parties have failed to address this issue. The Court will not  
13 dismiss the claim without further analysis of this critical issue because it cannot be  
14 established, based upon the papers before the Court, that Plaintiff has failed to state a claim  
15 upon which relief may be granted.

16 An employee also has a claim in tort for wrongful termination under the AEPA if “the  
17 employer has terminated the employment relationship of an employee in retaliation for,”  
18 *inter alia*,

19 The disclosure by the employee in a reasonable manner that the employee has  
20 information or a reasonable belief that the employer, or an employee of the  
21 employer, has violated, is violating or will violate the Constitution of Arizona  
22 or the statutes of this state to either the employer or a representative of the  
23 employer who the employee reasonably believes is in a managerial or  
24 supervisory position and has the authority to investigate the information  
provided by the employee and to take action to prevent further violations of the  
Constitution of Arizona or statutes of this state or an employee of a public  
body or political subdivision of this state or any agency of a public body or  
political subdivision.

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26  
27 <sup>8</sup> Wrongful termination and wrongful discharge are used interchangeably in case law  
and statutory law, and likewise in this order.

1 A.R.S. § 23-1501 (3)(c). In the present matter, Ms. Lombardi has alleged sufficient facts in  
2 her SAC to assert a claim that her termination was at least in part the result of retaliation  
3 against her for opposing age discrimination. For the reasons stated above, the Motion to  
4 Dismiss is DENIED.

5 **2. Common Law Wrongful Discharge in Violation of Public Policy (Count**  
6 **Seven)**

7 In her SAC, Plaintiff asserts that she was wrongfully discharged on December 18,  
8 2008, in violation of public policy as established by common law in Wagenseller v.  
9 Scottsdale Memorial Hospital, 147 Ariz. 370 (1985). Defendants move to dismiss this claim  
10 on the ground that the Arizona legislature enacted the AEPA in effect to supercede  
11 Wagenseller. In Wagenseller, the Arizona supreme court held that an at-will employee of  
12 a hospital could bring a wrongful termination suit alleging that she was fired in violation of  
13 Arizona’s public policy. Wagenseller, 147 Ariz. at 389. The court said that “an employer  
14 may fire for good cause or for no cause. He may not fire for bad cause-that which violates  
15 public policy.” Id. at 378. The court defined public policy to include violations of our  
16 statutory, constitutional, and common law. Id. at 378-80.

17 The Arizona legislature enacted the AEPA in 1996 in direct response to Wagenseller  
18 because “it took express exception to the court’s indication that it rather than the legislature  
19 had the authority to define public policy.” See Galati, 205 Ariz. at (2003), quoting  
20 Employment Protection Act Ch. 140, § 1, para. A, 1996 Ariz. Sess. Laws 683, 684. It was  
21 the intent of the legislature to limit the availability of wrongful termination for the violation  
22 of public policy. Therefore, as established above, the AEPA limited the circumstances under  
23 which a discharged employee may sue an employer to those situations involving either  
24 qualifying written contracts or an employer violating the public policy of the state *as*  
25 *enunciated in the state constitution and statutes.* Johnson v. Hispanic Broadcasters of  
26 Tucson, Inc., 196 Ariz. 597, 599 (Ariz. Ct. App. 2000).(Emphasis added)

27 In her seventh claim for relief, Ms. Lombardi specifically alleges that as a result of  
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1 the Defendants' actions, they are liable to her for wrongful discharge in violation of common  
2 law public policy as established in Wagenseller. She cites Logan v. Forever Living Prod.  
3 Int'l, 203 Ariz. 191, 194-95 (2002) and Galati v. America West Airlines, Inc., 205 Ariz. 290,  
4 294 (2003) to support her argument that the tort of wrongful discharge based upon common  
5 law public policy of Arizona still exists.

6 In Logan, the plaintiffs brought an action for wrongful termination alleging they were  
7 discharged by their employer for not selling their property to him at the price he demanded.  
8 Logan, 203 Ariz. at 192. The superior court dismissed the action for failure to state a claim  
9 and the court of appeals affirmed. Id. The Arizona Supreme Court vacated the decision of  
10 the court of appeals and reversed the judgment of the trial court. Id. at 195. The court held  
11 that the plaintiffs in fact stated a claim for wrongful termination under the AEPA. Id. The  
12 court explained that one of the express purposes of the AEPA is to provide protection to  
13 employees from employers exacting "fees, gratuities, commissions, kickbacks, or other forms  
14 of remuneration from employees as a condition of continuing employment or as a condition  
15 to obtaining employment in the first instance." Id. at 194. Thus, because the court found that  
16 the Logans' claim fell directly within the parameters of the AEPA, the court explained, "we  
17 need not reach the question, raised by our associate in a separate concurring opinion, whether  
18 a common law cause of action of the kind asserted by the Logans may still be asserted  
19 independent of the AEPA." Id. at 195. As such, the court did not affirmatively decide the  
20 question; rather it merely left open the possibility that a cause of action for common law  
21 wrongful termination may still exist.

22 Likewise, in Galati, the court did not foreclose the idea that a common law tort of  
23 wrongful discharge based upon public policy remains in Arizona in the post-Wagenseller era.  
24 Galati was employed by America West Airlines ("AWA") as a flight attendant until he was  
25 discharged in January 1999. He filed suit against AWA asserting that he was wrongfully  
26 terminated for being a whistle-blower; and his claims were based on violations of Federal  
27 Aviation Administration regulations. AWA filed a motion to dismiss for failure to state a  
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1 viable claim under Arizona Rule of Civil Procedure 12(b)(6) arguing that Galati had failed  
2 to plead a violation of Arizona statutory or constitutional law as required by the AEPA. The  
3 trial court dismissed the case. It found that Galati's claims, grounded in federal violations,  
4 did not fall within the scope of A.R.S. § 23-1501. Galati timely appealed. The court of  
5 appeals held that (1) a statutory public policy exception did not exist for whistle-blowing  
6 associated with federal regulations and (2) the Airline Deregulation Act preempted the flight  
7 attendant's state cause of action. It further explained, with great significance to the present  
8 case, "[w]hether a common law tort for wrongful termination still exists after the AEPA is  
9 an open and much debated question in Arizona law." *Id.* at 294. Both Logan and Galati  
10 remain good law in Arizona and establish support for Plaintiff that, contrary to the  
11 Defendants' steadfast assertion otherwise, Plaintiff's common law tort for wrongful  
12 termination claim is not foreclosed as a matter of law merely based upon the enactment of  
13 the AEPA. Accordingly, the Motion to Dismiss Count Seven of Plaintiff's SAC is  
14 DENIED.<sup>9</sup>

15 **D. Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional**  
16 **Distress**

17 Fed.R.Civ.P. 12(b)(1)

18 In Count Eleven, Plaintiff contends that the Defendants' conduct was "intentional,  
19 outrageous, and unconscionable in its scope and severity, and Defendants either intended to

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21 <sup>9</sup> When considering a motion to dismiss, this Court must "accept as true all material  
22 allegations in the complaint and construe them in the light most favorable to the plaintiff."  
23 Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 670 (9th Cir.1993). Accordingly,  
24 the facts considered by this Court are gleaned directly from the allegations of Plaintiff's  
25 SAC. Upon careful review, the Court has determined that based on the conduct alleged,  
26 there is sufficient factual content in the SAC for the Court to *infer* a plausible claim of  
27 wrongful discharge. Twombly, 550 U.S. at 570. Plaintiff is cautioned that since the  
28 inception of the AEPA, common law wrongful discharge claims based upon public policy  
are limited, as the legislature now favors the comprehensive statutory scheme of the AEPA.  
The motion to dismiss stage is merely the threshold, Plaintiff still bears the burden of  
establishing a prima facie case with authoritative support therefor.

1 cause emotional distress or recklessly disregarded the near certainty that such distress would  
2 result from their conduct. Furthermore, this conduct was without legal justification. Such  
3 actions caused severe emotional distress to Lombardi.” Plaintiff maintains that “she has  
4 suffered and will continue to suffer for the rest of her life emotional distress, mental anguish,  
5 anxiety, anger, pain and suffering, stress, insecurity, shame, and depression.” As stated,  
6 Plaintiff was 73 years old when she made the complaints in June 2008 and 74 years old in  
7 December 2008 when she was discharged.

8 The Supreme Court has limited Garmon-preemption in the context of intentional  
9 infliction of emotional (IIED) distress based on its interpretation of the NLRA. It has  
10 explained that the NLRA does not preempt *all* claims brought by an employee against an  
11 employer. In an often cited case, the Supreme Court explained,

12 [i]nflexible application of the doctrine is to be avoided, especially where the  
13 State has a substantial interest in regulation of the conduct at issue and the  
14 State’s interest is one that does not threaten undue interference with the federal  
15 regulatory scheme. With respect to [the employee’s] claims of intentional  
16 infliction of emotional distress, we cannot conclude that Congress intended  
17 exclusive jurisdiction to lie in the Board.

18 Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, 302  
19 (1977) . The Court continued, “[n]o provision of the National Labor Relations Act protects  
20 the ‘outrageous conduct’ complained of by [the employee]...”

21 In Farmer, the Supreme Court held that a claim for IIED was not preempted by the  
22 NLRA. The court explained that in order for such a claim to avoid preemption, “it is essential  
23 that the state tort be either *unrelated to employment discrimination* or a function of the  
24 particularly abusive manner in which the discrimination is accomplished or threatened rather  
25 than a function of the actual or threatened discrimination itself.” Id. at 305. (Emphasis  
26 added). The employee’s cause of action depended on the “outrageousness” of the conduct  
27 and whether the manner of conduct was proper or was beyond the scope of labor relations  
28 regulated by federal law. The Court concluded that the state’s interest in protecting its  
citizens from the kind of abuse of which the employee in Farmer complained outweighed any

1 minimal potential for interference with the federal scheme of regulation. Id. at 302-304.

2 The “unrelated to employment discrimination” prong of the Farmer test, “is equivalent  
3 to a requirement that the facts not be ‘inextricably intertwined’ with a labor law duty  
4 established by the collective bargaining agreement.” Truex v. Garret Freightliners, Inc., 784  
5 F.2d 1347, 1351 (9th Cir. 1985) (citing Bloom v. International Brotherhood of Teamsters,  
6 Local 468, 752 F.2d 1312 (9th Cir.1984)). Ms. Lombardi’s claims for intentional and  
7 negligent infliction of emotional distress, however, are wholly independent from the terms  
8 of any collective bargaining agreement. Rather, the claims are based on the discrete  
9 incidences of alleged wrongful conduct of Defendants. The claims are specific to the  
10 individuals as opposed to the employment institution, unrelated to any collective bargaining  
11 agreement, and were particularly outrageous given her age, the length of time for which the  
12 conduct was committed, and the nature of the conduct itself. Furthermore, although the  
13 alleged actions by Defendants took place in the employment environment, they do not  
14 concern matters within the scope of federal labor policy.

15 The Court finds further support that this claim is not preempted in that the alleged  
16 infliction of emotional distress upon a single employee as described in the SAC is at best a  
17 “peripheral” concern of the NLRB, and instead is a concern best suited for this Court.

18 Accordingly, Defendants’ Motion to Dismiss Plaintiff’s claims for IIED (Count  
19 Eleven) and NIED (Count Twelve) under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction  
20 based on NLRA preemption is DENIED.

21 **Fed.R.Civ.P. 12(b)(6)**

22 In the alternative, Defendants claim that assuming the Court does have jurisdiction  
23 over the emotional distress claims, they should nevertheless be dismissed, as Ms. Lombardi  
24 has failed to state a claim (for IIED and NIED) upon which the Court can grant relief. Fed.  
25 R. Civ. P. 12(b)(6). Having determined that the Court does have jurisdiction over these two  
26 claims, the Court will now consider whether Plaintiff has validly stated her claims under  
27 R.12(b)(6).



1           **2.     NIED**

2           Ms. Lombardi’s final cause of action is for NIED. Ms. Lombardi alleges that  
3 Defendants’ conduct was such that it unintentionally caused her emotional distress which  
4 they should have realized involved an unreasonable risk of causing the alleged distress. The  
5 conduct included “harassment by close monitoring, false job performance corrective action  
6 complaints, defamation about Lombardi to students, unfair schedule assignments, moving  
7 Ms. Lombardi to another dormitory that would be unpleasant to her because of physical  
8 limitations, and complaints about her age” over the course of approximately six months.  
9 These actions by Defendants allegedly caused Ms. Lombardi to suffer “emotional distress,  
10 mental anguish, anxiety, anger, pain and suffering, stress, insecurity, shame, and depression.”  
11 Moreover, she has alleged that it caused her such distress that it prompted her to write a letter  
12 to management regarding her fear that she might lose her job.

13           Defendants argue that this claim should be dismissed because Arizona’s Workers’  
14 Compensation Act, A.R.S. § 23-1022 (A), is the exclusive remedy against the employer for  
15 work-related injuries. Arizona Workers’ Compensation Act provides the exclusive remedy  
16 for employees who are *accidentally* injured in the course of their employment. A.R.S. § 23-  
17 1021. (Emphasis added). The statute provides, “[t]he right to recover compensation  
18 pursuant to this chapter for injuries sustained by an employee ... is the *exclusive remedy*  
19 against the employer or any co-employee acting in the scope of his employment[.]” A.R.S.  
20 § 23-1022 (A) (Emphasis added). “A mental injury ...shall not be considered a personal  
21 injury by accident ... and is not compensable ... unless ...unexpected, unusual or extraordinary  
22 stress ... was a substantial contributing cause.” A.R.S. § 23-1043.01(B). More specifically,  
23 concern over job security is not compensable under worker’s compensation because this type  
24 of stress is not the result of any “unexpected, unusual or extraordinary stress related to the  
25 employment.” La Pare v. Industrial, 154 Ariz. 318 (App. 1987).

26           In the pending matter, Plaintiff has alleged a mental injury caused by the stress,  
27 anxiety, and surrounding distress resulting from her fear of losing her job. Plaintiff further  
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1 alleged that the injury was not unexpected, as Defendants knew or should have known that  
2 their conduct created an unreasonable risk of such mental distress and Defendants devised  
3 a plan to force Plaintiff to quit said job prior to discharging Plaintiff. The Court finds that  
4 based on the allegations set forth in the SAC, assuming Plaintiff can prevail on her claim,  
5 she has demonstrated that her distress was not unexpected. Accordingly, Arizona Workers'  
6 Compensation Act does not apply to this claim and the Court has jurisdiction to hear this  
7 claim.

8 In Arizona, to recover for the tort of NIED, a plaintiff must have been in the zone of  
9 danger so that the negligent defendant created an unreasonable risk of bodily harm to  
10 plaintiff and the emotional distress inflicted by defendant's negligent conduct "must be  
11 manifested as a physical injury." Rowland v. Union Hills Country Club, 157 Ariz. 301, 304  
12 (App. 1988). Ms. Lombardi alleges that Defendants' conduct caused her, *inter alia*, anxiety,  
13 pain and suffering, and depression. In Arizona, short-lived physical manifestations do not  
14 sufficiently constitute physical injury for purposes of a NIED claim. Burns v. Jaquays  
15 Mining Co., 156 Ariz. 375, 379, (holding that headaches, weeping, muscle spasms,  
16 depression, and insomnia were transitory physical phenomena that do not sustain a cause of  
17 action for emotional distress). However, physical injury and long-term physical illness or  
18 mental disturbance constitute sufficient bodily harm to support a claim of NIED. Monaco  
19 v. Health Partners of S. Arizona, 196 Ariz. 299, 303 (App. 1999) (holding that Plaintiff stated  
20 a claim for NIED when he suffered from nightmares, depressive syndrome, sleepless nights,  
21 and was diagnosed with post-traumatic stress disorder). It is clear based upon Arizona  
22 precedent that long-term physical illness or mental disturbance constitutes sufficient bodily  
23 harm to support a claim of NIED. Id. at 304. Weighing the evidence to determine whether  
24 Plaintiff's specific circumstances give rise to such a claim is reserved for the fact-finder after  
25 sufficient discovery has been conducted. Nevertheless, based on the allegations that she has  
26 suffered the foregoing injuries over the course of time, Plaintiff has sufficiently stated a claim  
27 for NIED. Accordingly, the Motion to Dismiss Plaintiff's NIED claim is DENIED.

1 **III. CONCLUSION**

2 Accordingly,

3 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Plaintiff's claims for  
4 wrongful discharge in violation of A.R.S. §23-1501 (**Count Six**); wrongful discharge in  
5 violation of public policy (**Count Seven**); breach of implied duty of good faith and fair  
6 dealing (**Count Eight**); intentional interference with contractual relations (**Count Nine**);  
7 breach of contract (**Count Ten**); intentional infliction of emotional distress (**Count Eleven**);  
8 and negligent infliction of emotional distress (**Count Twelve**) is **DENIED**.

9 DATED this 21<sup>st</sup> day of September, 2010.

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12 Paul G. Rosenblatt  
13 United States District Judge  
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