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

8
9 SHAROLYNN L. GRIFFITHS, a single
woman

10 Plaintiff,

No. CIV 12-430-TUC-CKJ

11 v.

ORDER

12 CITY OF TUCSON, a municipal
13 corporation of the State of Arizona

14 Defendant.

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16 Pending before this Court is Defendant's Motion to Dismiss. (Doc. 9). Plaintiff
17 filed a Response on January 14, 2013. (Doc. 14). In it, Plaintiff withdrew one of her
18 claims and pled in the alternative for leave to amend Plaintiff's Complaint if Defendant's
19 Motion is granted. Defendant filed its Reply on February 6, 2013. (Doc. 19).

20 Although Defendant has requested oral argument, the Court finds this matter
21 appropriate for decision without oral argument. *See* LRCiv. 7.2(f) ; 27A Fed.Proc., L. Ed.
22 § 62:367 ("A district court generally is not required to hold a hearing or oral argument
23 before ruling on a motion."). As such, Defendant's request for oral argument is denied.
24 After reviewing the moving, opposing, and replying papers, for reasons set forth below,
25 the Court grants Defendant's Motion to Dismiss and grants Plaintiff's request for Leave
26 to Amend Complaint.
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1 *Background*¹

2 On June 4, 2012, Plaintiff Sharolynn Griffiths filed a complaint containing two
3 counts against her employer, the City of Tucson (the “City”), alleging claims of sexual
4 harassment and retaliation under Title VII of the Civil Rights Act of 1964, as amended,
5 42 U.S.C. §§ 2000e *et seq.* In Plaintiff’s Response to Defendant’s Motion to Dismiss she
6 withdrew her claim for retaliation. (Doc. 14).

7 Plaintiff began work as a law clerk for the City of Tucson Public Defender Office
8 on or about December 17, 2007. In or about August 2009, she was promoted to Assistant
9 Public Defender in that office. Plaintiff alleges that beginning in or about November 2009
10 through October 2010, an unnamed City Court judge whom she appeared in front of
11 “subjected her to pervasive and egregious sexual harassment on a daily basis, including,
12 without limitation, sexually explicit emails and text messages, verbal comments, and
13 physical conduct.” The judge warned the Plaintiff that rejecting his advances would not
14 be good for Plaintiff’s career and reminded Plaintiff about his role in her performance
15 evaluations. The Plaintiff did not welcome the judge’s conduct, “and made clear that it
16 was unwelcome, but the judge continued his harassment.” After the Plaintiff once again
17 rejected the judge’s advances, the judge publicly chastised, berated, and humiliated
18 Plaintiff in open court without cause on or about October 14, 2010.

19 Plaintiff further alleges that upon information and belief the unnamed judge had
20 made similar, inappropriate advances toward other females before he had pursued the
21 Plaintiff. Plaintiff believes the City was aware of these prior incidents but failed to take
22 actions to address the judge’s conduct, and that this failure to act demonstrates a
23 ratification of the judge’s harassment by the City.

24 Plaintiff timely filed a Charge of Discrimination with the Arizona Civil Rights
25 Division, which was dual-filed with the U.S. Equal Employment Opportunity
26 Commission (“EEOC”). The EEOC has issued a notice of right to sue to Plaintiff.

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28 ¹ The background information is principally derived from Plaintiff’s Complaint.
(Doc. 1). The Court accepts as true the factual allegations set forth in Plaintiff’s
Complaint for the purposes of resolving these motions.

1 Plaintiff claims Defendant unlawfully discriminated against her under Title VII by
2 subjecting her to severe or pervasive conduct that was subjectively and objectively
3 offensive and changed the terms and conditions of her employment and created a hostile
4 work environment. The City knew or should have known of the harassment and failed to
5 take prompt and effective action to prevent the conduct. Plaintiff has suffered damages,
6 including, without limitation, pain and suffering, emotional distress, mental anguish, and
7 loss of enjoyment of life as a result of the alleged discrimination.

8
9 *Motion to Dismiss*

10 On December 14, 2012, Defendant filed a Motion to Dismiss alleging Plaintiff
11 failed to state a claim upon which relief may be granted pursuant Fed.R.Civ.P. Rules 8(a)
12 and 12(b)(6). Defendant contends that Plaintiff has failed to allege sufficient facts
13 showing she was subjected to unwelcome verbal or physical conduct because of her sex
14 and that it was severe or pervasive enough that it altered the conditions of her
15 employment and created an abusive work environment. Further, Defendant argues the
16 facts plead do not demonstrate a reason the City knew or should have known of the
17 alleged previous harassment and therefore there are no grounds for vicarious liability
18 upon the Defendant.

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20 *Legal Standard*

21 A pleading must contain a "short and plain statement of the claim showing that the
22 pleader is entitled to relief[.]" Rule 8(a), Fed. R. Civ. P. While Rule 8 does not demand
23 detailed factual allegations, "it demands more than an unadorned, the-defendant-
24 unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct.
25 1937, 1949, 173 L.Ed.2d 868 (2009). "Threadbare recitals of the elements of a cause of
26 action, supported by mere conclusory statements, do not suffice." *Id.* Neither do mere
27 assertions devoid of any factual enhancement. *Id.* A court does not have to accept as
28 true, legal conclusions unsupported by factual allegations. *Id.*

1 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
2 claim to relief that is plausible on its face.’” *Id* at 678. (quoting *Bell Atlantic Corp. v.*
3 *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). A claim is
4 plausible “when the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
6 “Determining whether a complaint states a plausible claim for relief [is] . . . a context-
7 specific task that requires the reviewing court to draw on its judicial experience and
8 common sense.” *Id.* at 679.

9 This Court must take as true all allegations of material fact and construe them in
10 the light most favorable to the plaintiff. *See Cervantes v. United States*, 330 F.3d 1186,
11 1187 (9th Cir. 2003). Nonetheless, the Court does not accept as true unreasonable
12 inferences or conclusory legal allegations cast in the form of factual allegations. *Western*
13 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). A Complaint that fails to
14 meet the minimum pleading standard is subject to dismissal under Rule 12(b)(6), *Iqbal*,
15 556 U.S. at 679.

16 17 *Sexual Harassment Claim*

18 Plaintiff alleges that a City Court judge subjected her to sexual harassment
19 pervasive enough to alter the conditions of her employment and create a hostile work
20 environment. Further, she alleges that the City knew or should have known that the City
21 Court judge had previously harassed other female attorneys yet the City failed to take
22 action to address the judge’s action prior to his harassment of Plaintiff.

23 To support a claim for hostile environment under Title VII, the Plaintiff must
24 show that (1) she was subject to verbal or physical conduct because of her sex; (2) the
25 conduct was unwelcome; and (3) the conduct was severe or pervasive enough that it
26 altered the conditions of her employment and created an abusive work environment.
27 *Johnson v. riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008)
28 (describing hostile work environment under Title VII due to race). In her Complaint

1 however, Plaintiff simply restates these elements through allegations and supports them
2 with conclusory statements devoid of specific factual allegations sufficient “to raise a
3 right to relief above the speculative level.” *Twombly*, 127 S.Ct. at 1964-5; *see also Moss*
4 *v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (for a complaint to survive a motion
5 to dismiss, the non-conclusory “factual content,” and reasonable inferences from that
6 content, must be plausibly suggestive of a claim entitling the plaintiff to relief); *Starr v.*
7 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“If there are two alternative explanations, one
8 advanced by defendant and the other advanced by plaintiff, both of which are plausible,
9 plaintiff’s complaint survives a motion to dismiss[.]”). While detailed factual allegations
10 are not necessary to overcome a Motion to Dismiss, statements such as “the City Court
11 judge[] subjected her to pervasive and egregious sexual harassment on a daily basis,
12 including, without limitation, sexually explicit emails and text messages, verbal
13 comments, and physical conduct,” are mere assertions and have no factual enhancements.

14 In her Response to Defendant’s Motion to Dismiss, Plaintiff asks this Court to take
15 judicial notice of the facts of *In re Abrams*, 227 Ariz. 248, 257 P.3d 167 (2011).
16 However, an evaluation of those facts to determine if they are sufficient to support
17 Plaintiff’s claims is unnecessary because “taking judicial notice of findings of fact from
18 another case exceeds the limits of Rule 201 [of the Federal Rules of Evidence].” *Wyatt v.*
19 *Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003). “Factual findings in one case ordinarily
20 are not admissible for their truth in another case through judicial notice.” *Id.* at n. 5. If the
21 same facts in *In re Abrams* also apply to this case, the Plaintiff may independently plead
22 them, but the Court will not take judicial notice.

23 24 *The City’s Vicarious Liability*

25 The Plaintiff’s Complaint also fails to establish a plausible claim for vicarious
26 liability because Defendant knew or should have known of previous sexual harassment of
27 other females committed by the same City Court judge. To claim the City is vicariously
28 liable for the City Court judge’s (a non-management employee) actions, Plaintiff must

1 assert facts showing the City (employer) was negligent, and that the City knew or should
2 have known of the harassment but failed to take action aimed at ending it. *Nichols v.*
3 *Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 975 (9th Cir. 2001). To demonstrate
4 that the City knew or should have known of the judge’s previous harassment of other
5 females, Plaintiff alleges “[u]pon information and belief, Defendant knew about the
6 judge’s inappropriate conduct toward females before the incidents involving Plaintiff
7 came to light, but the Defendant failed to take action to address the behavior and by its
8 own conduct, ratified the judge’s harassment.” Information and belief is not sufficient for
9 an argument when the opposite of the argument may be believed just as easily. *Twombly*,
10 550 U.S. at 556-57, 127 S. Ct at 1971 (“while the plaintiff ‘may believe the defendants
11 conspired..., the defendants’ allegedly conspiratorial actions could equally have been
12 prompted by lawful, independent goals which do not constitute a conspiracy”).

13 Plaintiff does correctly assert that the Seventh Circuit has recognized that in some
14 instances it may be sufficient to allege facts upon information and belief. *Pirelli*
15 *Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 443
16 (7th Cir. 2011). Plaintiff may allege facts in this manner, so long as, “(1) the facts
17 constituting the [wrong] are not accessible to the plaintiff and (2) the plaintiff provides
18 ‘the grounds for [her] suspicions.’” *Id.* (quoting *Uni*Quality, Inc. v. Infotronx, Inc.*, 974
19 F.2d 918, 924 (7th Cir. 1992). The plaintiff has shown that she cannot make specific
20 allegations as to the City’s knowledge of the judge’s prior acts without discovery.
21 However, she does not allege facts providing the grounds for her suspicion that the judge
22 previously sexually harassed other females or that the City knew or should have known
23 about this. Allegations upon information and belief that do not meet both of these
24 requirements are insufficient.

25 Accordingly, IT IS ORDERED:

- 26 1. Defendant’s Motion to Dismiss (Doc. 9) is **GRANTED**. Count One of the
27 Complaint (Title VII Violation – Sex Harassment) is **DISMISSED WITH LEAVE**
28 **TO AMEND**. Count Two of the Complaint (Title VII Violation – Retaliation is

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DISMISSED.

- 2. Plaintiff's request for Leave to Amend Complaint is **GRANTED** as to Count One. Plaintiff shall have thirty (30) days from the date of filing this Order to file an Amended Complaint.
- 3. All causes of action alleged in the original or amended complaints which are not alleged in any Amended Complaint will be waived. Any Amended Complaint shall be clearly designated as an Amended Complaint on the face of the document.
- 4. The Clerk of Court is **DIRECTED** to enter a judgment of dismissal, without prejudice, without further notice to Plaintiff, if Plaintiff fails to file an Amended Complaint within thirty (30) days of the filing date of this Order.

Dated this 24th day of May, 2013.



Cindy K. Jorgenson
United States District Judge