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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
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7 DEBRA JENE PATEL-JULSON,)

8 Plaintiff,)

9 vs.)

10 PAUL SMITH, *et al.*,)

11 Defendants.)
12

Case No. 2:12-cv-01023-MMD-CWH

ORDER

13 This matter is before the Court on Plaintiff's Amended Complaint (#5), filed on October
14 29, 2012. On June 15, 2012, Plaintiff filed an Application to Proceed *in Forma Pauperis* (#1).
15 On October 3, 2012, the Court granted Plaintiff's Application to Proceed *in Forma Pauperis* (#1)
16 and ordered the Clerk of the Court to file Plaintiff's Complaint. In addition, the Court ordered
17 that the Complaint be dismissed without prejudice and granted Plaintiff thirty (30) days to file an
18 amended complaint correcting the noted deficiencies. The Court will now screen Plaintiff's
19 Amended Complaint.

20 **DISCUSSION**

21 **I. Screening the Amended Complaint**

22 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen
23 the complaint pursuant to § 1915(a). Federal courts are given the authority to dismiss a case if the
24 action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted,
25 or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C.
26 § 1915(e)(2). Allegations of a *pro se* complaint are held to less stringent standards than formal
27 pleading drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). When a
28 court dismisses a complaint under § 1915(a), the plaintiff should be given leave to amend the
complaint with directions as to curing its deficiencies, unless it is clear from the face of the

1 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
2 F.3d 1103, 1106 (9th Cir. 1995).

3 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a
4 complaint for failure to state a claim upon which relief can be granted. Review under Rule
5 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of*
6 *America*, 232 F.3d 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and
7 plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2);
8 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require
9 detailed factual allegations, it demands “more than labels and conclusions” or a “formulaic
10 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
11 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled
12 factual allegations contained in the complaint, but the same requirement does not apply to legal
13 conclusions. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a cause of action,
14 supported only by conclusory allegations, do not suffice. *Id.* at 678. Secondly, where the claims
15 in the complaint have not crossed the line from plausible to conceivable, the complaint should be
16 dismissed. *Twombly*, 550 U.S. at 570.

17 Additionally, the court cannot refer to a prior pleading in order to make an amended
18 complaint complete. Local Rule 15-1 requires that an amended complaint be complete in itself
19 without reference to any prior pleading. This is because, as a general rule, an amended complaint
20 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
21 plaintiff files an amended complaint, the original pleading no longer serves any function in this
22 case. Therefore, in an amended complaint, each claim and the involvement of the defendant
23 must be sufficiently alleged.

24 **A. Diversity Jurisdiction**

25 Pursuant to 28 U.S.C. § 1332, federal district courts have original jurisdiction over civil
26 actions in diversity cases “where the matter in controversy exceeds the sum or value of \$75,000”
27 and where the matter is between “citizens of different states.” According to Plaintiff’s complaint
28 she is a citizen of Nevada. Plaintiff has not alleged sufficient facts to determine the citizenship

1 of the parties she seeks to sue and whether complete diversity exists. Therefore, the Court finds
2 that Plaintiff has not invoked the court’s diversity jurisdiction pursuant to 28 U.S.C. § 1332.

3 **B. Federal Question Jurisdiction**

4 As a general matter, federal courts are courts of limited jurisdiction and possess only that
5 power authorized by the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004).
6 Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over “all civil
7 actions arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises
8 under’ federal law either where federal law creates the cause of action or ‘where the vindication
9 of a right under state law necessarily turn[s] on some construction of federal law.’” *Republican
10 Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (quoting *Franchise Tax Bd.
11 v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983)). The presence or absence of
12 federal-question jurisdiction is governed by the “well-pleaded complaint rule.” *Caterpillar, Inc.
13 v. Williams*, 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, “federal
14 jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly
15 pleaded complaint.” *Id.* Here, it appears Plaintiff is attempting to state a claim for discrimination
16 under Title VII of the Civil Rights Act. *See* 42 U.S.C. § 2000e et seq. A claim under this statute
17 invokes the Court’s is federal-question jurisdiction pursuant to 28 U.S.C. § 1331. The Court will
18 now determine whether Plaintiff has provided sufficient information to state a claim upon which
19 relief can be granted.

20 **C. Title VII Claim**

21 Title VII allows individuals to sue an employer for discrimination on the basis of race,
22 color, religion, gender or national origin if she has exhausted both state and EEOC administrative
23 procedures. Once a plaintiff files charges with the EEOC, it will investigate the charges, attempt
24 to reach a settlement, and decide whether to sue the employer or refer the decision to sue to the
25 Attorney General if the charges are against a state or local governmental entity. *Id.* If the EEOC
26 or Attorney General decides not to sue and if there is no settlement that is satisfactory to plaintiff,
27 the EEOC will issue plaintiff a right-to-sue letter and plaintiff will have exhausted her remedies
28 with the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1). After receipt of the right-to-sue letter, plaintiff

1 may sue in federal or state court. *Id.*; see also *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S.
2 820, 825-26, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990). Plaintiff received a right to sue letter on
3 April 18, 2012 and filed her and filed this action within 90 days of its receipt. Thus, it appears as
4 though Plaintiff has exhausted her administrative remedies.

5 In order to prove a prima facie case of discrimination in violation of Title VII, Plaintiff
6 must establish the following: (a) she belonged to a protected class; (b) she was qualified for the
7 position; (c) she was subject to an adverse employment action; and (d) similarly situated
8 employees not in her protected class received more favorable treatment. *Moran v. Selig*, 447
9 F.3d 748, 753 (9th Cir. 2006) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818 (9th
10 Cir.2002)). Plaintiff may also provide direct evidence of the discrimination. See *Vasquez v.*
11 *County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). Plaintiff is an African-American
12 female who alleges that she was paid less wages and terminated due to her race and gender. For
13 the gender discrimination claim, Plaintiff alleges that she was paid two dollars an hour less than
14 another male employee, Craig, who had less experience and worked with less luxurious brands.
15 She also highlights the fact that she received awards for her performance and attached a
16 recommendation letter and excellent interview performance rating letter. See Amended
17 Complaint #5, 18-19. Taking these allegations as true, Plaintiff has stated sufficient facts to state
18 a gender discrimination claim under Title VII.

19 Additionally, Plaintiff states that she was treated differently because of her race. She
20 alleges that she had to listen to rap music with the word “nigger” in it while she was in the stock
21 room. Plaintiff also indicates that her supervisor disciplined her for a comment that a customer
22 made describing her as a “black lady . . . [who] was laughing loudly.” She further alleges that
23 she did not receive her clothing allowance nor was she allowed to participate in the 401K plan in
24 contrast to other employees. Taking these allegations as true, Plaintiff has stated sufficient facts
25 to state a race discrimination claim under Title VII.

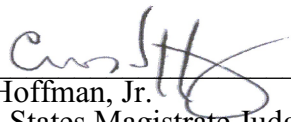
26 Based on the foregoing and good cause appearing therefore,

27 **IT IS HEREBY ORDERED** that the Clerk of the Court shall file the Amended
28 Complaint (#5) and shall issue Summons to Defendants and deliver the same to the U.S. Marshal

1 for service. Plaintiff shall have twenty days in which to furnish the U.S. Marshal with the
2 required Form USM-285. Within twenty days after receiving from the U.S. Marshal a copy of
3 the Form USM-285, showing whether service has been accomplished, Plaintiff must file a notice
4 with the Court identifying whether Defendant was served. If Plaintiff wishes to have service
5 again attempted on an unserved Defendant, a motion must be filed with the Court identifying the
6 unserved Defendant and specifying a more detailed name and/or address for said Defendant, or
7 whether some other manner of service should be attempted. Pursuant to Rule 4(m) of the Federal
8 Rules of Civil Procedure, service must be accomplished within 120 days from the date this order
9 is entered.

10 **IT IS FURTHER ORDERED** that, from this point forward, Plaintiff shall serve upon
11 Defendants or, if appearance has been entered by counsel, upon the attorney(s), a copy of every
12 pleading motion or other document submitted for consideration by the court. Plaintiff shall
13 include, with the original papers submitted for filing, a certificate stating that a true and correct
14 copy of the document was mailed to Defendants or counsel for Defendants. The Court may
15 disregard any paper received by a District Judge or Magistrate Judge that has not been filed with
16 the Clerk, and any paper received by a District Judge, Magistrate Judge, or the Clerk that fails to
17 include a certificate of service.

18 DATED this 3rd day of December, 2012.

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22 C.W. Hoffman, Jr.
23 United States Magistrate Judge
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