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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JENEITH SHANNON,

Case No.2:14-cv-01714-GMN-PAL

Plaintiff,

ORDER

v.

(IFP App – Dkt. #1)

FREEMAN LAS VEGAS,

Defendant.

Plaintiff Jeneith Shannon is proceeding in this action pro se. Plaintiff has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis, and she submitted a complaint. This matter was referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rules IB 1-3 and 1-4.

I. In Forma Pauperis Application (Dkt. #1).

Plaintiff has submitted the affidavit required by § 1915(a) showing that she is unable to prepay fees and costs or give security for them. Accordingly, her request to proceed in forma pauperis will be granted pursuant to 28 U.S.C. § 1915(a). The court will now review Plaintiff's complaint.

II. Screening the Complaint

Upon granting a request to proceed in forma pauperis, a court must additionally screen a complaint pursuant to § 1915(a). Federal courts are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a 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

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1 the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v.*
2 *United States*, 70 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. *Id.* Mere recitals of the elements of a cause of action, supported only by
14 conclusory allegations, do not suffice. *Id.* at 679-80. Secondly, where the claims in the
15 complaint have not crossed the line from plausible to conceivable, the complaint should be
16 dismissed. *Twombly*, 550 U.S. at 570.

17 Plaintiff’s complaint attempts to state a claim for violation of Title VII of the Civil Rights
18 Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Americans with Disabilities Act, 42 U.S.C.
19 §§ 12101 et seq., against Defendant Freeman Las Vegas. It alleges Plaintiff was hired as a
20 forklift operator, and on November 14, 2012, John Devon, one of Plaintiff’s co-workers told
21 another co-worker, “He was going to run this n----r over,” and then Devon intentionally drove
22 the forklift behind Plaintiff, striking her left foot. Devon allegedly then said, “That n----r ran
23 into forks.”

24 Plaintiff is attempting to state a Title VII claim against her employer, alleging a co-
25 worker intentionally injured her because of her race. Title VII allows a plaintiff to sue an
26 employer for discrimination on the basis of race, color, religion, gender or national origin, but it
27 limits liability to an employer. *See* 42 U.S.C. § 2000e(b). An individual cannot be held liable
28 under Title VII. *See Miller v. Maxwell’s Internat’l, Inc.*, 991 F.2d 583, 578 (9th Cir. 1993).

1 However, an employer may be vicariously liable for an employee’s conduct that violates Title
2 VII. *See Vance v. Ball State Univ.*, -- U.S. --, 133 S. Ct. 2434, 2439 (Jun. 24, 2013). For
3 example, if the harassing/discriminating employee was the victim’s co-worker, the employer is
4 liable only if it was negligent in controlling working conditions. *Id.* (citing *Burlington Ind., Inc.*
5 *v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998)). If,
6 however, the harassing/discriminating employee is a supervisor, and the supervisor’s conduct
7 results in a “tangible employment action,” the employer is strictly liable. *Id.* If no tangible
8 employment action results from the supervisor’s conduct, the employer may not be liable if it can
9 establish, as an affirmative defense, that: (a) it exercised reasonable care to prevent and correct
10 harassing behavior; and (b) the plaintiff unreasonably failed to take advantage of the corrective
11 or preventative measures the employer provided. *Id.*

12 The ADA allows individuals who have suffered discrimination because of a disability to
13 sue their employers in federal court for damages and injunctive relief. 42 U.S.C. § 12117(a).
14 Like Title VII, the ADA also limits liability for violations of its provisions to an employer. *See*
15 42 U.S.C. § 12111(5)(a). The Ninth Circuit has held that individuals cannot be held liable under
16 the ADA. *See Walsh v. Nev. HSW Human Re.*, 471 F.3d 1033, 1038 (9th Cir. 2006). Although it
17 has not applied the same *Ellerth/Faragher* supervisory rule for vicarious liability to claims of
18 disability discrimination, the Ninth Circuit generally applies Title VII discrimination law to
19 claims arising under the ADA. *See Fallar v. Compuware*, 202 F. Supp. 2d 1067, 1080 (D. Ariz.
20 2002) (citing *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001)
21 (applying Title VII analysis to ADA claim); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th
22 Cir. 1999) (same)). Thus, it is likely the supervisory rule would apply to Plaintiff’s ADA claims
23 here.

24 Plaintiff’s complaint does not allege that John Devon was her supervisor, or that
25 Defendant was negligent in controlling working conditions. Therefore, the complaint does not a
26 claim against Defendant under Title VII or the ADA.

27 Furthermore, Plaintiff has not alleged that she has exhausted both state and Equal
28 Employment Opportunity Commission (“EEOC”) administrative procedures—a prerequisite to

1 filing a lawsuit in federal court alleging claims under Title VII and/or the ADA. Once an
2 employee files charges with the EEOC, it investigates the charges, attempts to reach a settlement,
3 and decides whether to sue the employer or refer the decision to sue to the Attorney General if
4 the charges are against a state or local governmental entity. *Id.* If the EEOC or Attorney
5 General decides not to sue, and if there is no settlement that is satisfactory to employee, the
6 EEOC will issue the employee a right to sue letter, and she will have exhausted her remedies
7 with the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1). An employee may only sue her employer for
8 violation of the ADA or Title VII after she has received a right to sue letter. *Id.*; *see also Yellow*
9 *Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825-26 (1990). Here, Plaintiff has not alleged she
10 has exhausted her administrative remedies, and her complaint will be dismissed with leave to
11 amend.

12 If Plaintiff elects to proceed in this action by filing an amended complaint, she is advised
13 that in order to state a Title VII discrimination claim, Plaintiff must allege that in order to state a
14 claim for discrimination in violation of Title VII, Plaintiff must allege: (a) she belonged to a
15 protected class; (b) she was qualified for her job; (c) she was subjected to an adverse
16 employment action; and (d) similarly situated employees not in her protected class received more
17 favorable treatment. *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006) (citing *Kang v. U. Lim*
18 *Am., Inc.*, 296 F.3d 810, 818 (9th Cir. 2002)). *See* 42 U.S.C. § 2000e-3(e). Additionally, in
19 order to state a disability discrimination claim, Plaintiff must allege that (a) she is disabled under
20 the meaning of the ADA (this includes being “regarded as” disabled; (b) she is qualified to
21 perform the essential functions of her position with or without a reasonable accommodation; and
22 (c) she suffered an adverse action because of her disability. *See McDonnell Douglas Corp. v.*
23 *Green*, 411 U.S. 792 (1973). Plaintiff’s claims must be set forth in short and plain terms, simply,
24 concisely and directly. *See Swierkeiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); Fed. R.
25 Civ. P. 8. Plaintiff should support each of her claims with factual allegations, as a “formulaic
26 recitation of the elements” of these claims will not suffice. *Iqbal*, 556 U.S. at 678.

27 Additionally, the court cannot refer to a prior pleading in order to make an amended
28 complaint complete. Local Rule 15-1 requires that an amended complaint be complete in itself

1 without reference to any prior pleading. This is because, as a general rule, an amended
2 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967).
3 Once plaintiff files an amended complaint, the original pleading no longer serves any function in
4 the case. Therefore, in an amended complaint, as in an original complaint, each claim and the
5 involvement of each defendant must be sufficiently alleged.

6 Accordingly,

7 **IT IS ORDERED:**

- 8 1. Plaintiff's request to proceed in forma pauperis is GRANTED. Plaintiff shall not
9 be required to pay the filing fee of four hundred dollars.
- 10 2. Plaintiff is permitted to maintain this action to conclusion without the necessity of
11 prepayment of any additional fees or costs or the giving of a security therefor.
12 This Order granting leave to proceed in forma pauperis shall not extend to the
13 issuance of subpoenas at government expense.
- 14 3. The Clerk of Court shall file the complaint but shall not issue summons.
- 15 4. Plaintiff's complaint is DISMISSED WITH LEAVE TO AMEND.
- 16 5. Plaintiff shall have until **March 2, 2015**, to file her amended complaint, if she
17 believes she can correct the noted deficiencies. The amended complaint must be a
18 complete document in and of itself and will supersede the original complaint in its
19 entirety. Any allegations, parties, or requests for relief from prior papers that are
20 not carried forward in the amended complaint will no longer be before the court.
- 21 6. Plaintiff shall clearly title the amended complaint as such by placing the words
22 "FIRST AMENDED COMPLAINT" below the case number, **2:14-cv-01714-**
23 **GMN-PAL**, on page 1 in the caption.

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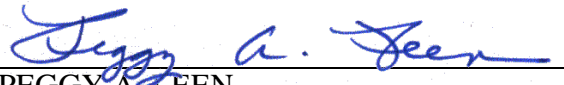
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7. Plaintiff is expressly cautioned that if she does not timely file an amended complaint in compliance with this order, this case may be immediately dismissed.

Dated this 30th day of January, 2015.


PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE