

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Bathsheba Nichole Adams v. Kiewit Infrastructure West Company, et al.

Adams v. Kiewit · No. CV-25-01823-PHX-DJH · Decided February 19, 2026

OPINION

Adams

PER CURIAM.

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

8 9 Bathsheba Nichole Adams, No. CV-25-01823-PHX-DJH 10 Plaintiff, ORDER 11 v. 12 Kiewit
Infrastructure West Company, et al., 13 Defendants. 14 15 On July 1, 2025, Defendant Kiewit
Infrastructure West Co. (“Defendant” or 16 “Kiewit”) filed a Motion to Dismiss Plaintiff’s First
Amended Complaint (“FAC”), under

17 Rules 12(b)(1) and 12(b)(6). (Doc. 12). Plaintiff Bathsheba Nichole Adams (“Plaintiff”)

18 filed a Response in Opposition (Doc. 15), and Defendant thereafter filed a Reply. 19 (Doc. 18).

20 I. Background 21 Defendant Kiewit is a construction company that operates in the State of
Arizona. 22 (Doc. 9 at ¶ 3). Plaintiff was previously employed by Defendant and worked in the 23
construction industry. (Id. at ¶¶ 10–12). During her employment, Plaintiff faced “multiple 24
alarming incidents involving Kiewit’s foreman, [Defendant Robert Young], who subjected 25
Plaintiff to ongoing physical assaults, harassment and retaliation.” (Id. at ¶ 12). While 26 Plaintiff
alleges several instances of discriminatory conduct, the FAC is premised not on 27 discrimination,
but rather several discrete incidents occurring between Plaintiff and 28 Defendant Robert Young
(“Young”). The specific episodes Plaintiff alleges are: 1 • “On or about April 25, 2024, Young
exposed Plaintiff to a chemical without 2 providing any warning or safety information, causing
Plaintiff to experience an 3 allergic reaction that affected her nose, throat, and breathing...While
Plaintiff was 4 experiencing a medical emergency, Young refused to show Plaintiff the safety 5
instructions, or assist in any way,” (id. at ¶¶ 25–27); 6 • “On or about April 28, 2024, Young
referenced the TV show ‘The Walking Dead’ 7 and stated he would have shot a character named
Andrea for ‘talking too much’” 8 this was “a thinly veiled threat directed at Plaintiff” and “[t]he
following day, Young 9 acted out this scenario by holding up what Plaintiff describes as a work
machine 10 gun [later identified as a Milwaukee concrete chipping hammer] to Plaintiff’s 11
forehead and saying ‘bang,’” (id. at ¶¶ 29–31, 34); 12 • “While Plaintiff was using a portable
toilet, Young instructed colleagues to move it, 13 forcing Plaintiff to rush out and soil her clothes,
leaving Plaintiff humiliated and 14 traumatized,” (id. at ¶ 38); and 15 • “On or about May 1, 2024,

Young left Plaintiff, and her coworker, stranded by the 16 roadside in a dead zone, forcing Plaintiff to hitchhike back to her vehicle...When 17 confronted about leaving Plaintiff stranded, Young used profanity and issued threats 18 against Plaintiff.” (Id. at ¶¶ 44–45). 19 “The incidents regarding the portable toilet, the exposure to the unknown chemical, 20 and the chipping hammer were intended to cause Plaintiff harm.” (Id. at ¶ 54). As a result 21 of the above incidents, Plaintiff has suffered severe emotional distress and “can no longer 22 work without the fear of further incidents caused by Kiewit.” (Id. at ¶ 55). Plaintiff 23 ultimately left her job with Kiewit, and she filed a Charge of Discrimination, “related to 24 the discriminatory conduct only.” (Id. at ¶¶ 51–52). Plaintiff then brought this suit against 25 Defendants based on the tortious conduct that she allegedly endured at Kiewit. Although 26 initially filed in state court, Defendants removed the case on May 27, 2025. (See Doc. 1). 27 Plaintiff filed her FAC on June 17, 2025, bringing Count I for intentional infliction of 28 emotional distress (“IIED”), Count II for assault and battery, Count III for negligent 1 supervision and training, and Count IV for punitive damages. (Doc. 9 at ¶¶ 57–86). Kiewit 2 now moves to dismiss Plaintiff’s FAC. 3

II. Legal Standard 4

A motion to dismiss under Rule 12(b)(1) challenges the subject matter jurisdiction 5 of the court. See *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039–40 (9th Cir. 6 2003). A jurisdictional attack can be facial or factual. *Safe Air for Everyone v. Meyer*, 373 7 F.3d 1035, 1039 (9th Cir. 2004). Facial attacks assert that “the allegations contained in a 8 complaint are insufficient on their face to invoke federal jurisdiction.” Id. “By contrast, 9 in a factual attack, the challenger disputes the truth of the allegations that, by themselves, 10 would otherwise invoke federal jurisdiction.” Id. With a factual attack, a court may review 11 evidence beyond the complaint without converting the motion into one for summary 12 judgment, and it “need not presume the truthfulness of the plaintiffs’ allegations.” *White 13 v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The plaintiff must show that the court in 14 question has jurisdiction to hear their case. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 15 511 U.S. 375, 377 (1994). A court must dismiss a plaintiff’s complaint if it fails to establish 16 subject matter jurisdiction. *Savage*, 343 F.3d at 1039 n.2. 17 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. 18 *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must make a short and 19 plain statement showing that the pleader is entitled to relief for its claims. 20 Fed. R. Civ. P. 8(a)(2). This standard does not require “‘detailed factual allegations,’ but 21 it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” 22 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 23 544, 555 (2007)). There must be “more than a sheer possibility that a defendant has acted 24 unlawfully.” Id. A plaintiff must allege facts sufficient to “raise a right to relief above the 25 speculative level.” *Twombly*, 550 U.S. at 555. A complaint must “state a claim to relief 26 that is plausible on its face.” Id. at 570. “A claim has facial plausibility when the plaintiff 27 pleads factual content that allows the court to draw the reasonable inference that the 28 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “Determining 1 whether a complaint states a plausible claim for relief will . . . be a context-

specific task 2 that requires the reviewing court to draw on its judicial experience and common sense.”

3 Id. at 679.

4 Dismissal of a complaint for failure to state a claim may be based on either the “lack 5 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable 6 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In 7 reviewing a motion to dismiss, courts will “accept factual allegations in the complaint as 8 true and construe the pleadings in the light most favorable to the nonmoving party.” 9 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But 10 courts are not required “to accept as true a legal conclusion couched as a factual allegation.” 11 *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). 12 III. Discussion 13 Defendant raises several arguments that dismissal is warranted, including that 14 Plaintiff’s tort claims are preempted by the Arizona Employment Protection Act (“AEPA”) 15 and the Arizona Civil Rights Act (“ACRA”), Plaintiff failed to exhaust her administrative 16 remedies, Plaintiff’s exclusive remedy is under the Worker’s Compensation Act, and 17 Plaintiff does not adequately plead vicarious liability. (Doc. 12 at 4–9). Plaintiff disagrees 18 with Defendant on each argument and maintains that her claims are sufficiently pled. 19 (See generally Doc. 15). The Court will address Defendant’s arguments in turn. 20 A. The AEPA and ACRA 21 Defendant first argues that Plaintiff’s common law tort claims are preempted by the 22 AEPA and the ACRA.¹ (Doc. 12 at 4). It claims that the workplace harassment Plaintiff 23 alleges “are intertwined with claims of discrimination and protected activity.” (Id.) 24 However, none of the case law cited by Defendant supports its position that Plaintiff’s 25 1 Initially, the Court notes that the issue here is not whether the AEPA or the ACRA 26 “preempts” Plaintiff’s tort claims, rather it is whether either of these statutes provides Plaintiff with her exclusive remedy. *Valdez v. National Retail Transportation, Inc.*, 2016 27 WL 2992489, *1 n. 1 (C.D. Cal. 2016) (“A state law claim is preempted by federal law, not other provisions of state law.”); *Moscona v. California Business Bureau, Inc.*, 2011 28 WL 5085522, *4 (S.D. Cal. 2011) (“[F]ederal law may preempt state laws, not other federal laws.”). 1 claims are precluded by either statute, and the cases regard only claims that were 2 invalidated by the AEPA, not the ACRA. 3 It has been established that the AEPA “is the exclusive remedy for terminations that 4 violate public policy statutes, and a plaintiff is therefore limited to the remedies provided 5 under statute.” *Fallar v. Compuware Corp.*, 202 F. Supp. 2d 1067, 1076 (D. Ariz. 2002). 6 The common law claim of tortious wrongful termination in violation of the ACRA has 7 been abrogated by the AEPA, but no case has ruled that all common law tort claims are 8 precluded by the statute. *Cronin v. Sheldon*, 991 P.2d 231, 240-41 (Ariz. 1999). In fact, 9 the Cronin court acknowledged: 10 Importantly, the EPA does not preclude recovery of compensatory damages under federal law within parameters authorized by Title VII of the Civil 11 Rights Act of 1964, nor does it preclude wrongfully terminated employees 12 from pursuing collateral common law tort claims related to discharge from employment, including intentional infliction of emotional

distress, negligent infliction of emotional distress, interference with contractual relations, or defamation. Nor does today's decision affect such common law causes of action as assault and battery, fraud, and other protected claims. *Id.* at 241 (internal citations omitted). Summarizing its holding, the Cronin court stated, "while the EPA precludes petitioners' ACRA-based claims for compensatory and punitive damages for tortious wrongful discharge, a panoply of constitutionally protected common law tort remedies remains undisturbed as fully beyond the scope of the EPA." *Id.* The authority cited by Defendant reaffirms that a claim of termination in violation of public policy is precluded by the AEPA. See Fallar, 202 F. Supp. 2d at 1076 (dismissing the plaintiff's termination in violation of public policy tort claim as the AEPA "is the exclusive remedy for terminations that violate public policy statutes"); *Taylor v. Graham Cnty. Chamber of Com.*, 33 P.3d 518, 521–22 (Ariz. Ct. App. 2001) (concluding that the plaintiff's wrongful termination in violation of the ACRA tort claim was barred under the plain language of the AEPA); *Peterson v. City of Surprise*, 418 P.3d 1020, 1025 (Ariz. Ct. App. 2018) ("Because [plaintiff] forfeited her exclusive remedy for sex discrimination under the [ACRA] by failing to file an administrative charge, the EPA does not permit her to refashion her discrimination claim into a retaliation claim under § 23–1501(A)(3)(c)(ii)."). At most, the AEPA has precluded a negligence claim based on employment discrimination and a negligence per se claim for violations of the ACRA. See *De Silva v. Pima Cnty. Government*, 2024 WL 4751574, *14 (D. Ariz. 2024). Acknowledging the ruling in Cronin, the De Silva court concluded that, "while the EPA does not preclude all common law tort claims, it does preclude common law tort claims for employment discrimination where there exists a statute that provides a remedy for that discrimination." *Id.* Critically, here, Plaintiff does not bring tort claims based on employment discrimination. None of the claims alleged by Plaintiff—IIED, assault and battery, or negligent supervision—requires a showing of any discriminatory conduct based on a protected status. So, the claims do not conflict with either statutory scheme. Defendants do not provide any authority that supports the notion that Plaintiff's battery, IIED, and negligent supervision claims are prohibited by either the AEPA or the ACRA.² In fact, the Cronin court noted the availability of several of Plaintiff's claims, notwithstanding the AEPA. Therefore, the Court will not dismiss Plaintiff's tort claims under either the ACRA or the AEPA.

B. Exhaustion of Administrative Remedies Defendant next argues that Plaintiff failed to file a timely charge with the Equal Employment Opportunities Commission ("EEOC") or Arizona Civil Rights Division ("ACRD"), and therefore she cannot bring a claim under ACRA or recast her statutory claim as tort claims. (Doc. 12 at 6–7). Under the ACRA, "the filing of a charge of discrimination with an administrative agency is a prerequisite to filing a lawsuit on the alleged discrimination." *Madden-Tyler v. Maricopa Cnty.*, 943 P.2d 822, 828 (Ariz. Ct. App. 1997). For a charge to be timely, it is cautioned to exercise greater care when citing legal authority to the Court. Defendant cites a quoted portion of Fallar stating "the AEPA precludes all common law tort claims that arise from the same facts as statutory

discrimination or retaliation claims” and a quoted portion of Peterson stating “where the same conduct forms the basis of both 27 statutory and common law claims, the statutory remedy is exclusive.” (Doc. 12 at 4; Doc. 18 at 2–3). However, neither of these quotes appears in their respective case, nor do 28 Fallar or Peterson stand for such a proposition. Defendant is reminded that it has a duty to verify the accuracy of any referenced case law. 1 must be filed within 180 days after the alleged unlawful employment practice occurred. 2 See A.R.S. § 41-1481(A); Ornelas v. Scoa Industries, Inc., 587 P.2d 266, 266 (Ariz. Ct. 3 App. 1978). Nonetheless, Plaintiff is not attempting to bring a claim under the ACRA or 4 Title VII (see Doc. 9 at ¶¶ 57–86), so this timeframe is immaterial here. Stone v. Charles 5 Schwab & Co. Inc., 2025 WL 2829563, *2 (D. Ariz. 2025) (“To bring an ACRA claim 6 against an employer, a plaintiff must file a charge of discrimination within 180 days of the 7 alleged unlawful employment practice.”) (emphasis added). 8 As to the latter portion of its argument, Defendants have not provided any authority 9 demonstrating that Plaintiff’s tort claims may not proceed. Defendant claims that, because 10 Plaintiff forfeited her statutory claim based on her untimely charge, she “cannot now recast 11 these claims as torts and render the limitation periods in the ACRA and Title VII 12 meaningless.” (Doc. 18 at 5). Albeit the only case Defendants cite to support this 13 proposition is Peterson. There, the plaintiff failed to timely file a charge with the ACRD, 14 and it was therefore undisputed that the plaintiff could not sue under the AEPA for 15 termination in violation of the ACRA. Peterson, 418 P.3d at 1024. For that reason, the 16 plaintiff framed her claim as a constructive discharge in retaliation for reporting violations 17 of the ACRA. Id. While the AEPA allows an employee to bring suit for termination in 18 violation of a statute, “[i]f the statute provides a remedy to an employee for a violation of 19 the statute, the remedies provided to an employee for a violation of the statute are the 20 exclusive remedies for the violation of the statute or the public policy prescribed in or 21 arising out of the statute.” Id. at 1025 (citing A.R.S. § 23-1501(A)(3)(b)). Based on this 22 provision and the plaintiff’s forfeiture of her exclusive remedy for sex discrimination under 23 the ACRA, the court held that “the EPA does not permit her to refashion her discrimination 24 claim into a retaliation claim[.]” Id. 25 In short, the holding in Peterson turned on the specific provisions of the AEPA and 26 was solely in regard to an AEPA retaliation claim. See also Bodett v. CoxCom, Inc., 366 27 F.3d 736, 746 (9th Cir. 2004) (employee waived claim for retaliation under what is now 28 § 23–1501(A)(3)(c) by failing to exhaust administrative remedies under the Arizona Civil 1 Rights Act). The Court, accordingly, will not dismiss Plaintiff’s common law tort claims 2 based on Peterson. 3 C. Worker’s Compensation Act 4 Alternatively, Defendant contends that Plaintiff’s claims are barred by the Workers’ 5 Compensation Act because it provides the exclusive remedy for workplace injuries. 6 (Doc. 12 at 7–8). Plaintiff responds that the alleged actions constitute willful misconduct 7 such that the exclusive remedy provision does not apply. (Doc. 15 at 7). 8 The Workers’ Compensation Act provides a statutory scheme for a “workers’ 9 compensation system designed to provide compensation for accidental injuries arising out 10 of the course of

employment.” *Stoecker v. Brush Wellman, Inc.*, 984 P.2d 534, 536 11 (Ariz. 1999). Subject to certain exceptions, § 23-1022(A) provides: “The right to recover 12 [workers’] compensation... for injuries sustained by an employee...is the exclusive remedy 13 against the employer or any co-employee acting in the scope of his employment.” And the 14 Act further provides that an “employee...who accepts compensation waives the right to 15 exercise any option to institute proceedings in court against his employer or any co- 16 employee acting within the scope of his employment[.]” A.R.S. § 23-1024(A). “Pursuant 17 to those statutes, unless an employee who is injured on the job has previously rejected the 18 workers’ compensation system, the superior court lacks subject matter jurisdiction over 19 any common law tort action that the employee files against a [co-employee] acting within 20 the scope of his or her employment.” *Mitchell v. Gamble*, 86 P.3d 944, 947 (Ariz. Ct. App. 21 2004). 22 However, “[t]he exclusive remedy provisions of Arizona’s workers compensation 23 statutes do not apply when the employee’s injury is caused by an employer’s ‘willful 24 misconduct,’ which is defined as ‘an act done knowingly and purposely with the direct 25 object of injuring another.’ ” *Mosakowski v. PSS World Med., Inc.*, 329 F. Supp. 2d 1112, 26 1129 (D. Ariz. 2003) (citing A.R.S. §§ 23-1022(A-B)). Under this definition, “the alleged 27 negligence or wantonness must be accompanied by the employer’s intent to inflict injury 28 upon the employee.” *Id.* 1 Here, taking the allegations as true, Plaintiff has alleged that the “incidents 2 regarding the portable toilet, the exposure to the unknown chemical, and the chipping 3 hammer were intended to cause Plaintiff harm.” (Doc. 9 at ¶ 54). Plaintiff’s IIED claim 4 is further supported by allegations that “Defendants’ conduct was intentional and/or 5 reckless, as evidenced by their position of authority over Plaintiff as foreman and 6 management,” and “Defendants’ misconduct was wilful all of which indicates a wilful 7 disregard for Plaintiff’s life, limb or bodily safety.” (*Id.* at ¶¶ 63–64). Moreover, in 8 reconciling the holdings of two Arizona cases, the *Mosakowski* court stated, “a negligence 9 claim is precluded by the workers compensation statutes while a claim for intentional 10 infliction of emotional distress is not precluded.” *Mosakowski*, 329 F. Supp. 2d at 1131. 11 As for assault and battery, Plaintiff’s claim references intentional conduct like knowingly 12 instructing workers to move a portable toilet while Plaintiff was inside of it and “[h]olding 13 a machine gun to Plaintiff’s forehead and threatening to shoot her[.]” (Doc. 9 at ¶¶ 68– 14 69). For this stage of proceedings, Plaintiff has adequately alleged an intent to inflict injury 15 as well as conduct that can be inferred was intended to cause injury. Thus, Plaintiff may 16 maintain her Counts I and II for IIED and assault and battery. 17 That said, Plaintiff’s negligent training and supervision claim is alleged against only 18 Defendant Kiewit and is based upon Kiewit’s failure to exercise ordinary care. (See *id.* at 19 ¶¶ 74–78). Plaintiff alleges negligent acts such as failure to exercise ordinary care in 20 investigating incidents, training employees on how to safely use tools, and providing 21 discipline to its employees. (*Id.* at ¶ 76). However, Plaintiff fails to establish any 22 wilfulness on Kiewit’s part. Moreover, courts, examining similar claims, have determined 23 that allegations of an employee’s wilful acts do not establish the wilful misconduct 24 exception

regarding a negligent supervision claim against an employer. See *Lewis v. 25 Arizona*, 2011 WL 3665367, *3 (D. Ariz. 2011) (“[E]ven if...any [] employee acted 26 wilfully when they allegedly harassed Plaintiff, Plaintiff’s claim for negligent supervision 27 and hiring against Defendant does not come under the wilful misconduct exception of 28 Arizona’s workers’ compensation statute.”); *Rosen v. Community Educ. Centers, Inc.*, 1 2010 WL 3981200, *4 (D. Ariz. 2010) (same). 2 Consequently, Plaintiff’s Count III for negligent supervision claim is dismissed. 3 However, this dismissal is without prejudice because, based on the information before the 4 Court, it cannot be said that any amendment would be inherently futile. 5 D. Vicarious Liability 6 Lastly, Defendant argues that Plaintiff has not sufficiently pled vicarious liability. 7 However, the FAC contains sufficient factual allegations to establish vicarious liability. 8 “Under the doctrine of respondeat superior, an employer is vicariously liable for the 9 negligent work-related actions of its employees.” *Kopp v. Phys. Group of Arizona, Inc.*, 10 421 P.3d 149, 151 (Ariz. 2018) (citation omitted). “For an employer to be held vicariously 11 liable for an employee’s negligent acts, the employee must be (1) subject to the employer’s 12 control or right of control, and (2) acting in furtherance of the employer’s business.” 13 *Engler v. Gulf Interstate Engr., Inc.*, 258 P.3d 304, 309 (Ariz. Ct. App. 2011), *aff’d*, 280 14 P.3d 599 (Ariz. 2012). 15 While an allegation that “Defendant is liable for the actions of its employee, Robert 16 Young, under the doctrine of respondeat superior” is conclusory, this allegation is 17 supported by a claim that Defendant Young was acting as Kiewit’s foreman when he 18 engaged in the conduct. (Doc. 9 at ¶¶ 49–50). Plaintiff has further alleged that Young 19 instructed colleagues to move a portable toilet and threatened her with machinery used on 20 construction sites. (See *id.* at ¶¶ 31, 34, 38). Allegations such as these allow one to 21 reasonably infer that the Young’s conduct occurred during working hours, while he was 22 performing his duties as foreman. See *Sheppard v. David Evans and Assoc.*, 694 F.3d 23 1045, 1051 (9th Cir. 2012) (drawing reasonable inferences in favor of the non-moving 24 party on a motion to dismiss). At bottom, Plaintiff has alleged that “[a]ll of the incidents 25 described herein occurred during work hours, on the worksite, incidental to Young’s duties 26 or in part to serve the purpose of Kiewit” (*Id.* at ¶ 72), which adequately provides Defendant 27 notice of the vicarious liability alleged against Kiewit. 28 IV. Motion to Strike 1 Defendant filed a Request for Judicial Notice in support of its Reply to its Motion 2 to Dismiss. (Doc. 19). Plaintiff filed a Response in Opposition to Defendant’s Request. 3 (Doc. 20). Defendant subsequently filed a Motion to Strike Plaintiff’s Response, arguing 4 that the Response is an inappropriate sur-reply. (Doc. 21). 5 The Court did not take judicial notice of the documents requested by Defendant as 6 it was not necessary to assess the viability and sufficiency of Plaintiff’s FAC. Upon 7 determining that judicial notice was unnecessary to resolve Defendant’s Motion to 8 Dismiss, the Court did not further consider Defendant’s Request and therefore did not 9 consider Plaintiff’s Response in rendering this Order. As a result, Defendant’s Motion to 10 Strike is denied as moot. 11 Accordingly, 12 IT IS ORDERED that Defendant’s Motion to Dismiss Plaintiff’s FAC (Doc. 12) is 13 GRANTED in part and DENIED in part. Plaintiff’s Count III negligent supervision and 14

training claim is dismissed without prejudice. 15 IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's 16 || Response (Doc. 21) is DENIED as moot. 17 Dated this 19th day of February, 2026. 18 19 oC. . oe 20 norable' Diang4. Huntetewa 1 United States District Judge 22 23 24 25 26 27 28 -ll-