

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEP 28 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROSAURA STROUS,

Plaintiff-Appellant,

v.

YUMA COUNTY SUPERIOR COURT,

Defendant-Appellee.

No. 23-15161

D.C. No. 2:22-cv-01906-JJT
District of Arizona,
Phoenix

ORDER

Before: BADE, LEE, and VANDYKE, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked leave to proceed in forma pauperis. *See* 28 U.S.C. § 1915(a). On February 22, 2023, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and the response to the court's February 22, 2023 order, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 4 and 6) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

No further filings will be entertained in this closed case.

DISMISSED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Rosaura Strous,

No. CV-22-01906-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Yuma County Superior Court,

13 Defendant.

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15 At issue is *pro se* Plaintiff Rosaura Strous's Application to Proceed in District Court
16 Without Prepaying Fees or Costs (Doc. 2). Having determined that Plaintiff does not have
17 the means to pay the Court's fees in this case, the Court grants the Application. However,
18 as set forth below, upon screening Plaintiff's Complaint (Doc. 1, Compl.) pursuant to
19 28 U.S.C. § 1915(e)(2), the Court finds that the Complaint fails to state a claim.

20 **I. LEGAL STANDARDS**

21 **A. 28 U.S.C. § 1915(e)(2)**

22 For cases in which a party is permitted to proceed *in forma pauperis*—that is, the
23 party lacks the means to pay court fees—Congress provided that a district court “shall
24 dismiss the case at any time if the court determines” that the “allegation of poverty is untrue”
25 or that the “action or appeal” is “frivolous or malicious,” “fails to state a claim on which
26 relief may be granted,” or “seeks monetary relief against a defendant who is immune from
27 such relief.” 28 U.S.C. § 1915(e)(2). Section 1915(e) applies to all *in forma pauperis*
28 proceedings. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). “It is also clear that section

1915(e) not only permits but requires a district court to dismiss an *in forma pauperis* complaint that fails to state a claim.” *Id.* at 1127.

3 B. Rule 8, Federal Rules of Civil Procedure

4 A complaint must include “a short and plain statement of the claim showing that the
 5 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The complaint must contain “sufficient
 6 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
 7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
 8 544, 570 (2007)). Thus, a dismissal for failure to state a claim can be based on either (1) the
 9 lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim.
 10 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

11 Even where a complaint has the factual elements of a cause of action present but
 12 scattered throughout the complaint and not organized into a “short and plain statement of the
 13 claim,” it may be dismissed for failure to satisfy Rule 8(a). *Sparling v. Hoffman Constr. Co.*,
 14 864 F.2d 635, 640 (9th Cir. 1988). Moreover, “[e]ach allegation must be simple, concise,
 15 and direct.” Fed. R. Civ. P. 8(d)(1).

16 II. ANALYSIS

17 In the Complaint (Doc. 1), Plaintiff raises a Title VII claim, alleging Defendant
 18 discriminated against her on account of her gender, age, and perceived disability between
 19 August 2015 and January 2018.

20 To bring a Title VII lawsuit, a plaintiff must first exhaust any administrative remedy
 21 available under 42 U.S.C. § 2000e-5 by filing a charge with the Equal Employment
 22 Opportunity Commission (EEOC). *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d
 23 621, 626 (9th Cir. 1988). The plaintiff must file a charge with the EEOC within “300 days
 24 of the date of the [alleged discriminatory or retaliatory] act or lose the ability to recover for
 25 it.” *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). The EEOC must
 26 then issue a right-to-sue letter. *Karim-Panahi*, 839 F.2d at 626. Once the agency issues a
 27 final decision, the complainant may either appeal the dismissal to the EEOC within 30
 28 days, 29 C.F.R. § 1614.401-402, or file an action in federal district court within 90 days,

1 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407. Absent waiver, estoppel or equitable
 2 tolling, failure to comply with the exhaustion regulations is “*fatal to a federal employee’s*
 3 *discrimination claim*” in federal court. *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir.
 4 2002) (emphasis added).

5 Plaintiff filed her latest EEOC charge on September 13, 2022. (Doc. 1 at 9.) Because
 6 this was long past the 300-day deadline for bringing a claim from the last incident of
 7 discrimination in 2018, the EEOC found Plaintiff “waited too long after the date of the
 8 alleged discrimination to file [her] charge” and dismissed the charge on September 27,
 9 2022. (Doc. 1 at 7.) Plaintiff may not base her lawsuit on this untimely EEOC charge.

10 Plaintiff also notes that she filed two prior charges with the EEOC, which were
 11 resolved in 2018 and 2021. (Doc. 1 at 9.) From the receipt of the Right to Sue letters in
 12 those instances, Plaintiff had 90 days to file an action in federal court. As a result, her
 13 current lawsuit is untimely if based on the 2018 or 2021 EEOC charges.

14 Because Plaintiff’s current EEOC charge is untimely, and this lawsuit is untimely if
 15 based on the old EEOC charges, the Court must dismiss this case. The Court notes that
 16 Plaintiff’s allegation that Defendant has since 2018 refused to provide her with her
 17 personnel records is not cause to toll the limitations period, nor is it a separate basis for a
 18 discrimination claim.¹ Plaintiff could have brought this lawsuit in 2018, when she received
 19 her first Right to Sue letter, but apparently failed to do so.

20 If a defective complaint can be cured, the plaintiff is entitled to amend the complaint
 21 before the action is dismissed. *Lopez*, 203 F.3d at 1130. Here, further amendment cannot
 22 cure the shortcomings of Plaintiff’s Complaint, so the Court will dismiss it with prejudice.

23 **IT IS THEREFORE ORDERED** granting Plaintiff’s Application to Proceed in
 24 District Court Without Prepaying Fees or Costs (Doc. 2).

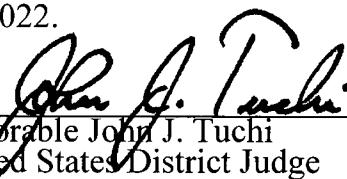
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28 ¹ Plaintiff could have obtained her personnel records through the discovery process in any
 lawsuit she timely brought.

1 **IT IS FURTHER ORDERED** dismissing the Complaint with prejudice.

2 **IT IS FURTHER ORDERED** directing the Clerk of Court to close this matter.

3 Dated this 10th day of November, 2022.

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5 Honorable John J. Tuchi
6 United States District Judge

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**Additional material
from this filing is
available in the
Clerk's Office.**