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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JANE BRUER, an unmarried woman, Plaintiff, vs. THE STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Defendant.	Case No: CV2018-014982 **RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Joseph Mikitish)

Defendant State of Arizona (the "State") responds to Plaintiff Jane Bruer's Motion for Summary Judgment and cross moves for summary judgment under Ariz. R. Civ. P. 56 on the single remaining claim in this case, which is the claim asserted in the Verified Complaint for Declaratory Relief. There is no genuine dispute as to any material fact, and the State is entitled to judgment as a matter of law.

PRELIMINARY STATEMENT

Plaintiff lacks standing, and her only remaining claim is moot. Plaintiff seeks a declaratory judgment interpreting the definition of "sex" in § 41-1463 of the Arizona Civil Rights Act (the "ACRA Unlawful Employment Practices Statute"), to "include sexual orientation, sex stereotyping, transgender status, and gender identity and expression." *Plaintiff's Motion for Summary Judgment of March 19, 2020* ("PMSJ") at 1. She claims to be entitled to such relief because the Civil Rights Division of the Arizona Attorney General's Office (the "Division") declined to issue her a right-to-sue letter because her allegations were not within the Division's jurisdiction. Plaintiff, however, later obtained a federal right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") and conclusively settled her federal *and state law* claims based on those same allegations. As Plaintiff has already brought and settled a lawsuit over the claims for which she initially sought a right-to-sue letter from the Division, and the ability to bring that now-settled suit is the basis for her alleged injury, her claims are no longer redressable and no justiciable issue exists between the parties.

Moreover, on Monday, June 15, 2020, in *Bostock v. Clayton County,* the U.S. Supreme Court held that Title VII's ban on discrimination "because of . . . sex" includes discrimination because of sexual orientation or transgender status. --- S.Ct. ---, 2020 WL 3146686, at *18 (June 15, 2020). This is a second, distinct reason why Plaintiff's remaining declaratory judgment claim is moot because, in the wake of *Bostock*, the Division will now review cases alleging employment discrimination because of sexual orientation or transgender status. For decades, the Arizona courts have looked to the U.S. Supreme Court's interpretations of Title VII in determining the scope of the similarly-worded ACRA Unlawful Employment Practices Statute. *See Higdon v. Evergreen Intern. Airlines, Inc.*, 138 Ariz. 163, 165 n.3 (1983). The Division has done the same and will do so with regard to *Bostock* as well, now that, for the

first time, the Court has held that Title VII protects against discrimination based on sexual orientation or transgender status.[1]

BACKGROUND

The relevant facts are undisputed and contained in the Parties' Joint Stipulated Statement of Facts ("JSF") or are already part of the factual record of this case. PMSJ *Ex. B (Parties Joint Stipulated Statement of Facts)*.

a. The Division Referred Plaintiff's Non-Jurisdictional Allegations to the EEOC.

The Division is tasked pursuant to Arizona Revised Statutes to administer the ACRA. JSF ¶ 2. Plaintiff submitted to the Division an online intake questionnaire in August 2017 alleging that her former employer, Phillips Law Group, P.C. ("Phillips Law"), discriminated against her on the basis of gender identity and/or sexual orientation. JSF ¶¶ 3, 4. Plaintiff requested that the Division either issue "findings in her favor" or issue her a right-to-sue letter. JSF ¶ 5. The Division determined that it did not have jurisdiction over Plaintiff's allegations because "sex" discrimination under the ACRA Unlawful Employment Practices Statute has not been interpreted to include "sexual orientation" or "gender identity." JSF ¶¶ 6, 7. On the same day that Plaintiff submitted the intake questionnaire, the Division informed Plaintiff it would not process her allegations due to lack of jurisdiction and recommended that Plaintiff contact the federal Equal Employment Opportunity Commission ("EEOC"). JSF ¶¶ 8, 10. Plaintiff mailed additional documentation to the Division on December 5, 2017, which the Division forwarded to the EEOC on January 3, 2018. JSF ¶¶ 11, 13. The Division further

[1] The Arizona Legislature may, of course, pass legislation clarifying that the definition of "sex" in the ACRA Unlawful Employment Practices Statute did not include sexual orientation or transgender status. Legislatures often pass legislation to correct a court's statutory interpretion to which they disagree. Otherwise, the Division will follow U.S. Supreme Court Title VII case law that does not clearly conflict with the language of ACRA and implement § 41-1463 consistent with the Supreme Court's interpretation of "because of . . . sex" in Title VII.

informed Plaintiff via telephone on January 3, 2018, that the allegations made in her communication did not fall within the Division's jurisdiction. JSF ¶¶ 12.

b. Plaintiff Obtained the Right to Sue from the EEOC then Sued and Settled All of Her Claims—Including Her State-Law Claims—with Phillips Law.

Plaintiff filed an employment charge of discrimination based on sex with the EEOC on April 3, 2018, and received a right-to-sue letter from the EEOC on April 16, 2018. JSF ¶¶ 14, 15. Plaintiff commenced a lawsuit in federal court against Phillips Law based on these same allegations on July 13, 2018, and subsequently entered into a settlement with Phillips Law. JSF ¶¶ 16, 17. The settlement included a general release of all claims Plaintiff had against Phillips Law, including claims under the Arizona Civil Rights Act. *State's Motion to Dismiss Pursuant to Rule 12(B)(1) of August 21, 2019,Ex. (B)* (Filed Under Seal) at 2. Pursuant to the settlement and a joint stipulation filed by Plaintiff and Phillips Law, all claims against Phillips Law were dismissed with prejudice on October 12, 2018. JSF ¶ 18. Plaintiff brought this lawsuit against the State on December 5, 2018, nearly two months after her relevant employment discrimination claims were already settled and dismissed. JSF ¶ 19.

On June 10, 2019, this Court dismissed Plaintiff's claim for mandamus and her procedural and substantive due process claims. *Court's Minute Entry of June 10, 2020*. Thus, there is only one claim remaining, for declaratory relief that "sex" discrimination under the ACRA Unlawful Employment Practices Statute includes discrimination on the basis of gender identity and sexual orientation. *Joint Report of February 28, 2020 at 2*.

ARGUMENT

I. PLAINTIFF'S ONLY REMAINING CLAIM HERE IS MOOT TWICE OVER.

Plaintiff's only remaining claim—for declaratory relief—should be dismissed as moot because that claim does not arise from existing rights and a declaratory judgment can be granted only when there is a justiciable issue between the parties. *Thomas v. City of Phoenix*, 171 Ariz. 69, 74 (App. 1991) ("Courts will not hear cases that seek declaratory judgments that

are advisory or answer moot or abstract questions."). "A case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights." *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229 (App. 1985). Plaintiff's settlement with Phillips Law bars her from further pursuing claims arising out of the facts she previously submitted to the Division.

The *Contempo-Tempe* decision—like this one—concerned a claim rendered moot by a settlement. In *Contempo-Tempe*, the court of appeals held that two tenant associations could not challenge a prior superior court finding that they lacked standing because the individual tenants covered had already stipulated to dismiss their case against the defendant mobile home park. *Id.* at 228-29. The court of appeals dismissed the appeal as moot because the stipulated dismissal had resolved "the substantive question" raised in the lawsuit, and so the tenant associations "would not be entitled to any substantive relief on appeal." *Id*. After the stipulated dismissal of the tenant's claims, the tenant associations were "merely seeking an advisory opinion concerning their capacity to sue" under the mobile home tenant act. *Id*. at 229. The same is true of Plaintiff's claims here.

Plaintiff has released all claims against Phillips Law, including any claims under ACRA, arising out of her allegations of employment discrimination on the basis of sexual orientation and transgender status, and her claims against Phillips Law were dismissed with prejudice pursuant to the parties' stipulation. As such, just as in *Contempo-Tempe*, the substantive questions concerning whether Phillips Law improperly discriminated against Plaintiff have been resolved. Any judicial declaration interpreting the scope of ACRA would not entitle Plaintiff to any substantive relief, but would function only as an advisory opinion. Thus, Plaintiff's declaratory relief count is moot because it does not stem from existing facts or rights but upon those that have already been settled.

Moreover, on June 15, 2020, the U.S. Supreme Court held in *Bostock* that Title VII, the federal statute forbidding employment discrimination "because of . . . sex," protects against

employment discrimination because of sexual orientation or transgender status. 2020 WL 3146686, at *18. Prior to *Bostock,* the U.S. Supreme Court had not held that Title VII extended to sexual orientation or transgender status. In light of *Bostock*, the Division will now accept and review cases alleging employment discrimination because of sexual orientation or transgender status. This is a second, dispositive reason why Plaintiff's remaining declaratory judgment claim is moot.

II. PLAINTIFF LACKS STANDING TO SUE FOR POTENTIAL FUTURE DISCRIMINATION.

Plaintiff lacks standing to sue for hypothetical future injuries.[2] Mootness and standing are closely related issues but are sufficiently unique to merit a separate analysis. *See Chambers v. United Farm Workers Org. Comm., AFL-CIO*, 25 Ariz. App. 104, 106 (1975) ("'Standing' … requires that each party possess an interest in the outcome of the litigation. 'Mootness' … requires that opinions not be given concerning issues which are no longer in existence because of changes in the factual circumstances. The concepts are inter-related."). A declaratory relief claim must "be based on an *existing* state of facts, not facts that may or may not arise in the *future*." *Thomas*, 171 Ariz. at 74 (emphasis added). Absent an injury based on an existing state of facts, "a distinct and palpable injury" sufficient to confer standing does not exist. *See Sears v. Hull*, 192 Ariz. 65, 69, ¶16 (1998) ("To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury."); *Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶17 (2005) ("[W]e require that petitioners show a particularized injury to themselves."); *State v. Okun*, 231 Ariz. 462, 466, ¶17 (App. 2013) ("[A] party must demonstrate a distinct and palpable injury caused by the complained-of conduct."). Plaintiff points to no distinct

[2] Plaintiff, in her Motion for Summary Judgment, presents a previously unasserted argument for special action jurisdiction. PMSJ at 2-3. This case was not brought as a special action and never has been held to be one. Further, the State asserts that the same deficiencies regarding mootness and lack of standing presented here would apply to any alleged claim for special action relief.

injury because she has already settled and waived the claims she sought to sue under when she approached the Division. Declaratory relief is not appropriate as a second chance at issues that have already been finally resolved by release, nor is it a means to pre-resolve hypothetical issues that may or may not arise in the future. An order from the Court concluding that the ACRA Unlawful Employment Practices Statute covers discrimination based on sexual orientation and transgender status would not redress any injury being suffered by Plaintiff now. She has already brought her discrimination claims in a judicial forum and settled those claims. That settlement included a waiver of all Plaintiff's claims against Phillips Law under ACRA. Plaintiff, therefore, cannot establish standing to bring her claim.

III. THE STANDING AND MOOTNESS DOCTRINES APPLY TO PLAINTIFF'S CASE.

The standing requirement and mootness doctrine apply here. Although the Arizona Constitution does not contain a "case or controversy" requirement, Arizona courts are "reluctant to waive the standing requirement and have done so only on rare occasions." *Bennett*, 211 Ariz. at 195, ¶15. Courts have done so only in cases of "great public importance that are likely to recur." *Sears*, 192 Ariz. at 71, ¶25.[3] Neither exception applies here.

First, Plaintiff's case is not one capable of repetition yet evading review. If Plaintiff had not settled her claims with her former employer, the court might be in a position to address her declaratory relief claim. *See Contempo-Tempe*, 144 Ariz. at 230 ("Although the issue involved in the case at bar is capable of repetition it does not evade review. Were it not for the stipulation entered into by the parties the issue raised by the appellants properly could be on review."). Had she not resolved those claims, the federal district court's rulings would have

[3] These exceptions apply to both the standing and mootness doctrines. *See Cardoso v. Soldo*, 230 Ariz. 614, 617, ¶¶5-7 (App. 2012) (noting similar exceptions to the mootness doctrine including cases of "great public importance" or where the harm is "capable of repetition yet evading review").

been subject to appeal, thus not evading review. Moreover, any other claimant with actual standing wishing to make the arguments that Plaintiff makes here is permitted to do so in state or federal court, with access to appellate review. The issue of the scope of ACRA is not susceptible to evasion of review.

Second, this is not a case of such "great public importance" that the standing requirement should be waived. *Cardoso*, 230 Ariz. at 617, ¶5. The "paucity of cases in which [courts] have waived the standing requirement [on that basis] demonstrates both [courts'] reluctance to do so and the narrowness of this exception." *Sears*, 192 Ariz. at 71, ¶25. Even in cases that arguably were of great public importance, courts have refused to apply the exception. *See id*. (refusing to apply the exception in a case concerning the governor's authority to enter into gaming compacts permitting gambling on Indian reservations); *Bennett v. Napolitano*, 206 Ariz. 520, 527, ¶31 (2003) (declining to apply the exception to a case involving the governor's line item veto of millions of dollars in public funds including for public health and safety); *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 142, ¶18 (2005) (refusing to apply the exception in an attempted class action suit against automobile seat belt manufacturers that would have potentially affected thousands or possibly millions of Arizona drivers). Even if the issues Plaintiff raises in her claim have some importance to Plaintiff and others, that does not provide an exception to the rule followed by the above-referenced cases. This is particularly true in light of *Bostock*.

Plaintiff has no current injury, having settled and waived the discrimination claims at the root of this case, so all she can accomplish in furthering this matter is to try to obtain a general ruling that may impact some as-yet unmaterialized instance of alleged discrimination against some as-yet unknown third party. But it is not within the courts' power to issue such general rulings. The relevant analysis is whether this case is an appropriate vehicle for Plaintiff to ask for a decision on the meaning of "sex" within the ACRA Unlawful

Employment Practices Statute. It is not. This Court should not waive the standing requirement and issue a wholly advisory opinion.

CONCLUSION

Plaintiff lacks standing, and her only remaining claim is moot. Moreover, the Division has looked to the U.S. Supreme Court's interpretations of Title VII in determining the scope of the similarly-worded ACRA Unlawful Employment Practices Statute and will do so with regard to *Bostock* as well, now that, for the first time, the U.S. Supreme Court has held that Title VII protects against discrimination based on sexual orientation or transgender status.

Accordingly, the Court should deny Plaintiff's Motion for Summary Judgment and grant the State's Motion for Summary Judgment and dismiss Plaintiff's case with prejudice.

RESPECTFULLY SUBMITTED this 18th day of June, 2020.

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