NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMY HO, Plaintiff-Appellant, v. MEGAN J. BRENNAN,** Postmaster General, U.S. Postal Service, Defendant-Appellee.	No. 15-35774 D.C. No. 3:14-cv-01998-MO MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief Judge, Presiding

Argued and Submitted November 9, 2017
Portland, Oregon

Before: TASHIMA and W. FLETCHER, Circuit Judges, and LASNIK,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Megan J. Brennan is substituted for her predecessor, Patrick R. Donahue, Postmaster General, U.S. Postal Service. Fed. R. App. P. 43(c)(2).

*** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

Appellant Amy Ho appeals the district court's dismissal of her Title VII discrimination and retaliation claims for failure to state a claim upon which relief can be granted.

Ms. Ho is Vietnamese-American and works as a mail handler with the United States Postal Service. In her time there, she has filed at least one Equal Employment Opportunity (EEO) grievance against a supervisor. In addition, she alleges her manager pressured her to return early from two year-long periods she spent on limited duty due to work-related injuries. The following year, she learned her manager allowed three other employees, who are not Asian-American and who have no history of EEO grievances, to remain on limited duty much longer. That day, she contacted her EEO counselor to complain that she was treated differently based on her race, national origin, and history of EEO complaints.

After failing to obtain administrative relief, Ms. Ho filed a complaint in federal court alleging discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Postal Service moved to dismiss the complaint, arguing she had not contacted an EEO counselor within 45 days of the "matter alleged to be discriminatory" as required by 29 C.F.R. § 1614.105(a). The district court agreed, reasoning that the 45-day period began to run when Ms. Ho returned to full duty rather than when she learned of the disparate treatment.

The district court accordingly dismissed Ms. Ho's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Ms. Ho timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's Rule 12(b)(6) dismissal *de novo*. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). A Rule 12(b)(6) dismissal is appropriate if, accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor, *id.*, the complaint "lack[s] . . . a cognizable legal theory" or lacks "sufficient facts alleged under a cognizable legal theory," *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

On appeal, Ms. Ho argues that, based on the terms of 29 C.F.R. § 1614.105, the district court erred by calculating the time period for contacting an EEO counselor starting with her return from limited duty.[1] We agree, and we conclude

[1] The Postal Service contends that Ms. Ho waived this argument and that we should not consider it on appeal. Ms. Ho did not specifically invoke 29 C.F.R. § 1614.105(a)(2) before the district court, but she did argue for extending the limitations period until the point in time that she discovered her comparators' allegedly more-favorable treatment. *See Cornhusker Cas. Ins. Co. v. Kachman*, 553 F.3d 1187, 1191–92 (9th Cir. 2009) ("[W]e will not consider an issue waived or forfeited if it has been raised sufficiently for the trial court to rule on it." (marks and citation omitted)). In addition, "waiver is [a rule[of discretion rather than appellate jurisdiction," *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980), and we have reviewed issues for the first time on appeal where, as here, "the issue is a legal one, not necessitating additional development

the district court misapplied the regulation in holding that 29 C.F.R. § 1614.105(a) bars her claim.

Satisfying 29 C.F.R. § 1614.105(a) is one of several steps a federal employee must take to exhaust available administrative remedies, which is a prerequisite to bringing a Title VII claim in federal court. 42 U.S.C. § 2000e–16(c). The regulation at issue requires an employee "initiate contact" with an EEO counselor at her agency "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). The regulation also provides that the agency "shall extend the 45-day time limit . . . when the individual shows . . . that he or she did not know and reasonably should not have been known that the discriminatory matter . . . occurred." *Id.* § 1614.105(a)(2).

In *Green v. Brennan*, 136 S. Ct. 1769, 1775 (2016), the Supreme Court explained that "'matter alleged to be discriminatory,' . . . refers to the allegation forming the basis of the discrimination claim." *Id.* at 1777. The basis of a Title VII discrimination claim is a prima facie showing of either discriminatory intent or presumptively discriminatory circumstances. *Vasquez v. City of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003), *as amended* (Jan. 2, 2004). A plaintiff can show the latter if "(1) she belongs to a protected class, (2) she was performing according to

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of the record," *Animal Prot. Inst. of Am. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988). For those reasons, we will not reject Ms. Ho's argument on waiver grounds.

her employer's legitimate expectations, (3) she suffered an adverse employment action, and (4) other employees with qualifications similar to her own were treated more favorably." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

The window for contacting an EEO counselor therefore extends to the point in time when the employee knew or should have known that "other employees with qualifications similar to her own were treated more favorably." *Id.*; *accord Boyd v. U.S. Postal Serv.*, 752 F.2d 410 414 (9th Cir. 1985) (explaining "[t]he time period for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights").

Here, the district court erred in concluding that the limitations period began to run on the date Ms. Ho returned from limited duty. The district court relied on general principles of claim accrual articulated in *Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008). *Lukovsky* involved claims against a local governmental agency for discriminatory hiring practices—claims that were subject to California's statute of limitations for personal injury torts. *Id.* at 1048. Those claims accrue when a claimant discovers she has been injured, but we explained that, in those cases, the relevant employment action is the injury whose discovery triggers accrual. *Id.* at 1049. That is, the claim accrues when the claimant

learns of the relevant employment action, not when she learns of discriminatory intent. *Id.*

Unlike *Lukovsky*'s application of claim-accrual principles to the limitations period for filing a lawsuit, this case depends on whether Ms. Ho met a regulatory time limit for contacting an EEO counselor. The latter determination proceeds from the regulation's text, which, as noted, extends to the point in time when an employee knows or should have known of the comparators' disparate treatment. *See* 29 C.F.R. § 1614.105(a)(2). The district court erred by applying the incorrect legal standard in dismissing Ms. Ho's complaint.

We reverse the district court's dismissal of Ms. Ho's complaint and remand with instructions to apply 29 C.F.R. § 1614.105(a) consistent with this disposition.

REVERSED and REMANDED.