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**NOT FOR PUBLICATION**  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Vanessa Hall,  
Plaintiff,  
vs.  
Eric K. Shinseki, Secretary, United States  
Dept. of Veterans Affairs,  
Defendant.

No. CV-09-0837-PHX-FJM

**ORDER**

The court has before it defendant’s motion to dismiss counts and claims (doc. 9), plaintiff’s response (doc. 13), and defendant’s reply (doc. 16).

Plaintiff Vanessa Hall filed this action against her former employer, the United States Department of Veterans Affairs, on April 21, 2009, alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Plaintiff asserts numerous allegations of discrimination and retaliation, which she previously raised in two formal complaints filed with the Veterans Affairs’ Equal Employment Office (“EEO”). Defendant now contends that, with the exception her claims of constructive discharge and failure to reassign, each of plaintiff’s claims must be dismissed for failure to exhaust administrative remedies or failure to state a claim.

Title VII requires a federal employee to exhaust administrative remedies as a “precondition” to filing a civil action in a federal court. Brown v. Gen. Servs. Admin., 425

1 U.S. 820, 832, 96 S. Ct. 1961 (1976). A federal employee asserting discrimination must first  
2 consult with an EEO counselor within 45 days of the alleged discriminatory event in an effort  
3 to informally resolve the matter. 29 C.F.R. § 1614.105(a)(1). The counselor must conclude  
4 the informal counseling within 30 days and notify the complainant in writing of the right to  
5 file a formal discrimination complaint. Id. § 1614.105(d). The employee may then file a  
6 formal discrimination complaint with the employer agency’s EEO office within 15 days of  
7 receipt of the notice. Id. § 1614.106(a), (b). Once the agency issues a final decision, the  
8 complainant may either appeal the dismissal to the Equal Employment Opportunity  
9 Commission within 30 days, id. § 1614.401-402, or file an action in federal district court  
10 within 90 days, 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(a). Absent waiver, estoppel  
11 or equitable tolling, failure to comply with the exhaustion regulations is “fatal to a federal  
12 employee’s discrimination claim” in federal court. Lyons v. England, 307 F.3d 1092, 1105  
13 (9th Cir. 2002).

14 Plaintiff pursued two administrative claims. She first contacted an EEO counselor on  
15 February 20, 2008, claiming that she suffered disparate treatment and a hostile work  
16 environment because of her race. Complaint ¶ 79. The informal counseling process  
17 concluded on March 24, 2008, when plaintiff received a Notice of Right to File a formal  
18 discrimination complaint, dated March 21, 2008. Response at 8-9.

19 On March 22, 2008, plaintiff notified the EEO counselor of two additional instances  
20 of alleged retaliation. Id. She claimed that her supervisor denied her request for a within-  
21 grade pay increase (“WIGI”) and unfairly reprimanded her. She claims that despite her  
22 efforts to contact the EEO counselor regarding these newly-filed claims, she had no response  
23 until May 13, 2008, when the counselor informed her that he had included these claims in  
24 the March 21, 2008 Notice of Right to File. Id. at 9.

25 Plaintiff then filed a formal complaint with the Veterans Affairs’ EEO office on June  
26 2, 2008, asserting 13 instances of discrimination, hostile work environment, and retaliation,  
27 including the WIGI and reprimand claims. The EEO office dismissed the formal complaint  
28 in its entirety as untimely under 29 C.F.R. § 1614.107(a)(2). See DSOE, exhibit 3 at 3.

1 Specifically, the EEO office found that plaintiff was required to file her formal complaint  
2 within 15 days of receiving the March 21, 2008 Notice of Right to File. However, her formal  
3 complaint was not filed until June 2, 2008, more than 50 days past the deadline. Plaintiff's  
4 administrative appeal was denied on October 16, 2008. Id. Her motion for reconsideration  
5 was denied on January 28, 2009. Complaint, exhibit 1. She filed her complaint in this court  
6 on April 21, 2009.<sup>1</sup>

7 In the meantime, plaintiff filed a second formal complaint with the Veterans Affairs'  
8 Equal Employment Office on July 15, 2008, duplicating many of the allegations raised in her  
9 first formal complaint, and adding two new claims—failure to reassign and constructive  
10 discharge. The EEO office dismissed each of the claims as duplicative and untimely, with  
11 the exception of (1) failure to reassign, (2) constructive discharge, and (3) interference with  
12 employment opportunity with the FBI. PSOF, exhibit 11. Defendant contends that only the  
13 failure to reassign and constructive discharge claims have been properly exhausted and now  
14 moves to dismiss all of the remaining claims.

15 Defendant incorrectly asserts that the EEO office dismissed as untimely plaintiff's  
16 claim that defendant improperly interfered with her potential employment opportunity with  
17 the FBI. In fact, the EEO issued a corrected decision finding that plaintiff's employment  
18 interference claim was timely. See id. Therefore, defendant has failed to make any showing  
19 that this claim should be dismissed.

20 In her response to the motion to dismiss, plaintiff objects only to the dismissal of the  
21 WIGI and the reprimand claims. Failure to respond to arguments raised in dispositive  
22 motions "may be deemed a consent to the . . . granting of the motion." See LRCiv 7.2(i).  
23 We therefore consider the arguments relating to the WIGI and reprimand claims only.

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25 <sup>1</sup>We reject defendant's argument that the instant action is untimely because plaintiff  
26 failed to file her complaint within 90 days of the October 16, 2008 decision. Defendant fails  
27 to recognize that plaintiff's motion for reconsideration extended her filing deadline. See  
28 Complaint, exhibit 1 (stating that plaintiff had 90 days from January 28, 2009, to file a  
complaint in federal court).

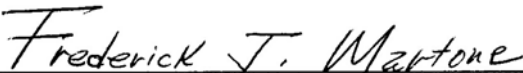
1 Defendant argues that plaintiff failed to exhaust her administrative remedies with  
2 respect to the WIGI and reprimand claims because she did not file her formal complaint  
3 within 15 days of the resolution of the informal counseling period, as required by 29 C.F.R.  
4 § 1614.106(b). Plaintiff filed her informal complaint challenging the reprimand and denial  
5 of her WIGI request on March 22, 2008. She did not receive a response from the EEO  
6 counselor until May 13, 2008, when she was informed that the counselor had included these  
7 claims in the March 21, 2008 Notice of Right to File. Response at 9. We agree with plaintiff  
8 that this explanation is illogical given that plaintiff did not submit the WIGI and reprimand  
9 complaints until March 22, 2008—one day after the Notice of Right to File was issued.

10 Nevertheless, even if we assume that plaintiff is entitled to equitable tolling of the  
11 filing deadline due to the EEO counselor's failure to respond within the statutorily prescribed  
12 time frame, the tolling would extend only until May 13, 2008, when plaintiff received actual  
13 notice that the informal review process was closed. Plaintiff then had 15 days from May 13,  
14 2008, or until May 28, 2008, to file her formal complaint. However, she did not file her  
15 complaint until June 2, 2008. Therefore, we conclude that plaintiff failed to properly exhaust  
16 her administrative remedies with respect to the WIGI and reprimand claims, and accordingly  
17 we dismiss these claims.

18 In conclusion, each of plaintiff's claims of discrimination and retaliation are dismissed  
19 for failure to exhaust administrative remedies or failure to state a claim, with the exception  
20 of three claims: (1) failure to reassign, (2) constructive discharge, and (3) interference with  
21 employment opportunity.

22 Therefore, **IT IS ORDERED GRANTING IN PART AND DENYING IN PART**  
23 defendant's motion to dismiss claims and counts (doc. 9).

24 DATED this 30<sup>th</sup> day of March, 2010.

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 Frederick J. Martone  
28 United States District Judge