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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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10 Sheila V. Studymire,	)	No. CV-09-1122 PHX DGC
11                   Plaintiff,	)	
12 vs.	)	<b>ORDER</b>
13 Bright Horizons Children's Center, Inc.,	)	
14                   Defendant.	)	
15 _____	)	

16           Plaintiff Sheila Studymire filed the present action against Defendant Bright Horizons  
17 Children's Center, Inc., claiming that she was fired from her position at Bright Horizons  
18 based on a complaint she made to the EEOC. Dkt. #1. On November 17, 2009, Bright  
19 Horizons filed a motion to dismiss. Dkt. #9. For the reasons that follow, the Court will grant  
20 Bright Horizons' motion.

21           On June 22, 2006, Studymire filed a charge with the EEOC against Bright Horizons,  
22 alleging that she was discriminated against on the basis of a disability in violation of Title I  
23 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111-12117. *See* CV-08-  
24 0772-PHX-ROS, Dkt. #1 at 2. She received her right-to-sue letter from the EEOC on  
25 January 25, 2008, and, on April 23, 2008, she sued Bright Horizons in this Court based on  
26 the alleged discrimination. *Id.* at 1-8. On November 26, 2008, the parties stipulated to  
27 dismiss that action. CV-08-0772-PHX-ROS, Dkt. #13. It is unclear from the stipulation why  
28 the parties agreed to the dismissal.

1           On April 30, 2008 – seven days after she filed suit in this Court based on the alleged  
2 discrimination – Studymire was terminated from her position at Bright Horizons. Dkt. #1  
3 at 5. A few months later, on the same day that she stipulated to dismiss the underlying  
4 discrimination suit, Studymire filed the present action claiming that Bright Horizons  
5 terminated her in retaliation for filing her charge with the EEOC. *Id.*

6           Bright Horizons has filed a motion to dismiss Studymire’s current complaint on four  
7 grounds: (1) service of process was insufficient, (2) Studymire has failed to prosecute,  
8 (3) this Court lacks subject matter jurisdiction, and (4) Studymire has failed to state a claim  
9 under Federal Rule of Civil Procedure 8. The Court agrees that it lacks subject matter  
10 jurisdiction over Studymire’s claim and, as a result, will dismiss this action.

11           “The party asserting jurisdiction has the burden of proving all jurisdictional facts.”  
12 *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing *McNutt v.*  
13 *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)); *see Kokkonen v. Guardian Life*  
14 *Ins. Co. of Am.*, 114 S. Ct. 1673, 1675 (1994). In effect, a court presumes lack of jurisdiction  
15 until the plaintiff proves otherwise. *See Kokkonen*, 114 S. Ct. at 1675; *Stock West, Inc. v.*  
16 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The defense of lack of subject  
17 matter jurisdiction may be raised at any time by the parties or the court. *See Fed. R. Civ. P.*  
18 *12(h)(3).*

19           To establish subject matter jurisdiction for an ADA claim of retaliation, Studymire  
20 must show that she exhausted her administrative remedies by timely filing a charge with the  
21 EEOC. 42 U.S.C. § 12203; *see B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1099 (9th Cir.  
22 2002) (citing *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)). “Subject matter  
23 jurisdiction extends over all allegations of discrimination that either ‘fell within the scope of  
24 the EEOC’s *actual* investigation or an EEOC investigation which *can reasonably be*  
25 *expected* to grow out of the charge of discrimination.” *B.K.B.*, 276 F.3d at 1100 (quoting  
26 *Farmer Bros.*, 31 F.3d at 899) (emphasis in original); *see Sosa v. Hiraoka*, 920 F.2d 1451,  
27 1456 (9th Cir. 1990). Allegations not included in the EEOC charge may be considered if the  
28 new claims are “‘like or reasonably related to the allegations contained in the EEOC

1 charge.” *B.K.B.*, 276 F.3d at 1100 (citations omitted).

2 Studymire filed an ADA charge with the EEOC based on disability discrimination.  
3 She did not, however, file a subsequent EEOC charge based on the retaliation she claims  
4 occurred because of her original EEOC charge. The question before this Court is whether  
5 a retaliation claim based on conduct that occurs after the filing of an EEOC charge is a claim  
6 that “can reasonably be expected to grow” out of the original EEOC charge of discrimination  
7 under the ADA. *Id.*

8 The Ninth Circuit has not considered this exhaustion issue as it relates to an ADA  
9 charge and a corresponding retaliation claim. It has, however, considered this issue as it  
10 relates to an EEOC charge under Title VII. Because the ADA exhaustion requirement for  
11 a retaliation claim is essentially the same as the exhaustion requirement in Title VII cases,  
12 the Ninth Circuit’s opinions relating to Title VII are directly relevant. *See* 42 U.S.C.  
13 § 2000e-5(f)(1) (requiring a party to receive a right-to-sue letter from the EEOC before filing  
14 suit in court for any Title VII claim); 42 U.S.C. § 12203 (stating that a party claiming  
15 retaliation based on filing an EEOC charge for employment discrimination under the ADA  
16 must follow the procedures available under 42 U.S.C. § 12117 which, in turn, requires that  
17 party to follow the requirements for a Title VII claimant under 42 U.S.C. § 2000e-5(f)(1)).

18 The controlling Ninth Circuit precedent is *Vasquez v. County of Los Angeles*, 349 F.3d  
19 634 (9th Cir. 2004). While working at a juvenile detention center, Vasquez experienced  
20 conflicts with his supervisor, Berglund, who worked in the same “cottage” as Vasquez – the  
21 turquoise cottage. Berglund told Vasquez “that [he] was too domineering . . . and had a  
22 ‘typical Hispanic macho attitude.’” *Id.* at 638. In response to this comment, Vasquez filed  
23 a grievance against Berglund with the detention center. *Id.* The following year, Berglund  
24 accused Vasquez of lying to her, and, in response, Leeds – the supervisor of both Berglund  
25 and Vasquez – transferred Vasquez out of turquoise cottage. *Id.* at 638-39. In response,  
26 Vasquez filed an EEOC charge claiming harassment and disparate treatment, which detailed  
27 Berglund’s claim that he lied and Leeds’ decision to transfer him out of turquoise cottage.

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1           After Vasquez received his right-to-sue letter from the EEOC, Leeds threatened to  
2 move him to an entirely different detention center if he continued to pursue his charge. Soon  
3 after, Vasquez filed a lawsuit under Title VII alleging the discrimination at issue in his  
4 original EEOC charge plus a claim of retaliation based on Leeds' threat to transfer him to a  
5 different facility and a claim of retaliation based on Leeds' decision to transfer him out of  
6 turquoise cottage.

7           The Ninth Circuit was required to decide whether the retaliation claims were  
8 "reasonably related to the EEOC charge" such that Vasquez exhausted his administrative  
9 remedies. In doing so, the Ninth Circuit considered the following factors: "the alleged basis  
10 of the discrimination, dates of discriminatory acts specified within the charge, perpetrators  
11 of discrimination named in the charge, and any locations at which discrimination is alleged  
12 to have occurred." *Id.* at 644. The court held that the retaliation claim based on Leeds' threat  
13 to transfer him to a different facility was not reasonably related to the underlying EEOC  
14 complaint because that alleged retaliation would not have fallen "under an investigation that  
15 the EEOC would have conducted" based on the discrimination charge. *Id.* at 645. The court  
16 found that the EEOC would not have investigated Leeds because it was Berglund who was  
17 accused in the original discrimination charge. More importantly, the threat to transfer  
18 Vasquez "occurred several months after the alleged harassment and even after the EEOC had  
19 issued its right to sue letter," meaning that "[t]he EEOC could not have investigated that  
20 incident because it had not yet happened at the time the EEOC was conducting its  
21 investigation." *Id.* The Ninth Circuit held that "[b]ecause Vasquez did not present the legal  
22 theory of unlawful retaliation, and the operative facts regarding this part of his claim were  
23 not related to the facts in the EEOC charge, he did not exhaust his administrative remedies"  
24 and there was no jurisdiction. *Id.*

25           For the retaliation claim based on Leeds' decision to transfer Vasquez out of the  
26 turquoise cottage, however, the Ninth Circuit found that the claim was sufficiently related  
27 to the EEOC charge. Because the EEOC charge discussed the fact that Vasquez was  
28 transferred out of the turquoise cottage – even though it did not technically allege that this

1 transfer was retaliation for filing the grievance against Berglund for saying he had a  
2 machismo attitude – the charge contained the relevant factual allegations necessary to  
3 support his retaliation claim. *Id.* at 645-646. This was, in substantial part, because Vasquez  
4 had already been transferred from the turquoise cottage at the time he filed his EEOC charge.

5 Studymire filed a charge with the EEOC based on job discrimination in violation of  
6 the ADA. *See* CV-08-0772-ROS, Dkt. #1. She alleged that her employer discriminated  
7 against her by placing her on medical leave because she could not lift more than eight  
8 pounds. *Id.* at 4-5. Her EEOC charge did not contain any factual allegations that could  
9 support her current retaliation claim, which is based solely on her termination. Because the  
10 termination “occurred several months after the alleged [discrimination] and even after the  
11 EEOC had issued its right to sue letter,” “[t]he EEOC could not have investigated [the  
12 termination] because it had not yet happened at the time the EEOC was conducting its  
13 investigation.” *Vasquez*, 349 F.3d at 645.

14 In summary, the Court concludes that Studymire has not exhausted her administrative  
15 remedies by filing an appropriate charge with the EEOC. The Court therefore will dismiss  
16 her action for lack of subject matter jurisdiction.

17 **IT IS ORDERED:**

- 18 1. Bright Horizons’ motion to dismiss (Dkt. #9) is **granted**.  
19 2. The Clerk of Court shall terminate this action.

20 DATED this 22nd day of February, 2010.

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David G. Campbell  
United States District Judge