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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Barbara Gammons,) No. CV-10-8146-PHX-LOA

10 Plaintiff,) **ORDER**

11 vs.)

12)

13 Real Property Investment Services, Inc.,)
14 an Arizona corporation, doing business as)
15 RPI Services,)

16 Defendant.)

17 This case comes before the Court on Defendant’s Motion to Dismiss Plaintiff’s
18 Discharge Claim. (Doc. 8) Pursuant to Federal Rules of Civil Procedure 12(b)(1) or,
19 alternatively, Rule 12(b)(6), Defendant Real Property Investment Services, Inc. (“RPI”)
20 moves the Court to dismiss Plaintiff Barbara Gammons’ (“Plaintiff”) constructive discharge
21 claim because she allegedly failed to exhaust her administrative remedies. The parties have
22 expressly consented to magistrate-judge jurisdiction pursuant to 28 U.S.C. § 636(c). (Docs.
23 3-4) After reviewing the parties’ briefing, the Court will deny RPI’s Motion.

24 **I. Background**

25 On May 20, 2010, Plaintiffs Barbara Gammons and a co-employee filed a Title
26 VII discrimination action, alleging, *inter alia*, claims of hostile work environment from
27 sexual harassment, and retaliation by their former employer, RPI, in connection with their
28 employment in maintaining and cleaning RPI’s residential apartments in Flagstaff, Arizona.

1 (Doc. 1¹) Plaintiff filed an Amended Complaint on September 3, 2010, seeking
2 compensatory and punitive damages for violations of Title VII, the Fair Housing Act, and
3 an award for her attorneys' fees and court costs.² (Doc. 7)

4 Plaintiff alleges that while employed in RPI's housekeeping department, she
5 was "subjected to a sexually hostile work environment that was both subjectively and
6 objectively offensive to a reasonable woman . . . [that] was both severe and pervasive in that
7 it happened on a near daily basis." (*Id.* at 2) The Complaint alleges several specific incidents
8 allegedly committed by Bruce Trease, a co-worker. Plaintiff alleges "much of the sexual
9 harassment occurred in the presence of Dina Samora, manager, who did nothing to stop the
10 conduct. Additionally, sexually offensive and hostile comments were also made in front of
11 Amy Smith, operations manager, and Gary Wilcox, facilities manager, and nothing was ever
12 done to stop the severe and pervasive sexual harassment." (*Id.* at 3) Further, when Plaintiff
13 complained about the sexually hostile work environment, RPI allegedly retaliated by
14 ostracizing her from management and some co-workers, reducing her pay and reassigning
15 her to work at "a less desirable property, which also necessitated that she give up the rental
16 unit that was provided as part of her compensation and accept a lesser rental for her place
17 to live." (*Id.*) The Amended Complaint pleads three causes of action: 1) sexual harassment
18 - hostile work environment, 2) retaliation, and 3) housing discrimination in violation of the
19 Federal Fair Housing Act. (*Id.* at 4-5) Plaintiff also alleges that she was "constructively
20 terminated." (*Id.* at 7, ¶ 22)

21 Defendant RPI's Motion to Dismiss alleges that Plaintiff was employed by RPI
22 "from approximately August 20, 2004 to November, 2008." (Doc. 8 at 2) According to a

23
24 ¹ On August 9, 2010 in CV-10-8081-PHX-LOA, the Court severed the actions due
25 to improper joinder, directed the Clerk of Court to assign a new case number for Plaintiff
26 Barbara Gammons (CV-10-8146-PHX-LOA), and ordered Plaintiffs to file Amended
27 Complaints. (Doc. 26 in CV-10-8081-PHX-LOA)

28 ² On July 28, 2010, the Court granted RPI's Motion to Dismiss Plaintiffs' Sixth Cause
of Action, dismissing Plaintiffs' State pendent claims of negligent hiring, supervising and
retaining as barred by Arizona's workers' compensation scheme. (Doc. 24)

1 copy of Plaintiff's charge of discrimination, attached as Exhibit ("Exh") 1 to RPI's Motion,
2 Plaintiff filed a charge of discrimination with the Equal Employment Opportunity
3 Commission ("EEOC") on April 2, 2007, over 18 months before she submitted a termination
4 letter. On the EEOC's Charge of Discrimination form, *id.*, Exh 1, she claimed discrimination
5 based on age, sexual hostile work environment and retaliation by checking the age,
6 retaliation, and "other" boxes and writing:

7 I started work For RPI Sept. 1, 2004[.] Bruce was Transferred to Terrace as
8 Lead Maintenance[.] The Sexual Talk started Shortly after That[.]

9 Age: I was Told They Took one of my Properties From me because of my
10 age[.]

11 Retaliation: I Also Think They moved me because of my discussion About
12 The Hostile work environment And made me move to a smaller Apartment and
13 Take a pay cut.

14 (Doc. 8-1, Exh 1 at 3) Attached to Defendant's Motion is a copy of Plaintiff's termination
15 letter, dated November 12, 2008, advising RPI that "[t]hat I am giving my notice to terminate
16 my employment as of Friday November 21, 2008. Sincerely, Barbara Gammons[.]"³ (*Id.*,
17 Exh 2 at 5)

18 Defendant contends Plaintiff failed to exhaust her administrative remedies
19 "relating to her claim of discriminatory discharge" and, therefore, her constructive discharge
20 claim should be dismissed. (Doc. 8 at 3) RPI points out that Plaintiff did not amend her
21 original EEOC charges to include, or file a separate subsequent charge of, constructive
22 discharge. Recognizing the general rule that claims of discrimination not included in a
23 timely-filed EEOC charge may not be considered by a district court, RPI also acknowledges
24 the exception that a "new claim (here, constructive discharge) [may be considered if the new
25 claim] is 'like or reasonably related to' the allegations contained in the EEOC charge[.]"

26 ³ Defendant's footnotes are very small, difficult to read and do not comply with
27 LRCiv 7.1(b)(1) ("[A]ll pleadings, motions and other original documents filed with the Clerk
28 shall be in a fixed-pitch type size no smaller than ten (10) pitch (10 letters per inch) or in a
proportional font size no smaller than 13 point, *including any footnotes.*") (emphasis added).
Defendant's future filings shall comply with LRCiv 7.1(b)(1).

1 citing 42 U.S.C. §§ 2000(e)-5(b),(f)(3) and 16(c); *B.K.B. v. Maui Police Department*, 276
2 F.3d 1091, 1099 (9th Cir. 2002) and *Padilla v. Bechtel Construction Company*, 2007 WL
3 1219737, * 4 (D.Ariz. 2007). (*Id.* at 4) In analyzing whether an unexhausted claim is “like
4 or reasonably related to” the claims contained in an EEOC charge, RPI correctly indicates
5 that a district court may consider “such factors as the alleged basis of the discrimination,
6 dates of discriminatory acts specified within the charge, perpetrators of discrimination named
7 in the charge, and any locations at which discrimination is alleged to have occurred.” *Id.* at
8 5 (quoting *B.K.B.*, 276 F.3d at 1100). RPI argues that “[h]ere, these factors indicate that
9 Plaintiff’s discriminatory discharge claim is not reasonably related to her EEOC charge.
10 First, the alleged constructive discharge is not temporally related to the incident alleged in
11 the charge. Rather, it occurred 18 months after Plaintiff filed the charge. Next, a constructive
12 discharge is a distinct adverse action from an alleged involuntary transfer[,]” relying upon
13 *Ong v. Cleland*, 642 F.2d, 315, 319-320 (9th Cir. 1981). (*Id.*) Further, RPI contends that
14 because “[t]he alleged discharge claim was never before the EEOC and Defendant never had
15 notice of an alleged claim of wrongful termination until Plaintiff filed her initial complaint
16 on May 25, 2010, over three (3) years after she filed her EEOC charge[,]” Plaintiff’s
17 constructive discharge claim should be dismissed because she failed to exhaust her
18 administrative remedy. (*Id.* at 5-6)

19 Plaintiff disagrees with RPI and argues that construing her charges of
20 discrimination liberally, “Plaintiff’s constructive termination from her employment is
21 reasonably related to the other instances of retaliation she brought to the attention of the
22 EEOC.” (Doc. 12 at 2) Arguing “[h]er termination is inextricably intertwined with the facts
23 relating to the retaliation she suffered when she dared to complain about the harassment she
24 was receiving[,]” Plaintiff attaches a copy of the EEOC’s December 11, 2009 Determination
25 letter. (Doc. 12-1, Exh 1 at 2) The Acting District Director Rayford O. Irvin wrote:

26 I have considered all the evidence obtained during the investigation and find
27 that there is reasonable cause to believe that there is a violation of Title VII in
28 that Respondent [RPI] subjected Charging Party [Plaintiff] to verbal and
physical sexual harassment and failed to take immediate appropriate corrective
action in response to her complaints allowing the conduct to continue. I also

1 find that Respondent discriminated because of her age in violation of the
2 ADEA and retaliated against her for complaining about the sexual harassment
3 when it reduced the properties assigned to her, transferred her and provided
her with a contract that reduced her pay and the size and value of her assigned
apartment.

4 *Id.* Without discussing or analyzing the *B.K.B.* factors to determine whether Plaintiff's
5 constructive discharge claim is reasonably related to her EEOC charges, Plaintiff concludes
6 that "[h]er termination is inextricably intertwined with the facts relating to the retaliation she
7 suffered when she dared to complain about the harassment she was receiving." (Doc. 12 at
8 2) Plaintiff's Response relies exclusively on *Gregory v. Georgia Dept. of Human Resources*,
9 355 F.3d 1277, 1280 (11th Cir. 2004) ("[w]e hold that the district court did not err in finding
10 that Dr. Gregory's retaliation claim was not administratively barred by her failure to mark the
11 retaliation space on the EEOC template form.")

12 **II. Relevant Legal Standards**

13 **A. Rule 12(b)(1), Fed.R.Civ.P.**

14 Dismissal is appropriate when a district court lacks subject matter jurisdiction
15 over a claim or lawsuit. Fed.R.Civ.P. 12(b)(1). To establish subject matter jurisdiction over
16 a Title VII claim, a plaintiff must have exhausted her administrative remedies by filing a
17 timely charge with the EEOC. *Vasquez v. County of L.A.*, 349 F.3d 634, 645-46 (9th Cir.
18 2003).

19 Subject matter jurisdiction involves the power of a district court to hear the
20 plaintiff's claims in the first place and, therefore, imposes upon a district court an affirmative
21 obligation to ensure that it is acting within the scope of its jurisdictional power. *Casillas v.*
22 *United States*, 2009 WL 735193, * 7 (D.Ariz. 2009); 5A Charles A. Wright & Arthur R.
23 Miller, *Federal Practice and Procedure* § 1350 (1990). Because federal courts are courts of
24 limited jurisdiction, it is presumed that an action lies outside the jurisdiction of federal courts
25 unless proven otherwise. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A
26 plaintiff bears the burden of establishing that federal jurisdiction exists. *Tosco Corp. v.*
27 *Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001); *Thornhill*
28

1 *Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir.
2 1979).

3 “A motion to dismiss for lack of subject matter jurisdiction may either attack
4 the allegations of the complaint or may . . .” attack the existence of subject matter
5 jurisdiction as a matter of fact. *National Union Fire Ins. Co. v. ESI Ergonomic Solutions,*
6 *LLC.*, 342 F.Supp.2d 853, 861 (D.Ariz. 2004) (quoting *Thornhill Publishing*, 594 F.2d at
7 733). “When a motion to dismiss attacks the allegations of the complaint as insufficient to
8 confer subject matter jurisdiction, all allegations of material fact are taken as true and
9 construed in the light most favorable to the nonmoving party.” *Id.* (citing *Federation of*
10 *African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996)). Where
11 the jurisdictional issue can be separated from the merits of the case, the district court may
12 consider the evidence presented with respect to the jurisdictional issue, resolving factual
13 disputes if necessary. *Thornhill Publishing*, 594 F.2d at 733. “When the motion is a factual
14 attack on subject matter jurisdiction, a defendant may ‘rely on affidavits or any other
15 evidence properly before the Court.’” *National Union*, 342 F.Supp.2d at 861 (citing *St. Clair*
16 *v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)); *also see Sommatino v. United States*,
17 255 F.3d 704, 710 n. 3 (9th Cir. 2001) (“In reviewing a motion to dismiss based on lack of
18 subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), the court may consider
19 affidavits or any other evidence properly before the Court.”). In the instance of a factual
20 challenge, no presumption of truthfulness attaches to the plaintiff’s allegations, and the
21 existence of disputed material facts will not preclude the court from evaluating the merits of
22 jurisdictional claims. *Thornhill Publishing*, 594 F.2d at 733.

23 **B. Rule 12(b)(6), Fed.R.Civ.P.**

24 In a motion to dismiss for failure to state a claim under Fed.R. Civ.P. 12(b)(6),
25 the district court considers the legal sufficiency of Plaintiff’s claims. A complaint should not
26 be dismissed unless “it appears beyond doubt that plaintiff can prove no set of facts in
27 support of his claim which would entitle him to relief.” *Vignolo v. Miller*, 120 F.3d 1075,
28 1077 (9th Cir. 1997) (citing *Parks School of Business v. Symington*, 51 F.3d 1480, 1484 (9th

1 Cir. 1995)). Dismissal for failure to state a claim can be based on either the “lack of a
2 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
3 theory.” *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). In a
4 Rule 12(b)(6) motion to dismiss “all factual allegations set forth in the complaint are taken
5 as true and construed in the light most favorable to plaintiffs.” *Lee v. City of Los Angeles*,
6 250 F.3d 668, 679 (9th Cir. 2001) (citation and internal quotation marks omitted). The
7 district court, however, is not required to accept every conclusion asserted in the complaint
8 as true; rather, the court “will examine whether conclusory allegations follow from the
9 description of facts alleged by the plaintiff.” *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th
10 Cir. 1992) (quoting *Brian Clewer, Inc. v. Pan American World Airways, Inc.*, 674 F.Supp.
11 782, 785 (C.D.Cal. 1986)). Where a motion to dismiss is granted, a district court should
12 provide leave to amend unless it is clear that the complaint could not be saved by any
13 amendment. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

14 **III. The EEOC Administrative Process**

15 Before filing suit for an employment discrimination claim made unlawful by
16 Title VII, the aggrieved employee must exhaust the employee’s administrative remedy by
17 filing a timely and sufficient charge with the appropriate administrative agency and obtain
18 a right-to-sue letter. Title 42 U.S.C. §§ 2000e-5(b), (f)(3), 16(c); *Stache v. Int’l Union of*
19 *Bricklayers and Allied Craftsmen, AFL-CIO*, 852 F.2d 1231, 1233 (9th Cir. 1988), *cert.*
20 *denied*, 493 U.S. 815 (1989). A failure of exhaustion in the form of a failure to timely file an
21 administrative claim is not jurisdictional and may be raised as an affirmative defense to the
22 claim. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Thus, a failure to
23 timely file an EEOC charge is “not a jurisdictional prerequisite to filing a Title VII suit.
24 Rather, it is a requirement subject to waiver, estoppel, and equitable tolling ‘when equity so
25 requires.’” *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) (citing
26 *Zipes*, 455 U.S. at 398).

27 Generally, once a complainant has filed a verified charge with the EEOC or
28 equivalent state agency alleging an unlawful employment practice, the EEOC will investigate

1 the claim. Title 42 U.S.C. § 2000e-5(b). If the EEOC determines that reasonable cause exists
2 to support the discrimination charge, it will attempt to reach a voluntary conciliation
3 agreement acceptable to the EEOC. Title 42 U.S.C. § 2000e-5(f)(1); *Alexander v.*
4 *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). “[I]f the EEOC is unable or unwilling to
5 resolve the controversy and if no action has occurred after 180 days and the complainant
6 wishes to withdraw the matter from EEOC jurisdiction, the EEOC issues a so-called ‘right
7 to sue letter.’ Issuance of this letter terminates EEOC jurisdiction and its ability to act and
8 ‘reactivates’ the individual’s right to bring a civil action under Title VII.” *Kirk v. Rockwell*
9 *Intern. Corp.*, 578 F.2d 814, 823 (9th Cir. 1978) (citations omitted). “If the individual does
10 not file suit within 90 days, however, the right is extinguished.” *Id.* (citations omitted).

11 “[T]he administrative charge requirement serves the important purposes of
12 giving the charged party notice of the claim and ‘narrow[es] the issues for prompt
13 adjudication and decision.’” *B.K.B.*, 276 F.3d at 1099 (citations omitted); *Garcia v. Los*
14 *Banos Unified School Dist.*, 418 F.Supp.2d 1194, 1212 (E.D. Cal. 2006).

15 “[T]itle VII’s purpose [is] eliminating the effects of discrimination in the
16 workplace. . . .” *Johnson v. Transportation Agency, Santa Clara County, California*, 480
17 U.S. 616, 630 (1987). In enacting Title VII, Congress intended the statute’s procedural
18 requirements to be liberally construed in order to remedy discrimination in the workplace and
19 to preserve a claimant’s federal remedies in discrimination suits. *Laquaglia v. Rio Hotel &*
20 *Casino, Inc.*, 186 F.3d 1172, 1177 (9th Cir. 1999) (citing *EEOC v. Commercial Office*
21 *Prods.*, 486 U.S. 107, 124 (1988) (“Title VII . . . is a remedial scheme in which laypersons,
22 rather than lawyers, are expected to initiate the process.”)).

24 **III. Failure to Exhaust Administrative Remedies**

25 “Although failure to file an EEOC complaint is not a complete bar to district
26 court jurisdiction, substantial compliance with the exhaustion requirement is a jurisdictional
27 pre-requisite.” *Leong*, 347 F.3d at 1122 (citing *Sommatino*, 255 F.3d at 708). “[E]xhaustion
28 of administrative remedies is central to the purpose of federal anti-discrimination statutes,

1 which is to provide the EEOC (or equivalent state agency) with a chance to informally
2 resolve employment discrimination claims before resort to litigation.” *Devereaux v. East Bay*
3 *Conservation Corp.*, 1998 WL 917798, at * 2 (N.D. Cal. 1998) (quoting, *e.g.*, *Ong*, 642 F.2d
4 at 319) . “[T]he charge must at least describe the facts and legal theory with sufficient clarity
5 to notify the agency that employment discrimination is claimed.” *Ong*, 642 F.2d at 319. “[A]
6 claimant’s failure to amend his charge to include a new claim is essentially the same as a
7 claimant’s failure to file an EEOC charge for the new claim.” *Albano v. Schering-Plough*
8 *Corp.*, 912 F.2d 384, 387 (9th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991).

9 While specific claims made in district court ordinarily must be presented to the
10 EEOC, district courts have jurisdiction over any charges of discrimination that are “like or
11 reasonably related to” the allegations made before the EEOC, as well as charges that are
12 within the scope of an EEOC investigation that reasonably could be expected to grow out of
13 the allegations. *Mamola v. Group Mfg. Services, Inc.*, 2010 WL 2643558, * 1 (D.Ariz. 2010)
14 (citing *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) and *Sosa v. Hiraoka*, 920 F.2d
15 1451, 1456 (9th Cir. 1990)). A plaintiff’s claim is reasonably related to the allegations in the
16 EEOC charge “to the extent that those claims are consistent with the plaintiff’s original
17 theory of the case.” *B.K.B.*, 276 F.3d at 1099 (finding that plaintiff’s EEOC charge was
18 reasonably related to claims for both racial and sexual harassment where the incidents of
19 harassment detailed in her pre-complaint questionnaire related to both race and gender).
20 *Vasquez*, 349 F.3d at 645-646 (plaintiff exhausted administrative remedies regarding
21 retaliation for filing a grievance claim because the EEOC charge described the retaliation,
22 but plaintiff did not exhaust remedies for his claim of retaliation for filing the EEOC charge
23 because the alleged retaliation was committed by individuals not identified as perpetrators
24 in the EEOC charge and took place after the EEOC investigation); *Nilsson v. City of Mesa*,
25 503 F.3d 947, 953 (9th Cir. 2007) (holding that plaintiff’s claim for disability discrimination
26 was not related to her EEOC charge for disability retaliation because the EEOC charge
27 merely claimed that the employer retaliated against her for filing a worker’s compensation
28 claim, but never alleged disability discrimination). A plaintiff, however, does not sufficiently

1 exhaust administrative remedies “by merely mentioning the word ‘discrimination’ in his or
2 her EEOC administrative charge.” *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 637
3 (9th Cir. 2002)

4 Although district courts must “construe the language of EEOC charges with
5 utmost liberality since they are made by those unschooled in the technicalities of formal
6 pleading . . . there is a limit to such judicial tolerance when principles of notice and fair play
7 are involved.” *Id.* at 636 (quoting *B.K.B.*, 276 F.3d at 1100) (internal quotations omitted).
8 To determine whether a plaintiff’s civil claim is reasonably related to the allegations in the
9 EEOC charge, district courts must examine “such factors as the alleged basis for the
10 discrimination, dates of discriminatory acts specified within the charge, perpetrators of
11 discrimination named in the charge, and any locations” where the discrimination allegedly
12 occurred. *Id.* (quoting *B.K.B.*, 276 F.3d at 1100) (quotation omitted).

13 Exhaustion is an affirmative defense that a defendant has the burden of raising
14 and proving. *Kraus v. Presidio Trust Facilities Div./ Residential Mgmt. Branch*, 572 F.3d
15 1039, 1046 n. 7 (9th Cir. 2009) (“[W]hether a plaintiff in a Title VII action has timely
16 exhausted her administrative remedies ‘is an affirmative defense, [so] the defendant bears the
17 burden of pleading and proving it.’” (quoting *Bowden v. United States*, 106 F.3d 433, 437
18 (D.C.Cir. 1997) (modification in original)).

19 **IV. Retaliation**

20 “Title VII prohibits, among other things, retaliation against an employee for
21 making a charge or otherwise participating in a Title VII proceeding.” *Nilsson*, 503 F.3d at
22 953 (citing 42 U.S.C. § 2000e-3(a)); see also *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093
23 (9th Cir. 2008) (“Employers may not retaliate against employees who have ‘opposed any
24 practice made an unlawful employment practice’ by Title VII.”) (quoting 42 U.S.C. §
25 2000e-3(a)). “To establish a claim of retaliation, a plaintiff must prove that (1) the plaintiff
26 engaged in a protected activity, (2) the plaintiff suffered an adverse employment action, and
27 (3) there was a causal link between the plaintiff’s protected activity and the adverse
28 employment action.” *Poland v. Chertoff*, 494 F.3d 1174, 1179-80 (9th Cir. 2007).

1 **V. Constructive discharge**

2 Constructive discharge claims are cognizable under Title VII when an
3 employee’s decision to resign is an objectively appropriate response to intolerable working
4 conditions. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). Constructive
5 discharge of an employee occurs “when an employer, rather than directly discharging an
6 individual, intentionally creates an intolerable work environment that forces an employee to
7 quit involuntarily.” *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 73 (2d Cir.
8 2000).

9 **VI. Discussion**

10 Because Plaintiff’s constructive discharge allegation can not be separated from
11 the merits of Plaintiff’s sexual harassment and retaliation claims, the Court takes all
12 Plaintiff’s allegations of material fact as true and construes them in the light most favorable
13 to Plaintiff. *Federation of African Amer. Contractors*, 96 F.3d at 1207.

14 The Court finds that the Plaintiff’s constructive discharge claim could
15 reasonably be expected to grow out of the hostile work environment and retaliation claims
16 she asserted in her EEOC charge. Examining the *B.K.B* factors, Plaintiff’s constructive
17 discharge claim is consistent with her sexual harassment and retaliation claims. *B.K.B.*, 276
18 F.3d at 1100. No meaningful dates on this issue have been provided the Court except the
19 dates Plaintiff filed her EEOC charge (April 2, 2007), the date she submitted her termination
20 letter (November 12, 2008), and the date (December 11, 2009) of the EEOC issued its
21 determination letter. If true, Plaintiff’s constructive discharge occurred substantially before
22 the EEOC completed and issued its December 11, 2009 determination letter. (Doc. 12-1, Exh
23 1 at 2) Perhaps no other dates, relevant information, or the scope of the EEOC’s
24 investigation⁴ have been provided to the Court because the record was not fully developed

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26 ⁴ The dearth of information provided the Court makes it sheer speculation whether
27 Plaintiff’s constructive discharge claim would naturally have been investigated as a part of
28 the EEOC investigation of Plaintiff’s original EEOC claims. The “scope of investigation”
doctrine provides that “the judicial complaint must be limited to the scope of the EEOC

1 at the time RPI filed its motion, *viz.*, on September 22, 2010. In fact, discovery in this case
2 does not close until June 30, 2011. (Doc. 20 at 5) RPI provides no information on, or
3 contrast to, the alleged perpetrators and locations involved in all Plaintiff's claims that
4 warrant an exhaustion finding on Plaintiff's constructive discharge claim. Additionally, RPI's
5 reliance on *Ong* is not helpful to the analysis of the issue and facts *sub judice* because the
6 *Ong* court found that Ong's constructive discharge claim differed substantially from his
7 claim of discrimination in promotion presented to the EEOC. *Ong*, 642 F.2d at 320. RPI's
8 argument that a constructive discharge is a distinct adverse action from an alleged
9 involuntary transfer adds little to the analysis of whether Plaintiff's constructive discharge
10 claim is "like or reasonably related to" the allegations Plaintiff made to the EEOC. Further,
11 the Court declines RPI's invitation to assume that Plaintiff's alleged constructive discharge
12 is temporally unrelated to the allegations made to the EEOC because, as Plaintiff argues,
13 RPI's unlawful acts continued beyond the April 2, 2007 EEOC filing date.

14 While there are cases that go both ways on whether a constructive discharge
15 claim not presented to the EEOC was properly exhausted, the Court is persuaded that RPI
16 has failed to meet its burden of proof on its affirmative defense (exhaustion) and, under the
17 facts of this case, it is not unfair to RPI to defend a constructive discharge claim on the
18 merits. *Dunbar v. County of Saratoga*, 358 F.Supp.2d 115, 129 (N.D.N.Y. 2005) (plaintiff's
19 constructive discharge claim is not barred for failure to exhaust administrative remedy
20 because it is based upon, at least in part, allegations that plaintiff was subjected to "obscene,
21 offensive and degrading behavior," which fairly describes the allegations contained in her
22 EEOC complaint.). *Contra, Diefenderfer v. Peters*, 2009 WL 1884419 (W.D.Wash. 2009);
23 *Lybarger v. Potter*, 2009 WL 2407735 (W.D.Mo. 2009).

24 The Court is unable to determine that "it appears beyond doubt that [P]laintiff
25 can prove no set of facts in support of [her constructive discharge] claim which would entitle
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27 investigation reasonably expected to grow out of the charge of discrimination." *Tisdale v.*
28 *Fed. Express Corp.*, 415 F.3d 516, 527 (6th Cir. 2005).

1 [her] to relief.” *Vignolo*, 120 F.3d at 1077. In an abundance of caution, the Court will
2 conclude Plaintiff’s constructive discharge claim is properly before the Court.

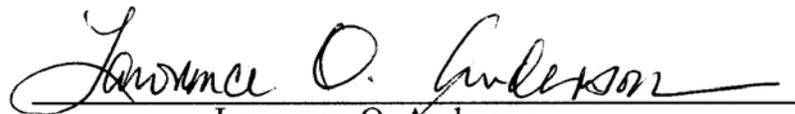
3 **VII. Conclusion**

4 Although it is undisputed that Plaintiff did not allege a constructive discharge
5 claim at the time she filed her EEOC charge, or amend her charge at or after the time she
6 submitted her termination letter, the Court nonetheless finds that RPI failed to prove that
7 Plaintiff’s constructive discharge claim is unrelated to her claims of sexual harassment and
8 retaliation. Construing, as it must, Plaintiff’s EEOC charge with “utmost liberality,” the
9 Court concludes that Plaintiff has not failed to exhaust her administrative remedies with
10 regard to her constructive discharge claim.

11 Accordingly,

12 **IT IS ORDERED** that Defendant’s Motion to Dismiss Plaintiff’s Discharge
13 Claim, Doc. 8, is **DENIED**.

14 DATED this 30th day of December, 2010.

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17 Lawrence O. Anderson
18 United States Magistrate Judge
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