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

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9 Tina N. Hoover,

10 Plaintiff,

11 vs.

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13 Eric Shinseki, Secretary, Department of  
Veterans Affairs,

14 Defendant.

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No. CV 11-00845-PHX-FJM

**ORDER**

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We have before us defendant's motion to dismiss for lack of subject matter jurisdiction (doc. 10), plaintiff's response (doc. 14), and defendant's tardy reply (doc. 15).

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**I**

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Plaintiff works as a nurse practitioner for the Department of Veterans Affairs' Casa Grande Clinic. Beginning in October 2009, she reported a co-worker's alleged sexual harassment to upper management and participated as a witness against him in an internal investigation. As a result, her first and second line supervisors allegedly began retaliating against plaintiff for her involvement.

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On August 12, 2010, plaintiff filed a formal complaint of discrimination with the Office of Resolution Management ("ORM") at the Department of Veterans Affairs ("VA"). The ORM dismissed some of her claims due to plaintiff's prior election of the union grievance procedure. The agency accepted for further processing claims of discrimination

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1 for receiving a written counseling and hostile work environment harassment, both based on  
2 sex, age, and/or reprisal for prior EEO activity. (Doc. 10, ex. 3 at 8). On January 30, 2011,  
3 plaintiff was informed in writing that she had the right to request a hearing with the EEOC,  
4 file a civil action, or await the final agency decision. Plaintiff filed this action on April 27,  
5 2011. The agency dismissed her administrative complaint on June 9, 2011 due to the  
6 pendency of this action. Plaintiff alleges a single cause of action for retaliation under Title  
7 VII of the Civil Rights Act of 1964. Defendant claims plaintiff did not file an administrative  
8 complaint for retaliation, and that we lack subject matter jurisdiction over unexhausted  
9 claims.

## 10 II

11 The United States continues to ignore the Supreme Court's clear mandate to be precise  
12 when using the term "jurisdiction." "In a series of recent cases, the Supreme Court has  
13 addressed courts' misapplication of the label 'jurisdiction' to what are actually merits-based  
14 dismissals for failure to state a claim." Dunlap v. United States, No. CV 11-01360-PHX-  
15 FJM, 2012 WL 510532, at \*2 (D. Ariz. Feb. 16, 2012). "[T]he term 'jurisdictional' properly  
16 applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and  
17 the persons (personal jurisdiction)' implicating that authority." Reed Elsevier, Inc. v.  
18 Muchnick, \_\_ U.S. \_\_, 130 S. Ct. 1237, 1243 (2010). To determine whether a statutory  
19 prerequisite is truly jurisdictional, we apply the "readily administrable bright line" rule of  
20 Arbaugh v. Y&H Corp., 546 U.S. 500, 516, 126 S. Ct. 1235, 1245 (2006). A rule is  
21 jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope  
22 shall count as jurisdictional." Id. at 515, 126 S. Ct. at 1245. The Supreme Court counsels  
23 us to focus on the legal character of the limitation, which is "discerned by looking to the  
24 condition's text, context, and relevant historical treatment." Reed Elsevier, 130 S. Ct. at  
25 1246; see Henderson ex rel. Henderson v. Shinseki, \_\_ U.S. \_\_, 131 S. Ct. 1197, 1204-05  
26 (2011).

27 Before a plaintiff may bring a Title VII claim in district court, she must first exhaust  
28 her administrative remedies. 42 U.S.C. § 2000e-16(c); B.K.B. v. Maui Police Dep't, 276

1 F.3d 1091, 1099 (9th Cir. 2002). The purpose of Title VII is "to provide an opportunity to  
2 reach a voluntary settlement of an employment discrimination dispute," and exhaustion  
3 furthers this goal. Blank v. Donovan, 780 F.2d 808, 809 (9th Cir. 1986). This requirement  
4 also "serves the important purposes of giving the charged party notice of the claim and  
5 narrowing the issues for prompt adjudication and decision." B.K.B., 276 F.3d at 1099  
6 (brackets and quotation marks omitted).

7 A federal employee claiming employment discrimination must seek relief from the  
8 allegedly discriminating agency before bringing an action in federal court. The employee  
9 must notify an EEO counselor at the agency within 45 days of the alleged discriminatory  
10 conduct. 29 C.F.R. § 1614.105(a). If the matter is not resolved, the employee may then file  
11 a formal administrative complaint with the agency. 29 C.F.R. § 1614.106; Sommato v.  
12 United States, 255 F.3d 704, 708 (9th Cir. 2001). This charge must "describe generally the  
13 action(s) or practice(s) that form the basis of the complaint." 29 C.F.R. § 1614.106(c). The  
14 employee may appeal to the EEOC or file a civil action within 90 days of an unfavorable  
15 agency decision or after 180 days from the filing of the initial charge if the agency fails to  
16 take final action. 42 U.S.C. § 2000e-16(c). After an EEOC appeal is filed, the employee  
17 may file a civil action within 90 days of the EEOC's final decision or after 180 days from the  
18 filing of the appeal if no decision has been issued. Id.; 29 C.F.R. § 1614.407. While the  
19 statutory language sets out detailed procedures that must be followed before filing a court  
20 action, the statute does not condition our jurisdiction on proper exhaustion of administrative  
21 remedies.

22 In addition, Congress enacted a jurisdictional provision specifically for Title VII,  
23 granting jurisdiction to district courts "of actions brought under" Title VII. 42 U.S.C. §  
24 2000e-5(f)(3). This statute does not contain any reference to exhaustion. Neither text nor  
25 context indicate that exhaustion of administrative remedies is jurisdictional.

26 "Subject matter jurisdiction relates to the power of a court to hear the class of claims  
27 to which the claim belongs and is not defeated just because the claim is barred by a defense."  
28 Dunlap, 2012 WL 510532, at \*5. Exhaustion is typically a defense, not a jurisdictional

1 limitation. In Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 921 (2007), the Supreme  
2 Court held that the exhaustion provision in the Prison Litigation Reform Act is not  
3 jurisdictional, but an affirmative defense. See also Reed Elsevier, 130 S. Ct. at 1246-47  
4 ("We similarly have treated as nonjurisdictional other types of threshold requirements that  
5 claimants must complete, or exhaust, before filing a lawsuit."); Day v. McDonough, 547 U.S.  
6 198, 205, 126 S. Ct. 1675, 1681 (2006) (describing exhaustion of state remedies as a  
7 nonjurisdictional threshold barrier to habeas review). While failure to exhaust may bar a  
8 claim, it plainly is not jurisdictional. We have jurisdiction. We turn next to exhaustion.

### 9 III

10 "EEOC charges must be construed with utmost liberality since they are made by those  
11 unschooled in the technicalities of formal pleading." Sosa v. Hiraoka, 920 F.2d 1451, 1458  
12 (9th Cir. 1990) (quoting Chung v. Pomona Valley Cmty. Hosp., 667 F.2d 788, 790 (9th Cir.  
13 1982)). Therefore, we may consider as exhausted "any charges of discrimination that are  
14 'like or reasonably related to' the allegations made before the EEOC, as well as charges that  
15 are within the scope of an EEOC investigation that reasonably could be expected to grow out  
16 of the allegations." Leong v. Potter, 347 F.3d 1117, 1122 (9th Cir. 2003). "The EEOC's  
17 failure to address a claim asserted by the plaintiff in her charge has no bearing on whether  
18 the plaintiff has exhausted her administrative remedies with regard to that claim." B.K.B.,  
19 276 F.3d at 1099. When determining whether an allegation not specified in the charge is  
20 exhausted, we consider factors such as "the alleged basis of the discrimination, dates of  
21 discriminatory acts specified within the charge, perpetrators of discrimination named in the  
22 charge, and any locations at which discrimination is alleged to have occurred." Id. at 1100.

23 Defendant contends that a difference exists between "a hostile work environment  
24 claim for which a base is retaliation . . . [and] a straight retaliation claim," and that plaintiff's  
25 administrative complaint covered only harassment and hostile work environment claims.  
26 (Doc. 10 at 7). But plaintiff's claim of retaliation was obviously within the scope of an  
27 investigation that reasonably could be expected to grow out of her allegations.

28 Plaintiff's complaint was entitled "Harassment/Hostile work environment/

1 Discrimination based on age, sex, prior position, and retaliation for my part in a recent  
2 administrative board investigation related to alleged sexual harassment by the office  
3 manager." (Doc. 10, ex. 2 at 2). She sought an investigation of three co-workers "for  
4 retaliatory harassment." (Doc. 10, ex. 2 at 3). Retaliatory actions were mentioned many  
5 times in plaintiff's complaint. For instance, after plaintiff received an anonymous card telling  
6 her to "get lost" and calling her a derogatory name, she became "concerned with retaliation."  
7 (Doc. 10, ex. 2 at 9). Other facts could reasonably be interpreted as alleging retaliatory  
8 actions by her supervisors. See Vasquez v. Cnty. of Los Angeles, 349 F.3d 634, 645 (9th  
9 Cir. 2003) (finding exhaustion because "[w]hile the EEOC charge does not contain the  
10 relevant legal theory of retaliation, it does contain the relevant factual allegations.").

11 The partial acceptance letter accepted two claims for further processing: whether  
12 plaintiff was discriminated against on the bases of sex, age, and/or reprisal for prior EEO  
13 activity when she received a written counseling, and whether she was subjected to hostile  
14 work environment harassment on the same bases. The requests for records relating to  
15 plaintiff's employment checked the boxes for age, sex, and reprisal as bases of the complaint.  
16 The agency's investigation was clearly directed, in part, at finding evidence of retaliation for  
17 plaintiff's participation in the sexual harassment investigation of her co-worker.

18 The factors listed in B.K.B. support plaintiff's argument that her claim was exhausted.  
19 All acts relating to harassment, hostile work environment, and retaliation occurred between  
20 August 2009 and the filing of the administrative complaint in August 2010. The same people  
21 are alleged to have committed all actions underlying the harassment and retaliation claims.  
22 All actions took place at the VA clinic in Casa Grande. Facts relating to plaintiff's  
23 participation in the sexual harassment investigation would necessarily have arisen during the  
24 investigation of plaintiff's case. The civil claim for retaliation is reasonably related to  
25 allegations in the charge because it is "consistent with the plaintiff's original theory of the  
26 case." B.K.B., 276 F.3d at 1100.

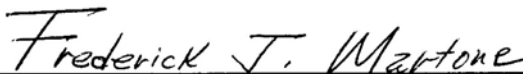
27 Plaintiff did not attempt to bypass the administrative process. Her administrative  
28 complaint was sufficiently detailed to notify the VA of her allegations and afford it an

1 opportunity to pursue conciliation. Allowing her to proceed does not circumvent Title VII's  
2 goal of encouraging voluntary compliance and conciliation. B.K.B., 276 F.3d at 1099. "The  
3 absence of a perfect 'fit' between the administrative charge and the judicial complaint is  
4 therefore not fatal to judicial review if the policies of promoting conciliation and avoiding  
5 bypass of the administrative process have been served." Ong v. Cleland, 642 F.2d 316, 319  
6 (9th Cir. 1981). Because plaintiff's administrative complaint included retaliation, plaintiff  
7 exhausted her administrative remedies.

8 **IV**

9 Accordingly, **IT IS ORDERED DENYING** defendant's motion to dismiss (doc. 10).

10 DATED this 3<sup>rd</sup> day of April, 2012.

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14 Frederick J. Martone  
15 United States District Judge  
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