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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Gail L. Rush-Shaw,

No. CV 12-0941-PHX-JAT

9 Plaintiff,

ORDER

10 vs.

11 USF Reddaway, Inc., a corporation,

12 Defendant.
13

14 Pending before the Court are Defendant's Motion for Summary Judgment on
15 Plaintiff's Title VII claim (the "Motion") (Doc. 21), Plaintiff's Response to Defendant's
16 Motion for Summary Judgment and Cross-Motion for Separate Bench Trial (the "Cross-
17 Motion") (Doc. 24), and Defendant's Reply in Support of Motion for Summary Judgment
18 and Response to Plaintiff's Cross-Motion. (Doc. 33). For the reasons set forth below,
19 Defendant's Motion for Summary Judgment is denied and Plaintiff's Cross-Motion is also
20 denied.

21 **I. BACKGROUND**

22 Plaintiff Gail Rush-Shaw worked for Defendant USF Reddaway, Inc. as the
23 Terminal Manager of Reddaway's Phoenix trucking terminal until Reddaway terminated
24 Plaintiff on March 25, 2011. (Doc. 21 at 2). On April 7, 2011, Plaintiff contacted the U.S.
25 Equal Employment Opportunity Commission ("EEOC") to obtain information regarding
26 her right to file a discrimination suit. (*Id.*). Plaintiff asserts that during that telephone call,
27 the EEOC representative told her she had 360 days to file a claim for discrimination. (*Id.*).
28 For purposes of this motion, Defendant does not dispute Plaintiff's claim that she was told

1 by the EEOC that she had 360 days to file her claim. (Doc. 33 at 6). It is uncontroverted
2 that under the law Plaintiff had until January 19, 2012, or 300 days from the last
3 discriminatory act, to file a charge of discrimination. (Doc. 24 at 2). The parties do not
4 dispute that Plaintiff's 300 days began on March 25, 2011, the date Plaintiff was
5 terminated. (Doc. 24 at 3). It is further undisputed that Plaintiff did not file her charge of
6 discrimination with the EEOC within the 300 day time limit. (*Id.* at 3).

7 On or around February 12, 2012, 313 days after the date Plaintiff was terminated,
8 Plaintiff visited the EEOC's website and located and printed a copy of the EEOC's Intake
9 Questionnaire. (Doc. 22 at ¶ 21).

10 On February 14, 2012, Plaintiff sent a six-page fax to the EEOC which contained a
11 transmittal form, a cover letter to the EEOC written by Plaintiff, and a copy of the Intake
12 Questionnaire filled out and signed by Plaintiff. (Doc. 22 at ¶ 26). In the cover letter,
13 Plaintiff stated that she desired "to speak with an individual regarding possible gender
14 discrimination" arising from her termination of employment with Defendant. (*Id.* at ¶ 28).
15 It is undisputed that Plaintiff did not have contact with anyone at the EEOC between the
16 telephone call on April 7, 2011 and her fax on February 14, 2012. (*Id.* at ¶ 27).

17 On or around February 29, 2012, Plaintiff received a telephone message from an
18 EEOC representative. (Plaintiff's Depo. at p. 62:3-63:54). On March 1, 2012, Plaintiff
19 contacted the EEOC to set up an interview for March 2, 2012. (*Id.* at 63:9-63:18). On
20 March 2, 2012, Plaintiff spoke with an EEOC representative over the phone for about an
21 hour. (*Id.* at 63:19-64:17). During this telephone call, the EEOC representative informed
22 Plaintiff that it would not be conducting an investigation into Plaintiff's charge because it
23 was "outside their justidiction" but the EEOC would issue Plaintiff a right to sue letter. (*Id.*
24 at 65:14-66:9). A few days after the March 2, 2012 telephone call, Plaintiff received the
25 draft charge of discrimination and telephoned the EEOC a third time to make a correction
26 on the draft. (*Id.* at 42:1-6).

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1 On March 8, 2012, Plaintiff filed charge of discrimination with the EEOC. (Doc. 24
2 at 3; Plaintiff’s Depo. at p. 74:20-75:5). Plaintiff indicated on the charge that the latest date
3 discrimination took place was on March 25, 2011. (Doc. 22 at ¶ 39).

4 On March 27, 2012 the EEOC issued a Dismissal and Notice of Right to Sue on
5 Plaintiff’s charge because her charge was “not timely filed with the EEOC.” (Doc. 22 at ¶
6 40). Approximately one week after receiving this notice, Plaintiff sought and retained
7 counsel. (*Id.* at ¶ 42).

8 On May 3, 2012, Plaintiff filed a complaint with this Court seeking equitable relief
9 and money damages for sex discrimination pursuant to Title VII of the Civil Rights Act of
10 1964, 42 U.S.C. §2000e, as amended. (Doc. 1). Defendant now moves for summary
11 judgment on Plaintiff’s claim arguing Plaintiff’s claim is time barred because it is
12 undisputed that she filed her charge with the EEOC after the 300 day time limit. (Doc. 21
13 at 1). Defendant further argues that no equitable exception applies. (*Id.*) Plaintiff’s
14 response, in addition to arguing Summary Judgment is inappropriate, moves for a Bench
15 Trial on the equitable tolling issue.

16 **II. LEGAL STANDARD**

17 Summary judgment is appropriate when “the movant shows that there is no genuine
18 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
19 Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely disputed
20 must support that assertion by . . . citing to particular parts of materials in the record,
21 including depositions, documents, electronically stored information, affidavits, or
22 declarations, stipulations . . . admissions, interrogatory answers, or other materials,” or by
23 “showing that materials cited do not establish the absence or presence of a genuine dispute,
24 or that an adverse party cannot produce admissible evidence to support the fact.” *Id.* at
25 56(c)(1)(A)&(B). Thus, summary judgment is mandated “against a party who fails to
26 make a showing sufficient to establish the existence of an element essential to that party’s
27 case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v.*
28 *Catrett*, 477 U.S. 317, 322 (1986).

1 **III. ANALYSIS**

2 Defendant argues that Plaintiff’s claim is time-barred because she failed to file her
3 Charge of Discrimination with the EEOC within the 300-day limit, and Plaintiff’s claim is
4 not entitled to equitable tolling. (Doc. 21 at 1). For purposes of the Motion for Summary
5 Judgment, Defendant does not dispute Plaintiff’s claim that she was misinformed by the
6 EEOC. (Doc. 33 at 6). Rather, Defendant argues that Plaintiff cannot meet her burden of
7 showing that she exercised “all due diligence” in pursuing her legal rights, and therefore
8 equitable tolling does not apply to save Plaintiff’s claim. (*Id.*). In response, Plaintiff argues
9 that the Court should deny Defendant’s Motion for Summary Judgment because there is a
10 genuine issue of material fact as to whether Plaintiff is entitled to equitable tolling. (Doc.
11 24 at 1). Plaintiff also moves for a separate Bench Trial on the issue of equitable tolling.
12 (*Id.*).

13 **A. Equitable Tolling**

14 Before a plaintiff may bring an Title VII suit in federal court, the plaintiff must first
15 exhaust his or her administrative remedies by filing a timely charge with the EEOC.
16 *Josephs v. Pac. Bell*, 443 F.3d 1050, 1054 (9th Cir. 2005). In Arizona, a “deferral” state, a
17 plaintiff must file his or her charge with the EEOC no later than 300 days after the last date
18 of discrimination. 42 U.S.C. § 2003e-5(e); see *Lewis v. Arizona*, CV 10-2387-PHX-JAT,
19 2011 WL 3665367, at *6 (D. Ariz. Aug. 22, 2011) (dismissing plaintiff’s claim because
20 plaintiff failed to file her charge with the EEOC within 300 days). However, the 300-day
21 filing deadline is “an administrative requirement that, like the statute of limitations, is
22 subject to waiver, estoppel, and equitable tolling.” *Santa Maria v. Pac. Bell*, 202 F.3d
23 1170,1176 (9th Cir. 2000) (internal citations omitted); see *Holland v. Florida*, 130 S.Ct.
24 2549, 2560 (2010) (“We have made it previously clear that a nonjurisdictional federal
25 statute of limitations is normally subject to a rebuttable presumption in favor of equitable
26 tolling.”). Equitable tolling may be available to a plaintiff who:

- 27 (1) diligently pursued his claim; (2) was misinformed or misled
28 by the administrative agency responsible for processing his
charge; (3) relied in fact on the misinformation or

1 misrepresentation of that agency, causing him to fail to exhaust
2 his administrative remedies; and (4) was acting pro se at the
3 time.

4 *Josephs*, 443 F.3d at 1054.

5 As discussed above, the parties do not dispute that Plaintiff was required to file her
6 charge with the EEOC within 300 days and failed to do so. (Doc. 24 at 3). Further, for
7 purposes of this motion, Defendant does not dispute that the Plaintiff was misinformed by
8 the EEOC and told she had 360 days to file her claim with the EEOC. (Doc. 33 at 6).
9 Rather, Defendant argues that: (1) equitable tolling does not apply in this case because
10 EEOC’s misstatements cannot be attributed to Defendant, and (2) Plaintiff is not entitled to
11 equitable tolling because Plaintiff cannot meet her burden that she exercised “all due
12 diligence” in pursuing her claim. (Doc. 21 at 8; Doc. 33 at 6).¹

13 **1. Equitable Tolling Applies in this Case**

14 As an initial matter, Defendant argues that equitable tolling does not apply in this
15 case because Defendant never misled Plaintiff about her rights and EEOC’s misleading
16 statement cannot be attributed to Defendant. (Doc. 21 at 8). To support this argument,
17 Defendant cites a case from the Second Circuit Court of Appeals. (*Id.*). Specifically,
18 Defendant cites *Vernon v. Cassadaga Valley Central School District*, 49 F.3d 886, 891 (2d
19 Cir. 1995), to argue it is ‘questionable’ whether acts of the EEOC can trigger equitable
20 tolling in a case where the federal government is not a party. (Doc. 21 at 8). However, in
21 *Vernon*, the court did not explicitly hold that equitable tolling *cannot* be used in cases

22 ¹ The Court notes that Defendant argues in its Motion that “Plaintiff cannot offer any
23 evidence (other than her own self-serving testimony) to support her allegations that the
24 EEOC misinformed her” and absent any corroborating evidence equitable tolling is
25 unavailable to Plaintiff. (Doc 21 at 10-11). However, Defendant explicitly states that for
26 purposes of this motion Defendant does not dispute Plaintiff’s testimony that she was
27 misinformed by the EEOC. (Doc. 33 at 6). Defendant cannot base its motion for summary
28 judgment on the premise that it does not dispute Plaintiff’s testimony, and nonetheless
argue that its motion should be granted because Plaintiff’s testimony is an “unsupported
allegation.” (Doc. 21 at 10).

1 between non-government parties, but rather equitable tolling in cases involving non-
2 government parties is generally more difficult to prove. 49 F.3d at 891.

3 Additionally, the Ninth Circuit has explicitly stated that equitable tolling may be
4 available when “an EEOC representative misleads the plaintiff concerning his claim. *See*
5 *Rodriguez v. Airborne Express*, 265 F.3d 890, 901-02 (9th Cir. 2001).” *Josephs*, 443 F.3d
6 at 1054. As a result, this Court holds that Plaintiff may be entitled to equitable tolling
7 notwithstanding the fact that the EEOC is not a party to this case.

8 **2. Due Dilligence (First Requirement under *Josephs*)**

9 Defendant argues that because Plaintiff took no action between the telephone call
10 on April 7, 2011, when Plaintiff was misinformed she had 360 days to file her claim, and
11 Plaintiff’s fax to the EEOC on February 14, 2012, Plaintiff has failed to show she
12 exercised “all due diligence” in preserving her legal rights. (Doc. 21 at 9). In response,
13 Plaintiff states it is uncontroverted that Plaintiff filed her charge with the EEOC within the
14 360 days she believed to be the time limit, and as a result is entitled to equitable tolling.
15 (Doc. 24 at 3).

16 Defendant relies on *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151
17 (1984) which holds that “one who fails to act diligently cannot invoke equitable principles
18 to excuse lack of diligence.” (Doc. 33 at 3). However, in *Baldwin*, the plaintiff was told
19 three separate times what she needed to do to preserve her claim, yet plaintiff failed to do
20 so. 466 U.S. at 151. The plaintiff in *Baldwin* was not misled or given incorrect
21 information, but instead simply did not file her claim within the time frame explicitly
22 stated by the District Court. *Id.* at 148. In contrast, in the present case, Plaintiff filed her
23 claim within what she believed was the correct time frame based on her telephone call with
24 the EEOC. Additionally, Plaintiff retained counsel within one week of receiving a
25 Dismissal and Notice of Right to Sue from the EEOC based on the notice. (Doc. 22 at ¶
26 42).

27 As Defendant notes, the Supreme Court has previously held that a parties’ lack of
28 diligence may prohibit equitable remedies. *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005)

1 (finding petitioner did not exercise due diligence because he waited almost ten years
2 without any valid justification to assert his claims). (Doc. 21 at 9). However, the Supreme
3 Court has also acknowledged the need for courts of equity recognize the “flexibility
4 inherent in equitable procedure[s]” which allows “courts to meet new situations that
5 demand equitable intervention, and to accord all the relief necessary to correct particular
6 injustices.” *Holland*, 130 S.Ct. at 2563.

7 **3. Other *Josephs* Factors**

8 As indicated above, *Josephs*’ requires three other factors for equitable tolling to
9 apply. 443 F.3d at 1054. In addition to showing due diligence, a plaintiff must show that
10 he or she was misinformed or misled by the administrative agency responsible for
11 processing his or her charge, plaintiff relied in fact on the misinformation of that agency,
12 and plaintiff was acting pro se at the time. Defendant has not disputed that Plaintiff has
13 satisfied these three factors in this case. Accordingly, because the Court has found Plaintiff
14 satisfies the first factor of due diligence and because the additional three factors are not in
15 dispute, the Court finds Plaintiff has satisfied all four factors under the *Josephs* test.
16 Considering the facts undisputed for purposes of this Order, the Court finds Plaintiff’s
17 filing qualifies for equitable tolling and is not time-barred. Thus, Defendant’s Motion for
18 Summary Judgment is denied.

19 **B. Plaintiff’s Cross-Motion for a Bench Trial**

20 In her response, Plaintiff moves to bifurcate this action and hold a separate bench
21 trial on the issue of equitable tolling. (Doc. 24 at 8). Having taken Plaintiff’s facts as true,
22 which Defendant did not dispute for purposes of Defendant’s Motion for Summary
23 Judgment (Doc. 33 at 6), the Court has found that Plaintiff is entitled to equitable tolling.
24 Because the Court has held that on this undisputed record Plaintiff is entitled to equitable
25 tolling, the Court need not conduct a bench trial on this issue. In other words, the Court
26 finds that Plaintiff’s request for an expedited bench trial for her to affirmatively prove that
27 she is within the statute of limitations would amount to an advisory opinion at this time
28 because Defendant is not currently disputing any facts, and this Court has concluded on

1 the undisputed facts that Plaintiff is entitled to equitable tolling. Thus, Plaintiff's motion
2 for bench trial will be denied as moot without prejudice.

3 If Defendant again seeks to raise a statute of limitations defense by disputing the
4 facts that the Court has taken as true for purposes of this Order, Defendant may raise such
5 issue at the time of trial, and shall include briefing on whether Defendant argues that statute
6 of limitations issues, and equitable tolling, are to be either: 1) decided by the Court
7 (following either an evidentiary hearing or a bench trial), 2) decided by the Court after
8 sending special interrogatories to the jury on the disputed facts, or 3) decided by the jury.
9 However, Defendant later claiming a disputed issue of fact is not any opportunity for
10 Defendant to seek reconsideration of the Court's ruling in this Order that accepting
11 Plaintiff's statements as true, Plaintiff is entitled to equitable tolling.

12 **III. CONCLUSION**

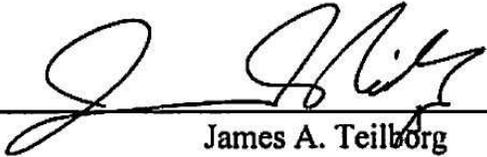
13 Based on the foregoing,

14 **IT IS ORDERED** that Defendant's Motion for Summary Judgment (Doc. 21) is
15 denied.

16 **IT IS FURTHER ORDERED** that Plaintiff's Cross-Motion for a Bench Trial
17 (Doc. 24) is denied as moot.

18 Dated this 9th day of July, 2013.

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James A. Teilborg
Senior United States District Judge