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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Alphatine Garnes,

10 Plaintiff,

11 v.

12 Vitalant,

13 Defendant.
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No. CV-19-04857-PHX-DWL

ORDER

15 In this action, Plaintiff Alphatine Garnes (“Plaintiff”) has asserted claims against
16 her former employer, Defendant Vitalant f/k/a Blood Systems, Inc. (“Defendant”), for
17 violating Title VII of the Civil Rights Act of 1984 (Counts I-II) and the Americans with
18 Disabilities Act (Count III). (Doc. 1.) Among other things, the complaint alleges that the
19 Equal Employment Opportunity Commission (“EEOC”) issued a right-to-sue letter to
20 Plaintiff on April 18, 2019 but Plaintiff didn’t receive the letter until May 3, 2019. (*Id.*
21 ¶¶ 32-33.) If this chronology were accurate, it would mean that the date on which Plaintiff
22 initiated this action, July 31, 2019, was 89 days after she received the right-to-sue letter.

23 Several months ago, Plaintiff’s counsel moved to withdraw “because irreconcilable
24 differences have arisen between lawyer and client regarding case strategy and because of
25 concerns under ER 1.16(a)(1).” (Doc. 34.) The withdrawal motion was properly served
26 on Plaintiff and, after Plaintiff failed to respond in the time permitted by this Court’s rules,
27 it was granted. (Doc. 36.)

28 Separately, Defendant has now filed a motion for summary judgment. (Doc. 35.)

1 Due to the withdrawal of Plaintiff’s counsel, the Court afforded extra time for Plaintiff to
2 respond to Defendant’s motion (Doc. 36), but the extra time has expired and Plaintiff still
3 has not responded.

4 Although Defendant’s summary judgment motion is unopposed, this doesn’t mean
5 it may automatically be granted. As the advisory committee notes to Rule 56 explain,
6 “summary judgment cannot be granted by default even if there is a complete failure to
7 respond to the motion.” This is because, “under the summary judgment standard, if the
8 moving party fails to meet its initial burden of production, the opposing party need not
9 produce anything.” *Finkle v. Ryan*, 174 F. Supp. 3d 1174, 1181 (D. Ariz. 2016). Thus, an
10 “opposing party’s failure to respond to a fact asserted in” a summary judgment motion
11 simply “permits a court to consider the fact undisputed for purposes of the motion.”
12 *Heinemann v. Satterberg*, 731 F.3d 914, 917 (9th Cir.2013) (internal quotation marks
13 omitted).

14 Here, Defendant argues it is entitled to summary judgment for several reasons,
15 including that Plaintiff’s action is time-barred. (Doc. 35 at 8-9.) Specifically, Defendant
16 argues that Plaintiff received the EEOC’s right-to-sue letter within three days of when it
17 was issued on April 18, 2019 (and not on May 3, 2019, as alleged in the complaint), which
18 means that by the time Plaintiff filed this action on July 31, 2019, the 90-day limitations
19 period had expired. (*Id.*)

20 The Court agrees that Defendant is entitled to summary judgment on this basis.
21 Because Plaintiff did not respond to Defendant’s motion, the Court may accept as
22 “undisputed” Defendant’s factual assertion that Plaintiff received the right-to-sue letter by
23 no later than April 21, 2019. *Heinemann*, 731 F.3d at 917.¹ This was more than 90 days
24 before Plaintiff initiated this action. Accordingly, this action is time-barred. *Payan v.*
25 *Aramark Mgmt. Servs. Ltd. P’ship*, 495 F.3d 1119, 1121-22 (9th Cir. 2007) (“Title VII

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27 ¹ The materials attached to Defendant’s motion also support this conclusion. Those
28 materials reveal that, during her deposition in this case, Plaintiff acknowledged that the
right-to-sue letter bore a mailing date of April 18, 2019 and then answered “Yes” when
asked: “Did you receive this shortly after that?” (Doc. 35-1 at 77.)

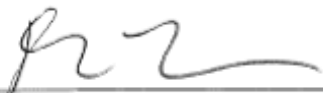
1 provides that upon dismissing a charge of discrimination, the EEOC must notify the
2 claimant and inform her that she has ninety days to bring a civil action. . . . [T]his ninety-
3 day period operates as a limitations period. . . . We measure the start of the limitations
4 period from the date on which a right-to-sue notice letter arrived at the claimant's address
5 of record."'). Given this conclusion, there is no need to address Defendant's other summary
6 judgment arguments.

7 Accordingly,

8 **IT IS ORDERED** that:

- 9 (1) Defendant's motion for summary judgment (Doc. 35) is **granted**.
10 (2) The Clerk of Court shall enter judgment accordingly and terminate this
11 action.

12 Dated this 20th day of November, 2020.

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17 Dominic W. Lanza
18 United States District Judge
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