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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 VENA L. WARD,

8 Plaintiff,

9 v.

10 RAY MABUS,

11 Defendant.

CASE NO. C15-5477 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S PARTIAL
MOTION TO DISMISS

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13 This matter comes before the Court on Defendant Ray Mabus's ("Mabus") partial
14 motion to dismiss (Dkt. 16).¹ The Court has considered the pleadings filed in support of
15 and in opposition to the motion and the remainder of the file and hereby grants the
16 motion in part and denies it in part for the reasons stated herein.

17 **I. PROCEDURAL HISTORY**

18 On July 9, 2015, Plaintiff Vena Ward ("Ward") filed a complaint against Mabus,
19 in his official capacity as Secretary of the Navy. Dkt. 1. On July 24, 2015, Ward filed an
20 amended complaint, alleging discrimination, hostile work environment, and retaliation in

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22 ¹ For the reasons explained below, the Court treats Mabus's motion to dismiss as one for
summary judgment.

1 violation of the Rehabilitation Act and Title VII of the Civil Rights Act. Dkt. 5
2 (“Comp.”) ¶¶ 18–51.

3 Ward alleges her “promotion to GS-12² was repeatedly delayed without
4 explanation.” *Id.* ¶ 10. Ward also claims she “was frequently denied opportunities that
5 others outside of her protected classes were provided,” including “temporary duty
6 assignments, scheduling, and position assignments.” *Id.* ¶ 11. Ward further alleges her
7 supervisors “restricted her from working weekends, restricted her from working aboard
8 ships, and relegated her to an isolated position that further ostracized her from the rest of
9 the employees” while the Equal Employment Opportunity Commission (“EEO”) was
10 investigating her complaint. *Id.* ¶ 15.

11 On May 19, 2016, Mabus filed a partial motion to dismiss. Dkt. 16. On June 6,
12 2016, Ward responded. Dkt. 18. On June 10, 2016, Mabus replied. Dkt. 21.

13 **II. FACTUAL BACKGROUND**

14 In May 2005, the Department of the Navy (“Navy”) hired Ward as a nuclear
15 engineering student trainee at the Puget Sound Naval Shipyard. Dkt. 19, Declaration of
16 Vena Ward (“Ward Dec.”) ¶¶ 3–4, 7. Ward is an African-American woman with a vision
17 impairment. *Id.* ¶¶ 1–2.

18 Ward worked as a student trainee during the summers of 2005, 2006, and 2007.
19 *Id.* ¶ 4. In June 2008, the Navy hired Ward as a full-time nuclear engineer at GS-07. *Id.*
20 She was assigned to the position of nuclear trouble desk engineer at GS-11 in August

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22 ² “GS” stands for the General Schedule, which is the basic pay scale for employees of the federal government. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 459 n.2 (1995).

1 not know exactly what the managers are thinking. Based on my
2 discussions with Ms. Moore, I believed at the time that I did not have a
3 right to bring an EEO complaint. She held herself out to me as if she was
4 the person to whom EEO complaints were to be made and that she would
5 not entertain mine. She made it seem that she was the “be all, end all” of
6 the complaint process, and did not inform that regardless of her opinions as
7 the building man[anager and code administrative officer, I could still
8 complain[] to the EEO office. It was only later in 2014 when I complained
9 to Arch McCleskey about the use of the word “nigger” in the workplace
10 and other issues that he (reluctantly) provided me with the form directing
11 me to call the EEO office—not Lisa Moore.

* * *

7 My meeting with Arch McCleskey on September 10, 2014, was the
8 first and only time I had ever been given information on how to file an EEO
9 complaint. Despite having approached Mr. Corich and Ms. Moore on
10 numerous prior occasions, I was never told I had the right to file a
11 complaint myself nor had I been directed to the appropriate contact
12 information for the EEO office. Indeed, I had been dissuaded from filing
13 and told that I had no claim.

11 *Id.* ¶¶ 32–33, 56. Ward was promoted to GS-12 on December 30, 2012. Whitehead
12 Dec., Ex. 3.

13 On October 1, 2014, Ward filed an informal EEO complaint, in which she alleged
14 discrimination “based on race, gender, and disability” through “emails, comments, and
15 missed promotions.” Whitehead Dec., Ex. 4 at 2. After engaging in the informal
16 complaint process, Ward filed a formal complaint with the Navy’s EEO office on January
17 6, 2015. Whitehead Dec., Ex. 2. Ward continues to work as a nuclear engineer at the
18 Shipyard. Ward Dec.¶ 2.

19 III. DISCUSSION

20 Mabus seeks to dismiss Ward’s disparate treatment and retaliation claims to the
21 extent they are based on discrete acts that occurred outside of the limitations period. Dkt.
22 16 at 7, 9.

1 **A. Materials Outside Pleadings**

2 When deciding a motion to dismiss, a court’s consideration is limited to the
3 pleadings. Fed. R. Civ. P. 12(d). A motion to dismiss under Rule 12(b)(6) must be
4 treated as a motion for summary judgment under Rule 56 if either party submits materials
5 outside the pleadings in support of or in opposition to the motion, and if the district court
6 relies on those materials. Fed. R. Civ. P. 12(b)(6); *Jackson v. Southern California Gas*
7 *Co.*, 881 F.2d 638, 643 n.4 (9th Cir. 1989) (“The proper inquiry is whether the court
8 relied on the extraneous matter.”).

9 In this case, both parties have submitted material outside the pleadings. Having
10 considered this extrinsic evidence, the Court converts Mabus’s motion to dismiss into one
11 for summary judgment.

12 **B. Summary Judgment Standard**

13 Summary judgment is proper only if the pleadings, the discovery and disclosure
14 materials on file, and any affidavits show that there is no genuine issue as to any material
15 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
16 The moving party is entitled to judgment as a matter of law when the nonmoving party
17 fails to make a sufficient showing on an essential element of a claim in the case on which
18 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
19 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
20 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
21 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
22 present specific, significant probative evidence, not simply “some metaphysical doubt”).

1 | *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
2 | if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
3 | jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
4 | U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
5 | 626, 630 (9th Cir. 1987).

6 | The determination of the existence of a material fact is often a close question. The
7 | Court must consider the substantive evidentiary burden that the nonmoving party must
8 | meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
9 | U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
10 | issues of controversy in favor of the nonmoving party only when the facts specifically
11 | attested by that party contradict facts specifically attested by the moving party. The
12 | nonmoving party may not merely state that it will discredit the moving party’s evidence
13 | at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
14 | *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
15 | nonspecific statements in affidavits are not sufficient, and missing facts will not be
16 | presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

17 | **C. Administrative Exhaustion**

18 | In order to bring a claim under the Rehabilitation Act or Title VII, a federal
19 | employee must exhaust her administrative remedies. *Brown v. Gen. Servs. Admin.*, 425
20 | U.S. 820, 835 (1976); *Cherosky v. Henderson*, 330 F.3d 1243, 1245 (9th Cir. 2003). This
21 | exhaustion requirement “serves the important purposes of giving the charged party notice
22 | of the claim and narrowing the issues for prompt adjudication and decision.” *Freeman v.*

1 | *Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (quoting *B.K.B. v. Maui*
2 | *Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002)).

3 | **1. EEO Complaint**

4 | “Incidents of discrimination not included in an EEOC charge may not be
5 | considered by a federal court unless the new claims are ‘like or reasonably related to the
6 | allegations contained in the EEOC charge.’” *Green v. Los Angeles Cnty. Superintendent*
7 | *of Sch.*, 883 F.2d 1472, 1475–76 (9th Cir. 1989) (quoting *Brown v. Puget Sound Elec.*
8 | *Apprenticeship & Training Tr.*, 732 F.2d 726, 729 (9th Cir. 1984)). “Although
9 | allegations of discrimination not included in a plaintiff’s EEOC charge generally may not
10 | be considered by a federal court, subject matter jurisdiction extends over all allegations of
11 | discrimination that either ‘fell within the scope of the EEOC’s *actual* investigation or an
12 | EEOC investigation which *can reasonably be expected* to grow out of the charge of
13 | discrimination.” *Freeman*, 291 F.3d at 636 (quoting *B.K.B.*, 276 F.3d at 1100).

14 | Mabus asserts, without any argument, that Ward’s allegations concerning her
15 | delayed promotion to GS-12 “are newly raised in her judicial complaint.” Dkt. 16 at 9.
16 | In response, Ward argues the evidence in the record shows she included her “missed
17 | promotion” in her informal EEO complaint and the EEO counselor acknowledged her
18 | allegations regarding her delayed promotion during the subsequent investigation. Dkt. 18
19 | at 18–19. Mabus does not address this issue further in his reply brief. *See generally* Dkt.
20 | 21.

21 | It is unclear from the briefing whether Mabus is conceding Ward adequately raised
22 | her complaints about her GS-12 promotion during the EEO process. In any event, Ward

1 has pointed to evidence that contradicts Mabus's assertion that Ward's allegations
2 regarding her delayed promotion to GS-12 are newly raised in this case. *See, e.g.,*
3 Whitehead Dec., Ex. 4 at 1; Downs Dec., Exs. F & G. Mabus has therefore failed to
4 show an absence of questions of material fact or that he is entitled to judgment as a
5 matter of law on this issue.

6 **2. Timeliness of Claims**

7 Federal regulations provide that a federal employee must notify an EEO counselor
8 of discriminatory conduct within forty-five days of the alleged conduct. *Cherosky*, 330
9 F.3d at 1245; *Sommato v. United States*, 255 F.3d 704, 708 (9th Cir. 2001). If the
10 matter is not resolved, the employee may submit a formal administrative complaint.
11 *Cherosky*, 330 F.3d at 1245; *Sommato*, 255 F.3d at 708. Failure to timely contact an
12 EEO counselor is fatal to a federal employee's discrimination claim. *Cherosky*, 330 F.3d
13 at 1245.

14 In some circumstances, a federal employee may bring suit based on discriminatory
15 events that fall outside of the forty-five-day limitations period. Under the continuing
16 violation doctrine, a plaintiff may seek relief for the cumulative effects of repeated
17 conduct that began outside the limitations period and continued into the limitations
18 period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–21 (2002). A
19 hostile work environment is a classic example of a continuing violation because it is
20 "composed of a series of separate acts that collectively constitute one unlawful
21 employment practice." *Id.* at 117 (internal quotation marks omitted). The doctrine,
22 however, does not apply to discrete acts that are time barred, even when they relate to

1 acts within the limitations period. *Id.* at 113. “[T]ermination, failure to promote, denial
2 of transfer, or refusal to hire” are examples of discrete acts because “[e]ach incident of
3 discrimination and each retaliatory adverse employment decision constitutes a separate
4 actionable unlawful employment practice.” *Id.* at 114 (internal quotation marks omitted).

5 In this case, Ward notified an EEO counselor of workplace discrimination on
6 October 1, 2014. Mabus argues Ward’s disparate treatment and retaliation claims are
7 untimely to the extent they are based on discrete acts that occurred before August 17,
8 2014. Dkt. 16 at 7, 9. Specifically, Mabus contends that Ward’s allegations about her
9 work assignments between 2005 and 2008, her letter of reprimand in 2011, her GS-12
10 promotion in 2012, and any denials of transfer before August 17, 2014, are time barred.
11 *Id.* at 9.

12 Ward does not dispute that her claims based on her work assignments, denials of
13 transfer, and letter of reprimand are untimely. *See* Dkt. 18. Indeed, each of these
14 incidents constitutes a discrete act that occurred outside of the forty-five-day limitations
15 period. *See Morgan*, 536 U.S. at 114.

16 Ward, however, contends that her allegedly delayed promotion to GS-12 is part of
17 an ongoing hostile work environment and therefore the continuing violation doctrine
18 applies.³ Dkt. 18 at 10–13. This argument is unavailing. In *Morgan*, the Supreme Court

21 ³ To the extent Ward argues Mabus’s motion should be continued so that she may obtain
22 additional evidence showing the pattern of her delayed promotion, Dkt. 18 at 22–23, the
evidence she seeks is not material to whether the continuing violation doctrine applies. *See*
Lyons v. England, 307 F.3d 1092, 1107 (9th Cir. 2002) (“A practice, though it may extend over

1 explained that the failure to promote an employee based on discrimination constitutes a
2 discrete act. 536 U.S. at 114. Although the alleged failure to promote Ward may have
3 occurred over a period of time or involved a series of related acts, each alleged failure to
4 promote Ward to GS-12 remains a discrete act of discrimination that occurred before
5 August 17, 2014. *See Williams v. Giant Food Inc.*, 370 F.3d 423, 429 (4th Cir. 2004);
6 *Lyons*, 307 F.3d at 1107–08. Accordingly, the continuing violations doctrine does not
7 apply to Ward’s delayed promotion claim.

8 **D. Equitable Estoppel**

9 Ward argues Mabus should be equitably estopped from asserting that her delayed
10 promotion claim is untimely. Dkt. 18 at 20–22. Ward contends that she relied on Moore
11 and Corich’s representations that she did not have a valid claim about her promotion to
12 GS-12 and that such a claim would not be considered. *Id.*

13 “Filing a timely charge of discrimination with the EEOC is a requirement that, like
14 a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”⁴ *Johnson v.*
15 *Lucent Techs. Inc.*, 653 F.3d 1000, 1008 (9th Cir. 2011). The doctrine of equitable
16 estoppel “focuses primarily on the actions taken by the defendant in preventing a plaintiff
17 from filing suit.” *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1116 (9th Cir. 2000),
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20 time and involve a series of related acts, remains divisible into a set of discrete acts, legal action
on the basis of each of which must be brought within the statutory limitations period.”).

21 ⁴ In his reply, Mabus argues equitable tolling does not apply. Dkt. 21 at 9–11. Ward has
22 not relied on the defense of equitable tolling and Mabus raised the issue for the first time in his
reply brief. The Court may properly decline to consider this issue. *See United States v. Cox*, 7
F.3d 1458, 1463 (9th Cir. 1993) (“[A] party may not make new arguments in the reply brief.”).

1 | *overruled on other grounds by Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176 (9th Cir. 2001).

2 | Equitable estoppel requires consideration of a non-exhaustive list of factors, including:

3 | (1) the plaintiff’s actual and reasonable reliance on the defendant’s conduct
4 | or representations, (2) evidence of improper purpose on the part of the
5 | defendant, or of the defendant’s actual or constructive knowledge of the
6 | deceptive nature of its conduct, and (3) the extent to which the purposes of
7 | the limitations period have been satisfied.

8 | *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002) (quoting *Santa Maria*, 202 F.3d
9 | at 1176). “[T]he plaintiff must point to some fraudulent concealment, some active
10 | conduct by the defendant, above and beyond the wrongdoing upon which the plaintiff’s
11 | claim is filed, to prevent the plaintiff from suing in time.” *Lukovsky v. City & County of*
12 | *San Francisco*, 535 F.3d 1044, 1051–52 (9th Cir. 2008) (internal quotation marks
13 | omitted).

14 | With respect to reliance, Ward states that she talked to Moore about filing an EEO
15 | complaint regarding her promotion to GS-12 and was told she did not have a valid claim.
16 | Ward Dec. ¶ 33. Ward further asserts she believed she did not have a right to bring an
17 | EEO complaint because Moore said she was the person to whom EEO complaints were to
18 | be made and she would not entertain hers. *Id.* ¶¶ 6, 33. Whether it was reasonable for
19 | Ward to believe Moore was the “be all, end all” of the EEO complaint process and she
20 | was therefore blocked from filing an EEO complaint are triable issues of fact that
21 | preclude summary judgment.⁵

22 | ⁵ Mabus submits evidence of Ward’s EEO training records in support of his reply. Even
if the Court were to consider this evidence, the evidence further shows that a triable issue of fact
exists with respect to the reasonableness of Ward’s reliance.

1 As for misleading conduct, Mabus argues Ward has failed to point to any
2 deceptive actions. Dkt. 21 at 8. Although Ward has not presented direct evidence of an
3 improper purpose, a reasonable juror could nevertheless find that Moore, as Ward's
4 administrative officer and building manager, had constructive knowledge that her
5 representations were misleading and would prevent Ward from filing an EEO complaint
6 about her GS-12 promotion.

7 In sum, Ward has submitted sufficient evidence to create material questions of fact
8 as to whether equitable estoppel applies to her delayed promotion claim. The Court
9 therefore denies Mabus's motion with respect to that claim. To the extent Ward's
10 disparate treatment and retaliation claims are based on other discrete acts that occurred
11 before August 17, 2014, the Court grants Mabus's motion for the reasons discussed
12 above.

13 IV. ORDER

14 Therefore, it is hereby **ORDERED** that Mabus's motion to dismiss (Dkt. 16) is
15 **GRANTED in part** and **DENIED in part** as stated herein.

16 Dated this 21st day of July, 2016.

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19 BENJAMIN H. SETTLE
20 United States District Judge
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