

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

TAMMY HENRY MONK,)	
)	
Plaintiff,)	Civil Action No. 5:01cv00093
)	
v.)	<u>Memorandum Opinion</u>
)	
STUART M. PERRY, INC.,)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendant.)	
)	

Plaintiff Tammy Henry Monk (“Monk”), an employee for Defendant Stuart M. Perry, Inc. (“Perry”) proceeding *pro se*, brings this action for employment discrimination under the Equal Pay Act of 1967 (“EPA”), 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* (“Title VII”). Monk claims that Perry, through its employees, sexually harassed her, and further sexually discriminated against her by making adverse employment decisions against her with respect to her compensation as well as the conditions and privileges of her employment, all in violation of Title VII.¹ Monk further claims that Perry violated the EPA by failing to provide her with compensation equal to that of similarly situated male employees. Perry moves to dismiss Monk’s sexual harassment claim under Fed. R. Civ. P. 12(b)(1), which the court construes as a motion to dismiss for failure to exhaust administrative remedies. Perry also moves to dismiss Monk’s EPA claim under Fed. R. Civ. P. 12(b)(6).² For the reasons that follow, the

¹Because Monk is a *pro se* plaintiff, this court construes her pleadings liberally, holding her to less stringent standards than attorney drafting such complaints. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277-78 (4th Cir. 1985).

²Perry has not moved to dismiss Monk’s Title VII claim of sexual discrimination in pay or conditions and privileges of employment.

court will deny without prejudice Perry's motion to dismiss the sexual harassment claim and deny its motion to dismiss the EPA claim.

I.

Monk has worked for Perry as a dump truck driver since September 9, 1996. On October 27, 2000, Monk filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") accusing Perry of sexually discriminating against her by paying her less wages than similarly situated male employees. In the charge of discrimination, Monk marked the boxes next to "Sex" and "Other," specifying "Equal Pay" underneath. She claimed violations of "the Equal Pay Act of 1963, as amended, and . . . Title VII of the Civil Rights Act of 1964, as amended." Specifically, Monk alleged: "In early January 2000 my employer gave higher pay raises to less senior male drivers for the same job that I perform. I complained to my supervisor, Cecil Hahn (male) and, through him, to the owner, Denny Perry (male). Mr. Hahn told me Mr. Perry said that . . . I 'got what [I] was supposed to get.'" The EEOC investigated Monk's charge, and issued a notice of dismissal and right to sue letter on August 20, 2001. The right to sue letter explained that the EEOC had closed its investigation because "[t]he evidence showed that Respondent rated its drivers based on the driver's skill and performance. Further, our investigation found that another female earned more than both you and other male drivers. Furthermore, we learned the type of vehicle, the specific work associated with each vehicle, and the skill required to operate said vehicles were the determinant factors regarding wages and salaries." (Opp. Ex. A.) The EEOC provided no indication in the right to sue letter or the notice of dismissal that it investigated any other charges of sexual discrimination. Monk filed the instant

action on November 20, 2001 and amended her complaint on March 19, 2002. In her amended complaint, Monk seeks to state a claim for sexual discrimination in pay, conditions and privileges of employment, sexual harassment, and violations of the EPA.

As a preliminary matter, the court finds that Perry has mistakenly characterized its motion to dismiss Monk's sexual harassment claim as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Perry bases its motion on the grounds that Monk has failed to exhaust her administrative remedies by filing a charge of sexual harassment with the EEOC as prescribed by Title VII, 42 U.S.C. § 2000e-5(e)(1). As noted in *Sloop v. Mem. Mission Hosp.*, the Fourth Circuit has variously referred to this requirement "as a jurisdictional prerequisite to adjudication in the federal courts, a procedural prerequisite to bringing suit, and a requirement that a claimant exhaust administrative remedies." 198 F.3d 147, 148 (4th Cir. 1999) (dismissing plaintiff's Title VII claim for "failure to exhaust administrative remedies"); *see also*, *e.g.*, *Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 137-39 (4th Cir. 1995) (finding that before a federal court may assume jurisdiction over a claim under Title VII, a claimant must exhaust administrative procedures); *Dennis v. County of Fairfax*, 55 F.3d 151, 156-57 (4th Cir. 1995) ("Where . . . claims raised under Title VII exceed the scope of the EEOC charge . . . , they are procedurally barred."). More recently, the Court of Appeals has recognized that a Title VII plaintiff's failure "to *timely* file a charge of discrimination . . . does not deprive the court of subject matter jurisdiction." *Edelman v. Lynchburg College*, 228 F.3d 503, 511 (4th Cir. 2000) (emphasis added) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)), *rev'd on other grounds*, 122 S.Ct. 1145 (2002). In *Edelman*, the district court dismissed plaintiff's Title VII claim under Rule 12(b)(1) on the grounds that plaintiff filed a charge of discrimination after

the requisite statutory time period expired. The Fourth Circuit affirmed, but remanded the case directing the district court “to indicate that dismissal is for failure to exhaust administrative remedies rather than for lack of subject matter jurisdiction.” *Id.* at 512; *see also English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (noting that Title VII’s filing period is “akin to a statute of limitations, rather than a jurisdictional prerequisite”). *But see Puryear v. County of Roanoke*, 214 F.3d 514 (4th Cir. 2000) (affirming dismissal under 12(b)(1) of Title VII claim on the grounds that plaintiff failed to exhaust her administrative state remedies, without specifically considering whether 12(b)(1) was the proper vehicle).

In *Zipes*, the case on which the Fourth Circuit relied in *Edelman*, the Supreme Court held that a *timely* filing before the EEOC was not jurisdictionally required to maintain suit in the district court. *Zipes*, 455 U.S. at 393 (finding the failure to exhaust is “in the nature of statutes of limitation” and “do[es] not affect the District Court’s subject matter jurisdiction”). Other circuits have also concluded from *Zipes* that there is no jurisdictional requirement for *any* filing before the EEOC, but rather that the prerequisite of EEOC filing should be viewed merely in the nature of a condition precedent or an affirmative defense. *See, e.g., Angelino v. New York Times Co.*, 200 F.3d 73, 87-88 (3d Cir. 2000) (citing *Zipes* and noting that “[t]he characterization of either lack of exhaustion or of untimeliness as a jurisdictional bar is particularly inept in Title VII cases”); *Temengil v. Trust Territory of Pacific Islands*, 881 F.2d 647, 654 (9th Cir. 1989) (relying on *Zipes* holding that “[p]ursuit of administrative remedies is a condition precedent to a Title VII claim. The requirement, however, is not jurisdictional.”), *cert denied*, 496 U.S. 925 (1990); *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989) (noting that in light of *Zipes* the district court should have concluded that plaintiff’s failure to exhaust her administrative remedies meant

“that her Title VII claim was barred; not that the court lacked jurisdiction of it”); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1005 (11th Cir. 1982) (“[T]he filing of an EEOC charge is not a jurisdictional prerequisite” to a Title VII suit in federal court.). *But see, Jones v. Runyon*, 91 F.3d 1398, 1400 n.1 (10th Cir. 1996) (reluctantly following Tenth Circuit precedent that “the requirement of an EEOC filing . . . [is] a jurisdictional requirement. . . .” “[b]ecause one panel cannot overturn the decision of a prior panel . . .”).

In light of the foregoing precedent, the court construes Perry’s motion to dismiss Monk’s sexual harassment claim as a motion to dismiss for failure to exhaust her administrative remedies. Perry also moves to dismiss Monk’s EPA claim on the grounds that Monk has failed to state a claim on which relief can be granted. The court will consider these motions, in turn.

II.

In support of its motion to dismiss the sexual harassment claim, Perry contends that Monk’s EEOC charge fails to raise the issue of sexual harassment. The court finds that while Monk’s charge of discrimination and the EEOC’s right to sue letter do not explicitly reference any sexual harassment allegations, the parties should conduct further discovery to determine whether Monk actually raised a sexual harassment claim with the EEOC.

“It is axiomatic that a claimant under Title VII must exhaust [her] administrative remedies by raising [her] claim before the EEOC.” *Sloop v. Memorial Mission Hosp. Inc.*, 198 F.3d 147, 148 (4th Cir. 1999). Exhaustion of administrative remedies requires a plaintiff, at the outset, to file a charge of discrimination with the EEOC, and to receive a right to sue letter, before filing a complaint in federal court. 42 U.S.C. § 2000e-5(b). A plaintiff’s allegations in her EEOC charge

of discrimination “generally operate to limit the scope of any subsequent judicial complaint. Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit.” *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962-63 (4th Cir. 1996).

In her EEOC charge, Monk marked the boxes labeled “sex” and “other,” specifying “Equal Pay” underneath the “other” box. In the space provided for description of the alleged discriminatory acts, Monk claims a violation of both the EPA and Title VII, but she does not make any factual reference to sexual harassment. In *Taylor v. Virginia Union University*, the Fourth Circuit held that plaintiff failed to exhaust her administrative remedies with respect to her sexual harassment claim because her EEOC charge was vague regarding her employer’s interaction with her, and, thus, it failed to raise an “inference that [the] actions were done in a manner that had the intent or effect of [sexual harassment].” 193 F.3d 219, 239 (4th Cir. 1999) Monk’s charge fails to raise even vague allegations; rather, the charge sets forth facts referring only to her claim of unequal pay based on gender. Moreover, in its right to sue letter, the EEOC refers only to an investigation relevant to Monk’s charge of discrimination in pay. The court further finds that Monk’s allegations of sexual harassment in the complaint are not “reasonably related” to her EEOC charge’s allegations of discrimination in pay. *See Evans*, 80 F.3d at 962-63 (holding that Title VII plaintiff could not maintain a claim for sexual harassment in federal court after her EEOC complaint only alleged discrimination on the basis of gender). Based on these findings, the court would typically grant a defendant’s motion to dismiss for failure to exhaust administrative remedies.

However, at oral argument, Monk stated that she told the EEOC about Perry’s sexual harassment and other sexual discrimination against her, and indicated that the EEOC must have written up only the discrimination in pay allegations because that was the last incident of discrimination she described.³ While Monk has not argued that the EEOC’s alleged failure to include her harassment allegations should invoke application of one of the equitable exceptions to Title VII’s exhaustion requirements—estoppel or equitable tolling—the court has considered those doctrines and finds that limited discovery is necessary to determine whether estoppel of the administrative requirements in this case is appropriate.

Equitable tolling applies “where the defendant has wrongfully deceived or mislead the plaintiff in order to conceal the existence of a cause of action.” *English*, 828 F.2d at 1049. “Equitable estoppel applies where, despite the plaintiff’s knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline.” *Id.* In Title VII cases, courts have extended equitable doctrines to apply where the plaintiff claims to have been misled by the EEOC rather than the defendant. *See, e.g., Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984) (finding EEOC’s erroneous advice about filing deadline, when substantiated, could be basis for equitable tolling); *Citicorp Person-to-Person Financial Corp. v. Brazell*, 658 F.2d 232, 234 (4th Cir. 1981) (“[A] clear violation of [a] regulation by [the] EEOC might warrant the finding of a tolling effect.”). The Fourth Circuit has also recognized that Title VII’s limitation period should be tolled when the plaintiff’s tardy filing

³Specifically, Monk stated: “I explained to [the EEOC investigator] about the four years of harassment and just constant nit-picking, and then he asked me what the last date of the – the last event, and I told him about the pay, that I didn’t get the rate that men were getting. It was the last incident. He wrote it up as Title VII and equal pay is the way the investigator wrote it up.”

resulted from the delay of the complaint once it reached the EEOC's office. *Walters v. Robert Bosch Corp.*, 683 F.2d 89, 92 (4th Cir. 1982) (“[The Plaintiff] did everything required of him by the statute; had his charge been properly processed, the charge would have satisfied the filing process.”); *see also Carter v. Smith Food King*, 765 F.2d 916, 924 (9th Cir. 1985) (“[A] claimant’s right to pursue a civil action is not to be prejudiced by the EEOC’s failure to properly process a grievance after it has been filed.”).

Courts have regularly made use of equitable remedies to allow Title VII claimants to bring an action in federal court where they filed an untimely charge of discrimination based on misleading information from the EEOC. *See, e.g., Johnson*, 731 F.2d at 146; *Cherry v. Thompson Steel Co.*, 805 F. Supp. 1257, 1261 n. 1 (D. Md. 1992). It seems apparent to the court that the same principles that excuse a plaintiff who relies on the EEOC’s misleading information in failing to timely file a charge of discrimination, would also apply in cases in which a plaintiff, reasonably relying on misleading information from the EEOC, reasonably believes that she has included all her claims within her charge of discrimination. *See Angotti v. Kenyon & Kenyon*, 929 F.Supp. 651, 656-57 (S.D.N.Y. 1996) (reviewing equitable principles in Title VII cases and finding that issues of fact existed as to whether equity excused plaintiff’s seeming failure to include explicitly the charge of retaliation in the EEOC charge she filed where she had “presented documentary evidence that she presented her claims to the EEOC when she filed her charge of sex and disability discrimination” and “averred that the EEOC interviewer assured her that her retaliation claims were encompassed by the charge she did timely file.”)

If Monk’s statement in open court that she informed the EEOC of her sexual harassment is true, then it is possible that Monk would have satisfied her exhaustion requirement but for the

EEOC's failure to properly process her charge. Nevertheless, even though Monk is proceeding *pro se*, the court assumes she read her charge of discrimination and understood that the sexual discrimination claims she now attempts to raise (except discriminatory pay) were not mentioned in that charge. Thus, unless the EEOC interviewer affirmatively lead Monk to believe that her charge would encompass all her present claims, it seems unlikely that she had any reasonable basis to believe that she had actually raised with the EEOC those claims that she attempts to state in the complaint but fails to mention in the charge of discrimination. *Hentosh v. Herman M. Finch University of Health Sciences/The Chicago Medical School*, 167 F.3d 1170, 1173 (7th Cir. 1999) (recognizing that plaintiff's reasonable reliance on misleading conduct is a prerequisite for equitably excusing a plaintiff's failure to exhaust administrative remedies). Monk has submitted no affidavits or EEOC forms, *e.g.*, the intake questionnaire, indicating what allegations she attempted to include in her charge of discrimination. Thus, mindful of the practical difficulties Monk faces as a *pro se* plaintiff, the court believes that further discovery is necessary to determine whether Monk actually raised with the EEOC the claims, other than discrimination in pay, that she attempts to state in the complaint: specifically, sexual harassment, and discriminatory conditions and privileges of employment. The parties should also advise the court whether Monk had any reasonable basis for believing that her charge actually exhausted her administrative remedies with respect to these claims.

III.

Perry moves to dismiss Monk's EPA claim on the grounds that Monk's "Amended Complaint is devoid of any reference to discrimination in rate of pay, but merely alleges sexual

harassment.” The court disagrees.

“Under the Equal Pay Act, the plaintiff must show that an employer has paid different wages to employees of opposite sexes for equal work in jobs which require equal skill, effort and responsibility and which are performed under similar working conditions.” *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 343 (4th Cir. 1994) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).⁴

The complaint seeks to state a claim under “the Equal Pay Act of 1963 (EPA), as amended, as it appears in volume 29 of The United States Code, at section 206(d).” (Compl. ¶ 1.) While the vast majority of the complaint’s factual allegations refer to sexual discrimination unrelated to pay, the complaint also alleges that Monk asked her supervisor “why her last pay raise was not equal to the hourly rate of her male co-workers, [and her supervisor replied], “You got what you were supposed to get.” (Compl. ¶ 17(d).) Liberally construing the allegations in the complaint and viewing the facts in the light most favorable to Monk, as the court is required to do with respect to a *pro se* plaintiff at this stage in the litigation, the court finds that Monk has satisfied the requirements of notice pleading.

IV.

⁴Section 6(d)(1) of the EPA provides, in part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis or sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

29 U.S.C. § 206(d)(1).

For the foregoing reasons, the court will deny without prejudice Perry's motion to dismiss Monk's sexual harassment claim, and deny Perry's 12(b)(6) motion to dismiss Monk's EPA claim.

ENTER: This ____ day of June, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

TAMMY HENRY MONK,)	
)	
Plaintiff,)	Civil Action No. 5:01cv00093
)	
v.)	<u>ORDER</u>
)	
STUART M. PERRY, INC.,)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendant.)	
)	

In accordance with the memorandum opinion entered this day, it is **ORDERED and ADJUDGED** that defendant's motion to dismiss plaintiff's sexual harassment claim is **DENIED WITHOUT PREJUDICE**, and defendant's motion to dismiss plaintiff's claim under the Equal Pay Act is **DENIED**. It is further **ORDERED** that the parties shall take discovery for sixty days limited to the issues of exhaustion and equitable tolling and estoppel.

ENTER: This ____ day of June, 2002.

CHIEF UNITED STATES DISTRICT JUDGE