UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY E. GOLLA,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.: 01-1594 (RMU)
v.	:	
	:	Document No.: 7
JOHN ASCHROFT,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

GRANTING THE DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

This matter is before the court on the defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) or, in the alternative, for summary judgment. The *pro se* plaintiff, Gregory Golla, a former Border Patrol Agent, alleges same-sex sexual harassment while employed by the United States Border Patrol, a component of the Immigration and Naturalization Service ("INS" or "the defendant"), in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The defendant moves to dismiss counts three through eight of the complaint for failure to state a cognizable claim. Because the plaintiff failed to respond to this argument, the court grants the motion, treating it as conceded. The court also grants the defendant's motion to dismiss counts one and two because the plaintiff failed to timely exhaust his administrative remedies.[1]

[1] Though the defendant also files his motion as one for summary judgment, the court need not address this alternative because the court dismisses the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). *Lockamy v. Truesdale*, 182 F. Supp. 2d 26, 29, 32 (D.D.C. 2001); *De Medina v. Reinhardt*, 444 F. Supp. 573, 576 (D.D.C. 1978).

II. BACKGROUND

The United States Border Patrol hired the *pro se* plaintiff in March 1998. Compl. ¶ 14. Soon thereafter, while in a training program, the plaintiff's Spanish instructor, Victor Maisonet, allegedly invited the plaintiff to his residence for drinks and commented on the plaintiff's good looks. *Id.* The plaintiff declined the offer. *Id.* As a result, Mr. Maisonet allegedly threatened the plaintiff, berated him in front of other trainees, and encouraged him to resign. *Id.* Additionally, the plaintiff contends that he received good evaluations before Mr. Maisonet's invitation, but he received bad evaluations after his declination. *Id.* ¶ 15.

Upon reporting to his duty station in July 1998, the plaintiff claims that Senior Patrol Agent Robert Guerra, who had spoken with Mr. Maisonet, subjected him to further harassment. *Id.* ¶ 17. Mr. Guerra, like Mr. Maisonet, allegedly threatened the plaintiff and encouraged him to resign. *Id.* The plaintiff insists that the harassment from Mr. Guerra grew directly out of the incident with Mr. Maisonet. *Id.* ¶ 18. The plaintiff subsequently resigned from the INS on October 7, 1998. Def.'s Mot. to Dismiss or for Summ. J. ("Def.'s Mot.") Ex. D.

On October 31, 1998, the plaintiff sent a letter to the Equal Employment Opportunity Commission ("EEOC") regarding his sexual harassment complaint. Pl.'s Opp'n at 1, Ex. A. The EEOC responded by letter dated November 12, 1998, stating that "a complaint of discrimination filed against a federal sector employer **must be filed with** the equal employment opportunity (EEO) office of **the agency involved**. . . within **45** days of the date of the alleged discriminatory act, personnel action . . . ." Pl.'s Opp'n Ex.

A (emphasis added). The plaintiff first contacted an Equal Employment Opportunity ("EEO") counselor at the INS on December 16, 1998. Def.'s Mot. Ex. B.

The plaintiff filed his complaint with this court on July 23, 2001. On October 12, 2001, the defendant filed a motion to dismiss or, in the alternative, for summary judgment. On December 14, 2001, the court issued an order directing the plaintiff to respond to the defendant's motion. This order explained to the plaintiff some of the case law, local rules, and federal rules that set forth the consequences for failing to respond to a dispositive motion. Order dated Dec. 14, 2001. On January 3, 2002, the plaintiff filed a one-page response to the defendant's motion.

III. ANALYSIS

A. The Court Treats the Defendant's Motion to Dismiss for Failure to State a Claim as Conceded

In counts three through eight, the plaintiff alleges tort, Fifth Amendment, and contract violations pursuant to Title VII. The defendant argues, in its motion to dismiss, that the plaintiff's tort, Fifth Amendment, and contract violation claims are not cognizable under Title VII, and thus, counts three through eight fail to properly state a claim. Def.'s Mot. at 5-8; FED. R. CIV. P. 12(b)(6).[2] On December 14, 2001, the court

[2] The defendant also argues that the court has no jurisdiction over the tort claims described in counts three through eight because the plaintiff failed to exhaust his administrative remedies as required by the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Def.'s Mot. at 6-7, Ex. A; Def.'s Statement of Facts ¶ 3. In response, the plaintiff argues only that "[a]s for the filing of an SF-95 administrative claim, Plaintiff was never advised of his right or responsibility to file such a form by either the EEOC or the Immigration and Naturalization Service." Pl.'s Opp'n at 1. The plaintiff never counters the defendant's evidence that he failed to pursue administrative remedies for the tort claims. Def.'s Mot. Ex. A; LCvR 56.1. Thus, even if the court did not treat the argument to dismiss the tort claims as conceded, they would not survive the defendant's alternative summary judgment analysis. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

issued an order directing the plaintiff to respond to the defendant's dispositive motion. This order explained to the plaintiff that, pursuant to Local Civil Rule 7.1(b), failure to respond may result in the court treating the motion as conceded. Order dated Dec. 14, 2001. When the plaintiff finally responded to the motion, he failed to address the defendant's failure to state a claim argument. Pl.'s Opp'n.

When a plaintiff responds to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded, even when the result is dismissal of the entire case. *Stephenson v. Cox*, --- F. Supp. 2d --- (D.D.C. Sept. 23, 2002); *Sparrow v. United Air Lines, Inc.*, 1999 U.S. Dist. LEXIS 22054, at *17 (D.D.C. July 23, 1999), *overruled on other grounds*, 216 F.3d 1111 (D.C. Cir. 2000); *see Fed. Deposit Ins. Corp. v. Bender*, 127 F.3d 58, 68 (D.C. Cir. 1997). Pursuant to Local Civil Rule 7.1(b), the court treats the motion to dismiss counts three through eight for failure to state a claim as conceded. *Id.* The court therefore dismisses these counts.

B. The Court Dismisses Counts One and Two for Failure to Exhaust Administrative Remedies

1. Legal Standard for a Motion to Dismiss for Lack of Subject-Matter Jurisdiction

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Dist. of Columbia Ret. Bd. v. United States*, 657 F. Supp. 428, 431 (D.D.C. 1987). In evaluating whether subject-matter jurisdiction exists, the court must accept all of the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other*

grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982). The court need not, however, accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. *E.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

Moreover, the court need not limit itself to the allegations of the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, the court may consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction over the case. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

2. The Court Lacks Jurisdiction Over the Plaintiff's Complaint Because the Plaintiff Failed to Exhaust His Administrative Remedies

Title VII regulations state that "[a]ggrieved persons who believe they have been discriminated against on the basis of . . . sex . . . must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter" within 45 days of the discriminatory behavior or the effective date of the relevant personnel action. 29 C.F.R. § 1614.105(a). As such, a plaintiff's administrative complaint is untimely unless a plaintiff consults with a counselor at the agency involved within this 45-day period. *Howard v. Evans*, 193 F. Supp. 2d 221, 228 (D.D.C. 2002) (citing *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 833-35). The purpose behind the administrative regulations "is to provide the agency with notice and an opportunity to rectify any wrong through the conciliation process or through administrative relief." *Howard*, 193 F. Supp. 2d at 227-28.

A district court generally lacks jurisdiction over a Title VII case when the plaintiff has failed to exhaust the required administrative remedies. *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985). This requirement, however, is subject to waiver, estoppel, and

equitable tolling. *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 393 (1982). The power to toll the statute of limitations can "be exercised only in extraordinary and carefully circumscribed instances." *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988). Thus, a plaintiff will not be afforded extra time to file an administrative claim without exercising due diligence, and any excuse presented by a plaintiff must be more than a "garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

In this case, the defendant argues that the plaintiff failed to exhaust his administrative remedies in a timely manner because he did not initiate contact with the INS EEO counselor until December 16, 1998, 70 days after he resigned from the INS. Def.'s Mot. at 2. The plaintiff responds that he, in good faith, attempted to file the complaint within the 45-day time period, stating that he contacted the EEOC on October 31, 1998. Pl.'s Opp'n at 1. Contradicting the plaintiff's good faith argument, however, the November 12, 2002 letter from the EEOC, attached to the plaintiff's response, informs the plaintiff of the administrative requirements. *Id.* Ex. A. The letter states that "a complaint of discrimination filed against a federal sector employer **must be filed** with the equal employment opportunity (EEO) office of the **agency involved** . . . within **45** days of the date of the alleged discriminatory act . . . ." *Id.* (emphasis added); 28 C.F.R. 1614.105(a)(1).

Because the plaintiff remains silent on this issue, the court infers that the plaintiff received this EEOC letter on November 15, 2002.[3] The 45-day period after the plaintiff resigned from INS on October 7, 1998 ended on November 21, 1998. Def.'s Reply at 4.

[3] In making this inference, the court relies on Federal Rule of Civil Procedure 6(e), which adds three days to a prescribed deadline when service is by mail.

Despite having six days after receiving the letter to contact an INS EEO counselor, and despite the warning in the EEOC letter, the plaintiff did not contact an INS EEO counselor until December 16, 1998. *Id.*; *Herbert*, 974 F.2d at 197. The fact that the plaintiff did contact the INS EEO counselor eventually suggests that he fully understood the warning in the EEOC letter. As a result, the plaintiff has failed to exercise due diligence in meeting the 45-day deadline and has presented no excuse worthy of equitable tolling. 28 C.F.R. 1614.105(a)(1); *Irwin*, 498 U.S. at 96. Because the plaintiff failed to timely exhaust his administrative remedies, the court dismisses counts one and two for lack of subject-matter jurisdiction. *Dist. of Columbia Ret. Bd.*, 657 F. Supp. at 431.

IV. CONCLUSION

For all these reasons, the court grants the defendant's motion to dismiss. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 30th day of September 2002.

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Ricardo M. Urbina
United States District Judge

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ORDER

GRANTING THE DEFENDANT'S MOTION TO DISMISS

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 30th day of September 2002, it is

ORDERED that the defendant's motion to dismiss is **GRANTED**.

SO ORDERED.

Ricardo M. Urbina
United States District Judge

Service List in *Golla v. Aschroft*
Civil Action No. 01-1594 (RMU)

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