



1 Count One of the Amended Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter  
2 jurisdiction.

### 3 Discussion

#### 4 **I. Standard of Review**

5 Pursuant to Fed. R. Civ. P. 12(b)(1), a party may move to dismiss a claim for lack of  
6 subject matter jurisdiction. It is presumed that a federal court is without jurisdiction to hear  
7 a claim. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). The  
8 burden of proving subject matter jurisdiction is on the party alleging subject matter  
9 jurisdiction. Id. A court ruling on a Rule 12(b)(1) motion may hear evidence and resolve  
10 disputed facts. See Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). "[N]o  
11 presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed  
12 material facts will not preclude the trial court from evaluating for itself the merits of  
13 jurisdictional claims." Thornhill Pub. Co. v. GTE, 594 F.2d 730, 733 (9th Cir. 1979) (cite and  
14 quotes omitted); see also Corrothers, 812 F.2d at 1176; Augustine v. United States, 704 F.2d  
15 1074, 1077 (9th Cir. 1983). Looking beyond the complaint to matters of public record and  
16 resolving disputed facts does not convert a Rule 12(b)(1) motion into a motion for summary  
17 judgment. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

#### 18 **II. Analysis**

19 Defendant argues that the Court lacks subject matter jurisdiction over Count One  
20 because Plaintiff failed to exhaust all the allegations in this count with the EEOC. (Doc. #11).  
21 "To establish federal subject matter jurisdiction over an employment discrimination claim, a  
22 plaintiff must have raised that claim or a 'like and reasonably related' claim in an administrative  
23 action." Yamaguchi v. U.S. Dep't of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997) (cite  
24 omitted); see also Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir. 1990). "In determining  
25 whether an allegation under Title VII is like or reasonably related to allegations contained in  
26 a previous EEOC charge, the court inquires whether the original EEOC investigation would  
27 have encompassed the additional charges." Green v. Los Angeles County Superintendent of  
28 Schools, 883 F.2d 1472, 1476 (9th Cir.1989); see also Sanchez v. Standard Brands, Inc., 431

1 F.2d 455, 466 (5th Cir. 1970) ("[T]he scope of the judicial complaint is limited to the scope  
2 of the EEOC investigation which can reasonably be expected to grow out of the charge of  
3 discrimination." ).<sup>1</sup>

4 The substance of Plaintiff's EEOC Charge is construed liberally to determine whether  
5 claims not raised in her EEOC Charge satisfy the exhaustion requirement. See Sosa, 920 F.2d  
6 at 1458 ("EEOC charges must be construed with utmost liberality since they are made by those  
7 unschooled in the technicalities of formal pleading.") (cite and quotes omitted).<sup>2</sup> The factual  
8 statement included in the charge of discrimination is the "crucial element" when examining an  
9 EEOC charge for exhaustion. See Kaplan v. Int'l Alliance Of Theatrical & Stage Employees &  
10 Motion Picture Machine Operators Of The U.S. & Canada, 525 F.2d 1354, 1359 (9th Cir.

---

11  
12 <sup>1</sup> Plaintiff argues that her claims "could have [been] proven following" an EEOC  
13 investigation. (Doc. #18 at 4). She further argues that she verbally raised her claims in Count  
14 One with the EEOC investigator. (Doc. #18, Exh. 2, ¶3). That Plaintiff could have proven her  
15 claim following an EEOC investigation does not exhaust the claim if it was never presented to  
16 the EEOC. See Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1051 (9th Cir. 1987).  
17 When a plaintiff does not include any allegations of a claim in an EEOC charge, it is reasonable  
18 to assume that the scope of the investigation would be limited to the scope of the charge. Id.  
19 Likewise, verbally presenting a claim to an EEOC investigator does not exhaust the claim if  
20 it is not alleged in the EEOC charge. Id.

21 <sup>2</sup> Defendant suggests that this court is not compelled to construe Plaintiff's charge  
22 liberally because she consulted counsel before filing her charges. (Doc. #24 at 1, 2).  
23 Defendant is correct that some courts in other circuits have refused to liberally construe  
24 administrative charges when the plaintiff had legal representation during the administrative  
25 process. Crosten v. Kamauf, 932 F. Supp. 676, 682 (D. Md. 1996); see also Harris v. First Nat.  
26 Bank of Hutchinson, Kan., 680 F. Supp. 1489, 1495 (D. Kan. 1987) (citing attorney's drafting  
27 of EEOC charge as one factor for not liberally construing the charge); cf. White v. North  
28 Louisiana Legal Assistance Co., 468 F. Supp. 1347, 1352 (W.D. La. 1979) (citing plaintiff's  
occupation as a "practicing attorney").

25 There are two reasons why abandoning liberal construction is inappropriate here. First,  
26 the policy for liberal construction is routinely cited and followed in the Ninth Circuit. "[T]he  
27 paucity of legal training among those whom [Title VII] is designed to protect requires charges  
28 filed before the EEOC to be construed liberally." Green, 883 F.2d at 1476 (cite and quotes  
omitted). Second, in the case at bar a liberal construction of Plaintiff's charge does not satisfy  
the exhaustion requirement for any of her claims in Count One.

1 1975). "Furthermore, '[t]he substance of the administrative charge, rather than its label, is the  
2 concern of Title VII.'" Hogan v. Henderson, 102 F. Supp.2d 1180, 1184 (D. Ariz. 2000)  
3 (alteration in original) (quoting Ong v. Cleland, 642 F.2d 316, 319 (9th Cir. 1981)).

4 Count One of Plaintiff's Amended Complaint alleges that she was wrongfully terminated  
5 because of her gender and race and that Home Depot was a hostile environment for females  
6 and Hispanics. (Am.Comp. ¶11). The Court must determine whether the allegations contained  
7 in Count One, or whether "like and reasonably related" allegations, were presented to the  
8 EEOC.

9 In her EEOC Charge, Plaintiff selected retaliation as the cause of discrimination though  
10 she had the option of also selecting race, color, sex, religion, national origin, age, disability  
11 or other. (Doc. #18, Exh.1).<sup>3</sup> In the body of her EEOC Charge, Plaintiff stated, "I feel I have  
12 been discriminated against in retaliation for standing up for myself." (Id.). Plaintiff also  
13 attached a five-page, single-spaced letter setting forth allegations against Home Depot. (Doc.  
14 #18, Exh.1). Plaintiff's allegations describe a conflict between herself, the store manager  
15 Greg Thompson ("Thompson"), and a co-employee, Jackie McConnell ("McConnell"). Plaintiff  
16 alleges that Thompson and McConnell had an inappropriate relationship and that they both  
17 treated the other employees poorly. (Id. at 1-3). She further alleges that she was prematurely  
18 terminated on April 23, 1999 by McConnell. (Id. at 3). Plaintiff did not set forth any reason  
19 why she was terminated.

20 The Court finds that it could not be reasonably expected that Plaintiff's claims of race  
21 or gender discrimination would grow out of her EEOC Charge. See Sanchez, 431 F.2d at 466.

---

22  
23 <sup>3</sup> Plaintiff attached an affidavit to her Response in which she states that she intended  
24 to have the EEOC investigate charges of race and gender discrimination. (Doc. #18, Exh. 2, ¶¶  
25 3, 5). When determining whether a claim was exhausted, the Court looks at the relation  
26 between the claim and the actual charge filed with the EEOC. "It is sufficient that the EEOC  
27 be apprised, in general terms, of the alleged discriminatory parties and the alleged  
28 discriminatory acts." Sosa, 920 F.2d at 1458 (quoting Kaplan, 525 F.2d at 1359). Plaintiff's  
intent to include the present claims does not make them "like and reasonably related" to her  
EEOC Charge when the charge included no act or allegation that would identify these claims.  
Sosa, 920 F.2d at 1458; see also Stallcop, 820 F.2d at 1051.

1 Plaintiff may not assert new theories of discrimination which she did not present to the EEOC.  
2 See Shah v. Mt. Zion Hospital and Medical Center, 642 F.2d 268, 271-72 (9th Cir. 1981)  
3 (upholding dismissal of Shah's claims of race, color and religious discrimination because his  
4 EEOC charge only alleged sex and national origin discrimination); see also Devereaux v. East  
5 Bay Conservation Corp., No. C 97-3065 SI, 1998 WL 917798, at \*3 (N.D. Cal. Dec. 30, 1998)  
6 (dismissing claims of race and sex discrimination based on the same set of facts from which  
7 plaintiff only alleged age discrimination in the EEOC charge).<sup>4</sup>

8 In her Response, Plaintiff argues that race discrimination is "like and reasonably related"  
9 to her retaliation charge for two reasons: 1) McConnell and Thompson do not have Hispanic  
10 surnames, and 2) claims of racial discrimination have been made against Home Depot in other  
11 states. (Doc. #18 at 1, 3). Plaintiff's ethnicity, even in contrast to those she alleges retaliated  
12 against her, does not by itself make a discrimination claim "like and reasonably related" to her  
13 retaliation charge. See Castro v. United States, 775 F.2d 399, 403 n.2 (1st Cir. 1985)  
14 ("Castro's argument that the MSPB or EEO Office should have known that Diaz Diaz was  
15 alleging discrimination on the basis of national origin by the fact that he is Puerto Rican and  
16 by the fact that he alleged discrimination on the basis of age is contrary to both logic and  
17 law."), overturned on other grounds, Stevens v. Dep't of the Treasury, 500 U.S. 1, 7 (1991); Ang  
18 v. Procter & Gamble Co., 932 F.2d 540, 546 (6th Cir. 1991) ("The scope of Ang's complaint  
19 does not automatically expand due to his membership in more than one minority group.").  
20 Additionally, claims of discrimination in other states with no connection to her claims do not  
21 make Plaintiff's race or gender discrimination claim "like and reasonably related" to her  
22 retaliation charge.

23 There are no facts or allegations in Plaintiff's EEOC Charge indicating that Plaintiff was  
24

---

25  
26 <sup>4</sup> See also Lowe v. City of Monrovia, 775 F.2d 998, 1003 (9th Cir. 1985) (district  
27 court properly dismissed sex discrimination claim where plaintiff raised issues of race, but not  
28 gender, before EEOC); Leong v. Hilton Hotels Corp., 689 F. Supp. 1565, 1567 (D. Haw. 1988)  
(dismissing sexual harassment claim where plaintiff complained of racial, but not sexual,  
harassment in EEOC filing).

1 discriminated against because she is female or Hispanic. See Shah, 642 F.2d at 271-72; see  
2 also Stallcop, 820 F.2d at 1051 (finding that the investigation would not encompass new claims  
3 of sex and age discrimination where no allegations of either claim were made in the charge).  
4 Construing Plaintiff's EEOC Charge liberally, there is no basis for finding that the EEOC  
5 investigation encompassed claims of race and gender discrimination. For this reason, Plaintiff  
6 also did not exhaust her claim of hostile work environment based upon race or gender  
7 discrimination.

8 The Court finds that the Motion to Dismiss should be granted. The hearing on the  
9 Motion to Dismiss will be vacated because both parties provided the Court with complete  
10 memoranda thoroughly discussing the law and evidence in support of their respective  
11 positions. Oral argument would not have aided the Court's decisional process. See Partridge  
12 v. Reich, 141 F.3d 920, 926 (9th Cir. 1998) (stating that no prejudice results from denial of  
13 a hearing when the parties have had adequate opportunity to provide the court with evidence and  
14 memoranda of law).

15 **IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss (Doc. #11) is  
16 **GRANTED**. The Clerk of Court is directed to dismiss Count One in the Amended Complaint  
17 with prejudice.

18 **IT IS FURTHER ORDERED** that the hearing scheduled to occur on February 5, 2001,  
19 is **VACATED**.

20  
21 DATED this \_\_\_\_\_ day of February, 2001.

22  
23  
24  
25  
26 \_\_\_\_\_  
27 Roslyn O. Silver  
28 United States District Judge