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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RONALD SMITH,
Plaintiff,
v.
MEGAN J. BRENNAN, et al.,
Defendants.

Case No. 15-cv-04516-WHO

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 15

INTRODUCTION

Plaintiff Ronald Smith, proceeding pro se, brings his third lawsuit in this district against his former employer, the United States Postal Service (“USPS”). Judge Wilken granted summary judgment against Smith in the first lawsuit in 2004, and the Ninth Circuit affirmed in 2006. I granted summary judgment against Smith in the second lawsuit in 2014. At the moment, the allegations in this action, brought pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Rehabilitation Act of 1973 (“Rehabilitation Act”), are so unclear that they fail to provide fair notice to the defendant, Postmaster General Megan J. Brennan, of Smith’s claims. From what I can tell, most if not all of his claims are barred by res judicata in light of the prior lawsuits, and all of them are untimely because of administrative requirements with which he failed to comply. Accordingly, I GRANT defendant’s motion to dismiss.¹ In light of Smith’s pro se status, I will give him leave to amend.

BACKGROUND

I. CURRENT COMPLAINT

Smith filed this action on September 30, 2015. Dkt. No. 1 (“Compl.”). According to his

¹ Defendant moves in the alternative for summary judgment. Because I am treating this as a motion to dismiss, the motion for summary judgment is DENIED as moot.

1 complaint, he began working for the USPS in December 1988. Compl. ¶ 6. He was designated as
2 a probationary employee for his first ninety days of employment. *Id.* During this period, he was
3 asked to complete additional application forms. *Id.* In completing these forms, he answered,
4 “No,” to a question asking whether he had ever been convicted of a crime. *Id.* Smith states that
5 he had suffered a felony conviction in California state court, but that the conviction had been
6 expunged, thereby “entitl[ing] him under California law to reply in the negative to [an] inquiry
7 regarding a [criminal] conviction.” *Id.* ¶¶ 7-8. He alleges that the USPS nevertheless required
8 him to produce a copy of his criminal record as a condition of employment. *Id.* ¶ 9. He also
9 alleges that from 1988 to 1992, the USPS “refused to grant [him] promotions [to] which he was
10 entitled by reason of his work performance.” *Id.* ¶ 10. The USPS “repeatedly cited [his] ‘criminal
11 record’ as justification” for refusing to grant the promotions. *Id.* In addition, “[u]nder threat from
12 [the USPS], [he] signed a form stating that he had ‘falsified’ his employment application by his
13 answer to the criminal conviction question.” *Id.* At the hearing, Smith argued that this was the
14 genesis of the problems about which he now seeks redress.

15 The rest of Smith’s complaint is a chronological laundry list of alleged wrongs by the
16 USPS spanning from 1992 to 2012, none of which appear in any way connected with his criminal
17 record. He alleges that:

18 • At some point “[a]fter 1992,” he successfully completed a course to qualify as a Postal
19 Supervisor but was not given a Postal Supervisor assignment. *Id.* ¶ 11.

20 • In 1996, he injured both his shoulders while working, but the USPS refused to
21 acknowledge his injury. *Id.* ¶ 12. He returned to work after one month. *Id.*

22 • In 2001, he reinjured his shoulders during the course of his employment, and the USPS
23 again “refused to recognize [his] injury and to accommodate [him] in his employment duties.” *Id.*
24 ¶ 13. He “underwent a period of rehabilitation . . . through the auspices of the Veteran’s
25 Administration” and then returned to work. *Id.*

26 • In 2004, he “requested accommodations from [the USPS] to enable him to work with the
27 aid of a computer designed to alleviate his hearing and learning disabilities.” *Id.* ¶ 14. The USPS
28 denied the request. *Id.*

1 • In 2004, the USPS “deemed [him] to be on leave-without-pay status.” *Id.* ¶ 15.
2 • In approximately 2010, the USPS “notified [him] that it was removing him from
3 employment for the stated reason that he had been on leave-without-pay status for more than one
4 year.” *Id.*

5 • In 2012, the USPS “terminated [his] employment . . . without just cause and without
6 responding in any way to [his] requests for reasonable accommodations to his injuries and
7 disabilities.” *Id.* ¶ 17.

8 Smith identifies no particular claims or causes of action but requests several forms of
9 relief, including reinstatement to a position with the USPS and compensatory damages, including
10 “back pay for the period since [his] unlawful discharge until the reinstatement.” *Id.* ¶ 18. He
11 asserts jurisdiction under Title VII and the Rehabilitation Act. *Id.* ¶ 1. He pleads no facts
12 regarding administrative exhaustion but submits, as an exhibit to his complaint, a decision from
13 the Equal Employment Opportunity Commission (“EEOC”) denying his request for
14 reconsideration and notifying him that he has 90 days to file a civil action. Dkt. No. 6. The EEO
15 decision is dated June 25, 2015. *Id.*

16 **II. PRIOR LAWSUITS**

17 Defendant identifies two other lawsuits Smith has filed against the Postmaster General in
18 this district. In *Smith v. Potter*, No. 01-cv-03270-CW (N.D. Cal. filed Aug. 27, 2001) (“*Smith I*”),
19 Smith alleged that between 1990 and 1994, the USPS failed to reasonably accommodate his
20 learning disability by refusing to give him a requested hand-held computer to help him with his
21 work, and that in 1995 the USPS discriminated against him on the basis of his race, age, and
22 learning disability by failing to appoint him to a supervisory position. Tseng Decl. Exs. A and B
23 (Dkt. Nos. 19-1 and 19-2). Judge Wilken granted summary judgment for John Potter, the
24 Postmaster General at the time, and the Ninth Circuit affirmed on appeal. Tseng Decl. Exs. A and
25 B; *Smith v. Potter*, 186 F. Appx. 733 (9th Cir. 2006). The Supreme Court denied Smith’s petition
26 for writ of certiorari. *Smith v. Potter*, 549 U.S. 1007 (2006).

27 Smith filed *Smith v. Brennan*, No. 12-cv-01358-WHO (N.D. Cal. filed Mar. 19, 2012)
28 (“*Smith II*”), after appealing his 2010 removal to the Merit Systems Protection Board (“MSPB”).

1 *Id.* at Dkt. No. 70 at 4. He accused the USPS of failing to reasonably accommodate a series of
2 injuries he sustained in 1988, 1999, 2000, and 2004. *Id.* at Dkt. No. 70 at 5. On March 6, 2014, I
3 issued an order granting summary judgment against Smith on the ground that his claims were
4 time-barred under the applicable statute of limitations. *Id.*

5 **III. INSTANT MOTION**

6 Defendant filed this motion for summary judgment, or in the alternative, motion to dismiss
7 on February 5, 2016. Dkt. No. 15 (“Mot.”). The motion is based on a number of defects in
8 Smith’s claims, including that they are inadequately alleged, untimely, and barred by res judicata.
9 *Id.* Smith’s opposition brief does not address either the arguments in defendant’s motion or the
10 merits of his claims. *See* Dkt. No. 22. It is largely dedicated to pointing out a series of purported
11 flaws in the administrative documents submitted with defendant’s motion. *Id.* I heard argument
12 from the parties on April 6, 2016. Dkt. No. 26.

13 **LEGAL STANDARD**

14 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain “a short and plain
15 statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in
16 order to “give the defendant fair notice of what the claim is and the grounds upon which it rests,”
17 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and alterations
18 omitted).

19 A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure
20 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
21 2001). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable
22 legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela*
23 *Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). While a complaint “need not contain
24 detailed factual allegations” to survive a Rule 12(b)(6) motion, “it must plead enough facts to state
25 a claim to relief that is plausible on its face.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th
26 Cir. 2009) (internal quotation marks and citations omitted). A claim is facially plausible when it
27 “allows the court to draw the reasonable inference that the defendant is liable for the misconduct
28 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

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In considering whether a claim satisfies this standard, the court must “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marines Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, “conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins*, 568 F.3d at 1067 (internal quotation marks omitted). A court may “reject, as implausible, allegations that are too speculative to warrant further factual development.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013).

DISCUSSION

I. SMITH’S ALLEGATIONS DO NOT PROVIDE FAIR NOTICE OF HIS CLAIMS

As an initial matter, Smith’s allegations are simply too disorganized and lacking in detail to state a claim under either Title VII or the Rehabilitation Act.

Title VII prohibits employment discrimination on the basis of a protected trait. A discriminatory employment practice is established by showing that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). “A plaintiff alleging disparate treatment under Title VII must first establish a prima facie case of discrimination by offering evidence that gives rise to an inference of unlawful discrimination.” *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009) (internal quotation marks and alterations omitted). A plaintiff may do this by satisfying the four-part framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

1 802 (1973),² or by simply presenting direct or circumstantial evidence indicating that the
2 employment decision was based on a protected trait. *Boeing*, 577 F.3d at 1049; *McGinest v. GTE*
3 *Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). “[A] Title VII plaintiff need not plead a prima
4 facie case to survive a motion to dismiss,” but he must “plead facts sufficient to show that his
5 claim has substantive plausibility.” *Haney v. United Airlines, Inc.*, No. 15-cv-00474-VC, 2016
6 WL 80554, at *1 (N.D. Cal. Jan. 7, 2016) (internal quotation marks and alterations omitted).

7 The Rehabilitation Act provides a cause of action for both disability discrimination and
8 failure to accommodate. To state a claim for disability discrimination under the Rehabilitation
9 Act, a plaintiff must plead facts plausibly demonstrating that he or she (1) is a person with a
10 disability, (2) is otherwise qualified for employment, and (3) suffered discrimination because of
11 his or her disability. *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1005 (9th Cir. 2007). “The
12 Americans with Disabilities Act, whose standards of substantive liability are incorporated in the
13 Rehabilitation Act, defines ‘disability’ as: (A) a physical or mental impairment that substantially
14 limits one or more of the major life activities of such individual, (B) a record of such an
15 impairment, or (C) being regarded as having such an impairment.” *Id.* To state a claim for failure
16 to accommodate under the Rehabilitation Act, a plaintiff must plausibly establish, among other
17 things, “the existence of a reasonable accommodation that would enable him or her to perform the
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19 ² In *McDonnell*, the Supreme Court explained that

20 The complainant in a Title VII trial must carry the initial burden
21 under the statute of establishing a prima facie case of racial
22 discrimination. This may be done by showing (i) that he belongs to a
23 racial minority; (ii) that he applied and was qualified for a job for
24 which the employer was seeking applicants; (iii) that, despite his
25 qualifications, he was rejected; and (iv) that, after his rejection, the
26 position remained open and the employer continued to seek
27 applicants from persons of complainant’s qualifications

28 [. . .]

The facts necessarily will vary in Title VII cases, and the
specification above of the prima facie proof required from
respondent is not necessarily applicable in every respect to differing
factual situations.

411 U.S. at 802, 802 n.13.

1 essential functions of [the] job.” *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1046-47
2 (9th Cir. 1999) (internal quotation marks omitted).

3 Smith’s allegations do not satisfy these requirements. With respect to Title VII, Smith
4 does not identify the protected trait or traits that formed the basis for the alleged discrimination.
5 Nor does he identify the employment decision or decisions that were allegedly discriminatory – he
6 alleges a number of employment decisions by the USPS but does not indicate which, if any,
7 provide the basis for his Title VII claims. With respect to the Rehabilitation Act, it is unclear
8 whether Smith’s claims are based on his shoulder injuries, his hearing and learning disabilities, or
9 some other impairments (for example, the eye, neck, and foot injuries raised in *Smith II*). Further,
10 he alleges no facts regarding whether his impairments “substantially limited one or more of [his]
11 major life activities.” *Walton*, 492 F.3d at 1005. Nor does he allege facts plausibly establishing
12 either that any employment decision was motivated by one or more of his impairments, or that
13 there was a reasonable accommodation that the USPS failed to provide. He states that in 2012 the
14 USPS “terminated [his] employment . . . without just cause and without responding in any way to
15 [his] requests for reasonable accommodations to his injuries and disabilities.” *Id.* ¶ 17. But he
16 does not explain which requests for reasonable accommodations or which injuries and disabilities
17 he is referring to, or how the termination in 2012 is connected to his impairments.

18 For these reasons, Smith’s allegations are not sufficient to provide “fair notice of what
19 [his] claim[s] [are] and the grounds upon which [they] rest[.]” *Twombly*, 550 U.S. at 555. This is
20 one reason Smith’s complaint must be dismissed. In amending his complaint, Smith should pay
21 attention not only to the defects I describe above, so that he states claims that are plausible, but
22 also to the problems I discuss below, which would require me to dismiss some or all of his claims
23 with prejudice in light of the facts as I currently understand them.

24 **II. SMITH’S CLAIMS ARE UNTIMELY**

25 Defendant contends that Smith’s claims are untimely because (1) he did not file suit within
26 90 days of receiving a right-to-sue notice from the EEOC; and (2) he did not contact an EEO
27 counselor within 90 days of the alleged misconduct. Defendant is right.

28

1 **A. 90 days to file suit**

2 Smith filed an informal complaint with the EEOC in March 2014, followed by a formal
3 complaint in June 2014. Lui Decl. Exs. A, B (Dkt. Nos. 17-1, 17-2).³ After the USPS dismissed
4 the formal complaint on July 24, 2014, Smith appealed to the EEOC. Lui Decl. Exs. C, E (Dkt.
5 Nos. 17-3, 17-5). On February 19, 2016, the EEOC issued a decision affirming the dismissal. Lui
6 Decl. Ex. F (Dkt. No. 17-6). On June 25, 2015, it issued a decision, along with a right-to-sue
7 notice, denying Smith’s request for reconsideration. Lui Decl. Ex. H (Dkt. No. 17-8).

8 Under both Title VII and the Rehabilitation Act, Smith was required to file suit within 90
9 days of receiving notice of the final agency action on his complaint. *See Bullock v. Berrien*, 688
10 F.3d 613, 616 (9th Cir. 2012); *see also* 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407. This 90-
11 day period “operates as a limitations period,” meaning that if a claimant does not file a civil action
12 within the 90 days, “then the action is time-barred.” *Payan v. Aramark Mgmt. Servs. Ltd. P’ship*,
13 495 F.3d 1119, 1121 (9th Cir. 2007).

14 The limitations period begins on the date the right-to-sue notice “arrive[s] at the claimant’s
15 address of record.” *Payan*, 495 F.3d at 1122. Where this date is unknown, the notice is presumed
16 to have arrived three days after the date it was mailed, which is presumed to be the date the notice
17 was issued. *Id.* at 1123-26. Both of these presumptions are rebuttable. *Id.*

18 The EEOC issued its decision denying Smith’s request for reconsideration on June 25,
19 2015. Lui Decl. Ex. H. The attached certificate of mailing indicates that the decision and right-to-
20 sue notice were mailed on that date. *Id.* Three days from June 25, 2015 is Sunday, June 28, 2015.
21 If the notice is presumed to have arrived on Monday, June 29, 2015, then Smith had until
22 September 28, 2015 to file his complaint.⁴ He did not file it until September 30, 2015.

23 While the presumptive dates of mailing and arrival can be rebutted, Smith offers no
24

25 _____
26 ³ “It is well established that courts may consider the administrative record of a plaintiff’s claims
27 before the EEOC as judicially noticeable matters of public record.” *Lacayo v. Donahoe*, No. 14-
28 cv-04077-JSC, 2015 WL 993448, at *9 (N.D. Cal. Mar. 4, 2015) (citing cases). To the extent that
Smith’s opposition brief can be construed as raising objections to the administrative documents
cited in this Order, the objections are OVERRULED.

⁴ Ninety days from June 29, 2015 is September 27, 2015, but September 27, 2015 was a Sunday.

1 evidence or argument to rebut them here. Nor does he identify any basis for equitable tolling. *Cf.*
2 *Gray v. Shinseki*, No. 12-cv-03109-JCS, 2013 WL 1891387, at *2-3 (N.D. Cal. May 6, 2013)
3 (noting that the 90-day period is subject to equitable tolling but dismissing the plaintiff’s Title VII
4 complaint with prejudice where it was filed two days after the 90-day deadline and the plaintiff
5 “does not allege in the complaint or suggest in her opposition brief that there are grounds for
6 finding equitable tolling”). Because he did not file suit within 90 days of receiving his right-to-sue
7 notice, his claims are time-barred and must be dismissed. *See id.*; *see also Payan*, 495 F.3d at
8 1127 (finding Title VII complaint time-barred where it was filed three days after the 90-day
9 deadline); *Scholar v. Pac. Bell*, 963 F.2d 264, 267-68 (9th Cir. 1992) (same); *Hemenway v.*
10 *Shinseki*, No. 11-cv-00505-DMR, 2012 WL 2792440, at *10 (N.D. Cal. July 9, 2012) (same).

11 **B. 45 days to contact an EEO counselor**

12 In addition to filing suit within 90 days of receiving the right-to-sue notice, Smith was
13 required to “initiate contact” with an EEO counselor within 45 days of the alleged misconduct.
14 *See* 29 C.F.R. § 1614.105(a)(1) (“An aggrieved person must initiate contact with a Counselor
15 within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel
16 action, within 45 days of the effective date of the action.”); *see also Cherosky v. Henderson*, 330
17 F.3d 1243, 1245 (9th Cir. 2003). While section 1614.105(a)(1) “is not a jurisdictional prerequisite
18 for suit in federal court, [the Ninth Circuit] ha[s] consistently held that, absent waiver, estoppel, or
19 equitable tolling, failure to comply with this regulation is fatal to a federal employee’s
20 discrimination claim in federal court.” *Kraus v. Presidio Trust Facilities Div./Residential Mgmt.*
21 *Branch*, 572 F.3d 1039, 1043 (9th Cir. 2009) (internal quotation marks and alterations omitted).
22 The burden is on the plaintiff to establish that waiver, estoppel, or equitable tolling applies. *See*
23 *id.* at 1043-44.

24 The alleged misconduct in the complaint spans from 1988 to 2012. According to the
25 documents submitted by defendant, Smith first contacted an EEO counselor on March 13, 2014,
26 more than two years after his termination. Lui Decl. ¶ 3, Ex. A (Dkt. No. 17-1). Smith does not
27 substantively address this issue in his opposition brief, and I see no basis in his complaint or
28 opposition brief for the conclusion that he initiated contact with an appropriate individual any

1 earlier than March 13, 2014, or for the application of waiver, estoppel, or equitable tolling. This is
 2 an additional reason his claims are time-barred. *See Branch v. McDonald*, No. 14-cv-03846-
 3 DMR, 2015 WL 7874763, at *3, *9 (N.D. Cal. Dec. 4, 2015) (granting summary judgment against
 4 plaintiff on her Title VII and Rehabilitation Act claims for failure to comply with section
 5 1614.105(a)(1)); *Lacayo*, 2015 WL 3866070, at *3-5 (dismissing Title VII and Rehabilitation Act
 6 claims under Rule 12(b)(6) for same reason); *Gullette v. Donahoe*, No. 12-cv-00490-CW, 2013
 7 WL 1283391, at *5-6 (N.D. Cal. Mar. 27, 2013) (dismissing Rehabilitation Act claims under Rule
 8 12(b)(6) for same reason); *see also Regacho v. Potter*, 247 F. Appx. 908, 909 (9th Cir. 2007)
 9 (“[Plaintiff] first complained to the EEO counselor on August 17, 1999 regarding USPS’s failure
 10 to train him and to accommodate him. Thus, [plaintiff] lost the ability to complain about
 11 discrimination that occurred prior to July 4, 1999.”).

12 **III. NEARLY ALL OF SMITH’S CLAIMS ARE BARRED BY RES JUDICATA**

13 Defendant contends that all of Smith’s claims in this action, except those concerning his
 14 termination in 2012, are barred by res judicata as a result of the judgments in *Smith I* and *Smith II*.
 15 Mot. at 7-8. I agree.

16 Res judicata, or claim preclusion, “provides that a final judgment on the merits bars further
 17 claims by parties or their privies based on the same cause of action.” *TahoeSierra Pres. Council,*
 18 *Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (internal quotation
 19 marks omitted). “Res judicata is applicable whenever there is (1) an identity of claims, (2) a final
 20 judgment on the merits, and (3) privity between parties.” *Id.* (internal quotation marks omitted).
 21 The doctrine extends to “any claims that were raised *or could have been raised* in a prior action.”
 22 *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (emphasis in original). “A plaintiff
 23 need not bring every possible claim. But where claims arise from the same factual circumstances,
 24 a plaintiff must bring all related claims together or forfeit the opportunity to bring any omitted
 25 claim in a subsequent proceeding.” *Turtle Island Restoration Network v. U.S. Dep’t of State*, 673
 26 F.3d 914, 918 (9th Cir. 2012).

27 Here, there is an identity of claims with respect to all of Smith’s current claims except,
 28 perhaps, those concerning his termination in 2012. The Ninth Circuit looks to four factors in

1 determining whether claims in successive lawsuits are identical for res judicata purposes:

- 2 (1) whether rights or interests established in the prior judgment
3 would be destroyed or impaired by prosecution of the second action;
4 (2) whether substantially the same evidence is presented in the two
5 actions; (3) whether the two suits involve infringement of the same
6 right; and (4) whether the two suits arise out of the same
7 transactional nucleus of facts.

8 *Turtle Island*, 673 F.3d at 917-18 (internal quotation marks omitted). The fourth factor is by far
9 the most important, to the point that the Ninth Circuit has repeatedly described it as “outcome
10 determinative.” *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010);
11 *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005).

12 *Smith I* and *Smith II* in combination brought claims concerning the USPS’s alleged
13 (1) failure to reasonably accommodate Smith’s learning disability between 1990 and 1994;
14 (2) failure to promote Smith to a supervisory position in 1995; and (3) failure to reasonably
15 accommodate Smith’s injuries in 1988, 1996, 2000, and 2004. The complained-of injuries in
16 *Smith II* were an eye infection (1988), shoulder injuries (1996 and 2000), and neck, shoulder, and
17 foot injuries (2004). *See Smith II*, No. 12-cv-01358, Dkt. No. 70 at 2-4.

18 As discussed above, Smith’s current claims are too disorganized and lacking in detail to
19 survive a Rule 12(b)(6) motion. But he appears to seek to assert claims based on his termination
20 in 2012, plus the USPS’s (1) failure to promote him between 1988 and “[a]fter 1992,” Compl. ¶¶
21 10-11; (2) failure to accommodate his shoulder injuries in 1996 and 2001, *id.* ¶¶ 12-13; and
22 (3) failure to accommodate his hearing and learning disabilities in 2004, *id.* ¶ 14.⁵

23 Apart from the termination in 2012, each of these claims clearly arises out of the same
24 transactional nucleus of facts as *Smith I* and/or *Smith II*. They all concern the same basic theories
25 of liability as the claims in those cases (failure to promote and/or to reasonably accommodate

26 ⁵ Smith does not appear to bring claims based on his being placed on leave-without-pay status in
27 2004, or his being removed from employment in 2010. Neither event is identified as an issue in
28 his informal EEO complaint, formal EEO complaint, or the June 27, 2014 dismissal of the formal
complaint. *See* Lui Decl. Exs. A, B, C; *see also B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1100
(9th Cir. 2002) (“Subject matter jurisdiction extends over all allegations of discrimination that
either fell within the scope of the EEOC’s actual investigation or an EEOC investigation which
can reasonably be expected to grow out of the charge of discrimination.”) (internal quotation
marks and alterations omitted).

1 injury or disability), and they all concern the same time period (1988 to 2004). At least some of
2 Smith’s current claims, such as those based on the USPS’s alleged failure to accommodate his
3 shoulder injuries in 1996 and 2001, appear to be the exact same as those that were previously
4 litigated. While other of his current claims appear to be slightly different from those raised in
5 *Smith I* and *Smith II*, there is no question that they arise from the same factual circumstances and
6 could have been raised in those cases. This includes Smith’s concerns regarding how the USPS
7 treated him as a result of his expunged conviction; those concerns should have been raised in the
8 prior cases. Smith makes no argument to the contrary in his opposition brief. The identity of
9 claims element is satisfied.

10 The final judgment on the merits and privity between parties elements are also satisfied.
11 *Smith I* and *Smith II* both ended in a judgment on the merits. *See Tahoe-Sierra Pres. Council, Inc.*
12 *v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) (dismissal on statute of
13 limitations grounds is a judgment on the merits). And, because Smith brought each of his actions
14 against the Postmaster General, there is privity between the parties. *See Gullette*, 2013 WL
15 1283391, at *4 (finding privity element satisfied where the plaintiff “brought both of her prior
16 actions against the Postmaster General”).

17 With the exception of his claims based on his termination in 2012, all of Smith’s claims are
18 barred by res judicata.⁶ It appears that any claims based on the termination may also be precluded
19 by the prior lawsuits, but I cannot be sure until Smith files a more coherent complaint.

20 **CONCLUSION**

21 All of Smith’s claims are inadequately alleged and untimely, and nearly all of them are
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23 ⁶ Instead of attacking Smith’s claims based on his termination on res judicata grounds, defendant
24 contends that these claims must be dismissed (in addition to the reasons discussed above) because
25 Smith initially appealed his termination to the MSPB. *See* Mot. at 6-7. Smith filed an MSPB
26 appeal on March 9, 2012, asserting that his termination was wrongful “because the agency never
27 presented my medical documentation to [the] OPM.” Mihal Decl. Ex. B (Dkt. No. 18-2). The
28 MSPB issued an initial decision on July 6, 2012 affirming the termination. Lui Decl. Ex. D (Dkt.
No. 17-4). Smith did not file a petition for review, and there is no indication that he took any
further action in the MSPB appeal. *See* Mihal Decl. Ex. A (Dkt. No. 18-1). Defendant contends
that this sequence of events precludes Smith from bringing claims in this Court based on his
termination. Because Smith’s claims arising from his termination fail for the reasons stated
elsewhere in this Order, I do not address this argument at this time.

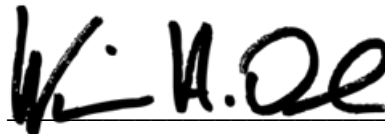
1 also barred by res judicata. Accordingly, defendant's motion to dismiss is GRANTED. In light of
2 Smith's pro se status, Smith may have an opportunity to amend his complaint to address the
3 deficiencies discussed in this Order. His first amended complaint, if any, is due within 45 days of
4 today's date. Defendant's motion for summary judgment is DENIED AS MOOT.

5 Smith may wish to seek assistance from the Legal Help Center by calling 415-782-8982 or
6 by signing the appointment book outside the Legal Help Center's office on the 15th floor of the
7 federal building at 450 Golden Gate Avenue, San Francisco, California. More information about
8 the Legal Help Center is available online at cand.uscourts.gov/helpcentersf. Smith may also wish
9 to obtain a copy of this district's handbook for parties representing themselves in federal court,
10 available at cand.uscourts.gov/prosehandbook.

11 Smith is advised to carefully review this Order and to file a first amended complaint that
12 addresses my concerns. If he is unable to state a plausible claim in his first amended complaint, I
13 may dismiss this case with prejudice because of the apparent res judicata effect of the prior
14 lawsuits and timeliness issues discussed above.

15 **IT IS SO ORDERED.**

16 Dated: April 13, 2016



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18 WILLIAM H. ORRICK
United States District Judge

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