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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHEILA BLACKMAN-BAHAM,
Plaintiff,
v.
JOHN F. KELLY, Secretary of the
Department of Homeland Security
Defendant.

Case No. 16-cv-03487-JCS

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

Re: Dkt. No. 20

I. INTRODUCTION

Plaintiff Sheila Blackman-Baham, an employee of the Federal Emergency Management Agency (“FEMA”), brings this action against the Secretary of the Department of Homeland Security¹ based on alleged employment discrimination based on age, race, sex, and disability and retaliation for prior EEO activity. Defendant has brought a Motion to Dismiss (“Motion”) seeking dismissal of Plaintiff’s complaint for failure to exhaust administrative remedies under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). The Court vacated the hearing pursuant to Civil Local Rule 7-1(b) and took the Motion under submission. *See* Docket No. 28. For the reasons stated below, the Motion is GRANTED in part and DENIED in part.²

II. BACKGROUND

A. The First Amended Complaint

Plaintiff began working for FEMA on October 10, 2010. First Amended Complaint (“FAC”) ¶ 6(b). She alleges that Defendant “started harassing, and making plaintiff’s working

¹ John Kelly has replaced Jeh Johnson as Secretary of the Department of Homeland Security and is therefore substituted as a defendant. *See* Fed. R. Civ. P. 25(d).

² The parties have consented to the jurisdiction of the undersigned United States magistrate judge pursuant to 28 U.S.C. § 636(c).

1 environment hostile, as early as her first couple of months” in retaliation for her “prior EEO
2 activity.” *Id.* ¶ 6(c). This retaliation allegedly included “attempt[ing] to disqualify [P]laintiff
3 for re-employment, . . . interviewing [her] physicians, neighbors, [and] landlords[,] suggesting
4 negative characteristics about [her][,] [a]ccusing [her] of acting disrespectfully, or not
5 cooperating” and “denying [her] training and promotional opportunities.” *Id.*; *see also id.* ¶ 6(d)
6 (alleging that in March 2011 Defendant “harassed plaintiff[] about her reinvestigation”) & (e)
7 (alleging that in April 2011 Defendant “denied plaintiff consideration for a promotional
8 opportunity, while forcing plaintiff to perform the duties of the higher grade position for almost 90
9 days, without promotional pay”).

10 Plaintiff further alleges that in September 2011, Defendant “denied [her] training
11 opportunities and additional pay, to process the first wrongful termination,” *id.* ¶ 6(f), “barred
12 [P]laintiff from her workspace, and charged her almost two weeks of Leave Without Pay.” *Id.* ¶
13 6(g). According to Plaintiff, Defendant “improperly stated facts to MSPB” in connection with the
14 two weeks of leave without pay, causing the MSPB to rule in Defendant’s favor based on this
15 inaccurate information. *Id.* ¶ 6(g). Plaintiff also alleges that Defendant “attempted to wrongfully
16 terminate plaintiff as a probationary employee, based on her period of unemployment and illness.”
17 *Id.* ¶ 6(i). Plaintiff further alleges that Defendant “posted termination documents on [her]
18 residence in plain view of Plaintiff’s neighbors or anyone else to see.” *Id.* ¶ 6(h). According to
19 Plaintiff, Defendant “was allowed to retract the [termination] when plaintiff proved she was in fact
20 an employee, not subject to a probation period.” *Id.* ¶ 6(i).³

21 Plaintiff alleges that in January 2012, Defendant wrongfully terminated her a second time,
22 based on her debts during her time of unemployment and illness, and that this decision caused her
23 and her family to become homeless. *Id.* ¶ 6(j). This decision was overturned by the MSPB in
24

25 ³As discussed below, Plaintiff filed two MSPB appeals during this period, one on November 2,
26 2011 challenging her termination and another on December 11, 2011 seeking back pay for the
27 two-week period referenced above on the basis that she had been constructively suspended from
28 duty. *See* RJN, Exs. A & C. In the first MSPB proceeding, FEMA conceded Plaintiff was not a
subject to a probationary period and reinstated Plaintiff with back pay. In the second MSPB
proceeding, the Administrative Judge concluded that Plaintiff’s absence from work during the
two-week period was voluntary and therefore did not constitute a constructive suspension.

1 August 2013, at which time Plaintiff was restored to her position. *Id.* ¶ 6(k).

2 Plaintiff also alleges that Defendant mischaracterized her EEO claims (discussed below),
3 tried to direct Plaintiff to the wrong place to file her EEOC case, and attempted to mislead the
4 EEOC into believing that she had abandoned her claims. *Id.* ¶ 6(l)-(n). Plaintiff further alleges
5 Defendant has continued to “harass, not promote and discriminate[] against [P]laintiff continually
6 since her return [to work] in August 2013.” *Id.* ¶ 6(o).

7 Plaintiff alleges that the EEOC issued an “Order/Dismissal in Favor of U.S. District Court
8 Action” on March 24, 2016. *Id.* ¶ 7. She initiated this action on June 22, 2016, when she filed the
9 original complaint. She filed her FAC on September 30, 2016.

10 Plaintiff alleges that Defendant discriminated against her based on her age, sex, race,
11 gender and “physical/mental disabilities.” *Id.* ¶ 5.⁴ She also asserts a retaliation claim based on
12 her prior EEO activity (discussed below). She asserts the following claims in the FAC:

13 1) Claim One: Violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e
14 *et seq.* (“Title VII”), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a
15 (“ADEA”), and the Rehabilitation Act of 1973, 29 U.S.C. § 791 (“Rehabilitation Act”) based on
16 the allegation that Defendant “processed two wrongful terminations against [P]laintiff, because
17 she was unemployed and ill for almost two years and had debt, violating [P]laintiff’s due process
18 rights.” FAC ¶ 9. In this claim, Plaintiff alleges that she is a “tenured disabled employee who is
19 in a protected class” but does not specifically identify a particular protected class. *Id.*

20 2) Claim Two: Failure to consider Plaintiff for a promotional opportunity, in violation of
21 Rehabilitation Act and the Lilly Ledbetter Fair Pay Act of 2009 (Pub.L. No. 111–2) (“LLA”)
22 based on the allegation that she “was denied consideration for a promotion and career
23 advancement opportunity, although she had completed almost 90 days in the [position], without
24 the additional higher grade of pay.” *Id.* ¶ 11. Plaintiff does not identify the type of discrimination
25 she contends led to Defendant’s failure to consider her for promotion and career advancement.

26 _____
27 ⁴Although Plaintiff does not allege specific facts in her complaint relating to her age, race or
28 disability, she states in her December 19, 2011 EEO Complaint that she was born in May 1963,
that she is African-American and that she suffers from depression and chronic hip and knee pain.
Wallace Decl., Ex. A.

1 3) Claim Three: Retaliation for prior EEO activity, in violation of Title VII
2 and the ADEA based on the allegation that “[d]uring [P]laintiff’s interview with the investigator,
3 and during the process of [P]laintiff’s investigation, [P]laintiff was harassed about her ongoing
4 EEO case.” *Id.* ¶

5 4) Claim Four: Disability Discrimination in violation of Rehabilitation Act and the LLA
6 based on allegation that “Plaintiff was denied training opportunities, which were later used against
7 [her] future [deployability] . . . [w]hile other’s outside plaintiff’s protected class were trained, and
8 entitled to additional pay.” *Id.* ¶ 15.

9 5) Claim Five: Failure to afford Plaintiff additional wages, in violation of the
10 Rehabilitation Act of 1973 and Fair Pay Act of 2009 based on allegation that Defendant
11 “prevented [P]laintiff from deploying to disaster declarations, which prevented [P]laintiff from
12 earning additional wages, which were tax free . . . [w]hile other similar[ly] situated contract
13 specialists not in plaintiff’s protected class were not treated the same.” *Id.* ¶ 17. Again, Plaintiff
14 does not identify a specific “protected class.”

15 6) Claim Six: Hostile working environment in violation of the Title VII, the ADEA and
16 the Rehabilitation Act based on allegation that Defendant “subject plaintiff to harsh working
17 conditions and hostile environments, while violating [P]laintiff’s due process rights” even though
18 Plaintiff “was a tenured disabled employee and the defendant was well aware of [Plaintiff’s]
19 medical conditions.” *Id.* ¶ 19.

20 7) Claim Seven: Disparate Treatment in violation of the Title VII, the ADEA and the
21 Rehabilitation Act based on allegation that Plaintiff is a “tenured qualified disabled employee,
22 who is in a protected class” and “was subjected to discriminatory treatment, different from other
23 employees who were not in her protected class, but were similarly situate[ed].” *Id.* ¶ 21. Plaintiff
24 does not identify the specific type of discrimination alleged under this claim.

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1 **B. Administrative Proceedings**⁵

2 As set forth below, Plaintiff filed MSPB Appeals challenging her terminations in 2011 and
3 2012, as well as a another MSPB appeal challenging FEMA’s failure to pay her wages for the
4 two-week period leading up to her first termination. In addition, following EEO counseling, she
5 filed a formal EEO complaint on December 10, 2011 (culminating in the March 24, 2016 Order/
6 Dismissal in Favor of U.S. District Court Action) (“First EEO Complaint”) and another EEO
7 Complaint on April 11, 2016 (“Second EEO Complaint”), which is still pending.

8 **1. The November 2, 2011 MSPB Appeal**

9 On October 6, 2011, Plaintiff was officially terminated from her position of contract
10 specialist with FEMA, which is part of the Department of Homeland Security (“Agency”), based
11 on her failure to pass a background investigation conducted by the Office of Personnel
12 Management (“OPM”) and her status as a probationary employee. *See* Opposition, Ex. 6 (October
13 6, 2011 Letter entitled “Notice of Decision to Terminate during Probationary Period”); RJN, Ex.
14 B (February 9, 2012 Initial Decision). On November 2, 2011, Plaintiff filed an MSPB Appeal
15 challenging her termination on the ground that she was hired under the Agency’s reinstatement
16 authority because of her prior Federal service with the Department of the Navy and therefore was
17 not subject to a probationary period. RJN, Ex. A (November 2, 2011 Appeal) & B (February 9,
18 2012 Initial Decision). The Agency conceded that Plaintiff was not, in fact, “in a probationary
19

20 ⁵ Defendant has requested that the Court take judicial notice of: 1) three Merit System Protection
21 Board (“MSPB”) appeals filed by Plaintiff and the Initial Decisions issued as to those appeals; and
22 2) a series of email exchanges between Plaintiff and two EEO Specialists at FEMA related to the
23 scope of Plaintiff’s EEO claims. *See* Docket Nos. 20-2 and 26-2. Plaintiff also submitted
24 documents related to her administrative proceedings. *See* Exhibits 1-25 to Plaintiff’s Opposition
25 brief, Docket Nos. 24-1 and 24-2. Defendant did not object to Plaintiff’s reliance on these
26 documents or question their authenticity. Likewise, Plaintiff did not object to Defendant’s requests
27 or question the authenticity of the documents Defendant filed in support of the Motion. Therefore,
28 the Court takes judicial notice of all of the extra-pleading documents submitted by the parties on
the basis that they are “records and reports of administrative bodies.” *See Interstate Nat. Gas Co.*
v. S. California Gas Co., 209 F.2d 380, 385 (9th Cir. 1953); *see also Lacayo v. Donahue*, No. 14-
cv-4077 JSC, 2015 WL 993448 (Mar. 4, 2015, N.D. Cal.) (“The extrinsic evidence that Defendant
submitted all pertains to Plaintiff’s administrative proceedings with the EEO; thus, all are either
referenced in the complaint or matters of public record and properly considered on either a
12(b)(1) or 12(b)(6) motion to dismiss.”).

1 period” in its November 25, 2011 response and that it had followed improper procedures in
2 terminating Plaintiff. RJN, Ex. B (February 9, 2012 Initial Decision) at 3. It rescinded the
3 termination and paid Plaintiff back-pay from the date of termination, October 6, 2011. *Id.*

4 The presiding Administrative Judge (“AJ”) then issued an order to show cause why the
5 appeal should not be dismissed as moot on the basis that the *status quo ante* had been restored. *Id.*
6 Plaintiff did not respond or provide any evidence that she was entitled to compensatory damages
7 or any further relief beyond that which had already been provided. *Id.* at 5. The AJ concluded the
8 appeal was moot because the Agency had “granted *status quo ante* relief regarding back pay,
9 interest and by placing the appellant in a paid status.” *Id.* at 7. Consequently, the AJ found that the
10 MSPB could “not assert jurisdiction over the rescinded action.” *Id.* at 13; *see also id.* at 1 (“There
11 has been no determination that the Board has jurisdiction over this appeal”). The Initial Decision
12 also included a notice informing Plaintiff that it would become the final decision of the MSPB on
13 March 15, 2012 and explaining her options for appealing the decision.

14 Plaintiff does not allege that she challenged the AJ’s Initial Decision or that she pursued
15 any claims related to the termination in any other forum and there is nothing in the record that
16 suggests that she did.

17 **2. The December 13, 2011 MSPB Appeal**

18 On September 16, 2011, two weeks prior to the termination that was the subject of the
19 MSPB appeal discussed above, Plaintiff learned that her scheduled deployment to a disaster site in
20 Connecticut was being cancelled and that the Agency planned to terminate her based on her failure
21 to pass the background investigation discussed above. RJN, Ex. D (April 10, 2012 Initial
22 Decision) at 13. Plaintiff did not return to work prior to her official termination, on October 6,
23 2011, and in her December 13, 2011 MSPB appeal she alleged that she had been barred from her
24 workplace without pay, amounting to a constructive suspension. RJN, Ex. C (December 13, 2011
25 MSPB Appeal) at 3. In her MSPB Appeal, she sought back-pay and benefits for this two-week
26 period. The AJ considered the evidence presented by Plaintiff and the Agency and dismissed
27 Plaintiff’s claim for lack of jurisdiction on the basis of her finding that Plaintiff had voluntarily
28 failed to report for duty and had not been constructively suspended from duty. *Id.* at 23 (“The

1 Board has no jurisdiction over the voluntary decision of an employee not to report for duty”).

2 Like the previous decision by the AJ, the December 13, 2011 Initial Decision included a
3 notice explaining to Plaintiff how she could appeal that decision. Again, Plaintiff does not allege
4 that she took any further action in connection with this two-week period in any forum and there is
5 nothing in the record that suggests that she did.

6 **3. The April 20, 2012 MSPB Appeal**

7 On March 21, 2012, the Agency again terminated Plaintiff from her FEMA position. RJN,
8 Ex. F (May 29, 2013 Initial Decision) at 5. The Agency cited her failure to pass the background
9 investigation discussed above, finding that certain unpaid debts showed that she had engaged in
10 dishonest conduct and therefore, that she did not meet the “suitability” requirement for her
11 position. RJN, Ex. F (May 29, 2013 Initial Decision) at 5-8. Plaintiff filed an MSPB appeal
12 challenging that termination on April 20, 2012. RJN, Ex. E (April 20, 2012 MSPB appeal).
13 Whereas the Agency had followed the wrong procedures in terminating Plaintiff on October 6,
14 2011, the March 21, 2012 termination was carried out according to the procedures that apply to
15 non-probationary employees. *See* RJN, Ex. F (May 29, 2013 Initial Decision) at 5-6. Because
16 the Agency apparently followed the correct procedures with respect to this termination, the focus
17 of the AJ’s initial decision was on whether the Agency’s suitability determination was proper.
18 She found that it was not. *Id.* at 18.

19 The AJ examined in detail the specific debts that were the subject of the Agency’s
20 conclusion, which included certain unpaid taxes as well as various debts owed to other creditors.
21 *Id.* at 16-19. As to the circumstances which gave rise to these debts, the AJ credited Plaintiff’s
22 testimony that the “debts arose initially because illness forced her to reduce her work hours, and
23 continued because extended unemployment significantly reduced her income.” *Id.* at 16. The AJ
24 further found that Plaintiff “engaged in a good faith effort to pay her taxes,” that there was “no
25 indication of fraud or deceit in the acquisition of any of her debts,” and that while Plaintiff’s
26 “circumstances have been difficult, including homelessness, continued depression and lack of
27 resources, she testified that has obtained some employment which has enabled her to make efforts
28 to satisfy the remaining debt.” *Id.* at 18. The AJ therefore concluded that Plaintiff’s “reduced

1 income, extended unemployment, and physical and mental illness fully explain[ed] her financial
2 circumstances” and that the Agency had not met its burden of showing that Plaintiff was
3 unsuitable for Federal service due to dishonesty. *Id.* The AJ sustained Plaintiff’s charge and
4 ordered that the Agency restore Plaintiff to her position at FEMA retroactive to March 22, 2012.
5 *Id.* at 19. Again, Plaintiff did not pursue any further challenges in any forum based on her second
6 termination.

7 **4. The December 19, 2011 EEO Complaint**

8 On October 19, 2011, Plaintiff sought EEO counseling – a prerequisite to filing a formal
9 EEO complaint. *See* Wallace Decl., Ex. A (December 19, 2011 EEO Complaint showing that
10 Plaintiff first contacted an EEO counselor on October 19, 2011). She was assigned an EEO
11 counselor, Stacy Merriwether. Opposition, Ex. 3 (October 31, 2011 email from Mr. Merriwether
12 informing Plaintiff that he had been assigned as her EEO counselor). Mr. Merriwether’s email
13 indicated that Plaintiff sought counseling both as to the October 6, 2011 termination and as to an
14 alleged hostile work environment. *Id.* When Plaintiff filed her formal EEO Complaint, however,
15 on December 19, 2011 (almost a month after the Agency had rescinded the October 6, 2011
16 termination) she did not list her October 6, 2011 termination in her description of the conduct that
17 was the basis of her discrimination claims. Wallace Decl. Ex. A (“December 19, 2011 EEO
18 Complaint” or “First EEO Complaint”). *Id.*

19 In her First EEO Complaint, Plaintiff checked the following boxes for the bases of the
20 alleged discrimination: 1) Race; 2) Sex; 3) Age; 4) Physical or Mental Disability; and 5)
21 Retaliation/Reprisal for prior EEO activity. *Id.* In the margin next to the boxes, she wrote that her
22 race is “African-American,” her sex is “Female,” her date of birth is “5/X/63,” that her disability is
23 “chronic pain hip/knee [illegible] Depression” and that her prior EEO activity was in “2011,
24 2008.” *Id.* Plaintiff identified the “action taken against [her] that [she] believe[d] was
25 discriminatory” in an attachment. *Id.* The attachment listed the following conduct in support of
26 Plaintiff’s discrimination claims:

- 27 1. Receipt of JPMorgan Chase Bank Statement: \$34.26
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- 1 2. When my deployment was cancelled, it deprived me of overtime hours.
- 2 3. Defamation of character:
 - 3 11/9/10 - Debbie Lewis, Celesta Cook accused me of time-card fraud.
 - 4 12/30/10 - Celesta questioning my therapy appointment and schedule.
 - 5 1/28/11 - When Debbie Lewis accused me of time card fraud
 - 6 8/16/11 - When Cheryl Lipari told Kimberlee Brown "on two occasions my behavior or communication was disrespectful or rude"
 - 7 7/25/11 When Cheryl Lipari told David Orris "I had an attitude problem"
 - 8 6/21/11 - When Michael Lull told me to get approval of my work from another employee, who was not my technical Supervisor.
 - 9 6/11/11 - Within the "Letter of Caution"
- 10 4. Denial of training: CON215, CON353, Disaster Contracting
- 11 5. Letter of Caution: Michael Hull issued the letter; it alleged that Cheryl and et.al complained. The complaints were all about the Regional Contracting Officers duties, which I was not official, assigned or compensated for performing.
- 12 6. Non Selection: Personnel said "I didn't qualify because I didn't have the training or education", they failed to request "waiver". Ann# MG-2011-81 369-KJD-464993D/M
- 13 7. Tele- work denial: Michael Lull returned my request and said "You need to provide additional doctor's explanation of how this schedule will help you, and explain your condition, whether its permanent or temporary".
- 14 8. Hostile Work Environment:
 - 15 11/9/10 Celesta Cook reported to Ameka Ali "I failed to record my time correctly" time card fraud.
 - 16 12/30/10 Celesta Cook questioned my working schedule again, although it had been approved the prior month.
 - 17 1/28/11 When Debbie Lewis accused me of time card fraud
 - 18 2/7/11 - When Cheryl Lipari told my supervisor in Headquarters "I didn't follow proper procedures in having my training approved" and "I had an attitude"
 - 19 2/22/11 -When Debbie Lewis refused to return my doctor's report
 - 20 3/1/11 - When Cheryl Lipari's Administrative Specialist accused me of "talking too loud"
 - 21 3/3/11 - When Celesta Cook called me into her office to inform me that "Nancy Ward doesn't want me to represent her or Region IX".
 - 22 4/11/11- When Fred Sanchez falsely accuses me of speaking disrespectfully to him, because I disagreed with his opinion
 - 23 4/21/11 - When Michael Lull calls me into his office for counseling "Cheryl Lipari said she noticed you in the hall talking to employees, wasting time"
 - 24 4/21/11 - When Michael Lull told me "you are not entitled to break by-laws"
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1 Wallace Decl., Ex. A (First EEO Complaint).

2 In a letter dated July 13, 2012, the Director of FEMA’s Office of Equal Rights, Pauline
3 Campbell, informed Plaintiff that her office had accepted Plaintiff’s EEO claim of “hostile work
4 environment based on race (African American), sex (Female), age (5/1963), physical disability
5 (Chronic Pain, Hip/knee Replacement), mental disability (Depression) and retaliation.” Wallace
6 Decl., Ex. B (July 13, 2012 Letter). The letter listed the following incidents that the Office of
7 Equal Rights understood to be the basis of Plaintiff’s claim:

- 8 • On August 16, 2011 and several occasions, you allege that your co-workers described you
9 as “disrespectful, rude and appeared to have an attitude problem” to your other co-workers.
- 10 • On June 21, 2011, you allege your supervisor told you to get approval of work from
11 another employee that was not your supervisor.
- 12 • On June 11, 2011, you allege you were issued a Letter of Caution that referenced
13 complainants about your regional contracting duties.
- 14 • On June 11, 2011 and March 11, 2011, you allege that the Regional Administrator denied
15 your training requests.
- 16 • On May 11, 2011, you allege that you were not selected for the Regional Contracting
17 Officer position (MG-2011-81369-KJD-464993 D/M).
- 18 • On April 21, 2011, you allege you were called to your supervisor’s office to be
19 admonished for “wasting time.” You allege that your supervisor told you that you were not
20 entitled to breaks by law.
- 21 • Sometime in early 2011, you allege that your supervisor denied your request for medical
22 telework.
- 23 • On December 30, 2010, you allege that a co-worker questioned your therapy appointment
24 and schedule.
- 25 • On November 19, 2010, you allege that your co-workers accused you of timecard fraud.

26 Wallace Decl., Ex. B (July 13, 2012 Letter). Plaintiff was informed that within five days she
27 should submit “written clarification” of her claims if she was “not satisfied with the claims as
28 identified” and that the Office of Equal Rights would assume that she was “satisfied with” the

1 claims as stated if it did not hear from her. *Id.*

2 On July 21, 2012, Plaintiff sent an email to Ms. Campbell informing her that she had
3 received the July 13, 2012 letter but that she needed an extension on the deadline to respond
4 because she was homeless and was “unable to communicate other than hand writing and sending
5 through the postal service.” Opposition, Ex. 22. She also explained that she could “only get to the
6 mailing address once the week” and asked that Ms. Campbell “[p]lease consider [her] situation
7 when sending correspondence to that address.” *Id.*

8 On August 29, 2012 (after Plaintiff’s second termination and before she had been restored
9 to her position as a result of the second MSPB appeal), the EEO Investigator assigned to
10 investigate Plaintiff’s EEO Complaint, Eddie Neal, conducted an examination of Plaintiff, under
11 oath, in connection with her EEO Complaint. *See* Wallace Decl., Ex. C (Affidavit). Mr. Neal
12 sought to establish that Plaintiff’s March 2012 termination was *not* part of Plaintiff’s claim and the
13 following exchange occurred:

14 Neal: Okay. Now what is your current status with the Department
15 of Homeland Security?

16 Plaintiff: Terminated

17 Neal: Okay . . . I don’t see the termination as part of what I am
18 investigating. Was that filed as a separate claim?

19 Plaintiff: The termination had to be filed with the MSPB Board
20 within thirty days after it was effected.

21 Neal: Okay. So –

22 Plaintiff: And they said I could not file an EEO on it if I was to file
23 with the MSPB Board.

24 Neal: Okay. So I just wanted to make sure it wasn’t part of what
25 I’m doing. Okay. Alright.

26 *Id.* at 3.

27 In response to Plaintiff’s September 3, 2012 email, EEO Specialist Kristena Jenkins sent
28 Plaintiff an email on September 5, 2012 asking Plaintiff to call her to discuss her EEO claims.
Reding Decl., Ex. I. Plaintiff responded that she would be unable to talk with Ms. Jenkins,
however, and told her that all of the information about her claims could be found in the original

1 EEO complaint and Plaintiff's communications with Mr. Merriwether. *Id.*

2 On January 6, 2014, Pauline Campbell, of the Office of Equal Rights, sent Plaintiff a letter
3 stating that her complaint was being amended to include "added claims" and asked Plaintiff's
4 permission to extend the 180-day deadline for investigation by 90 days. Opposition, Ex. 18.
5 Plaintiff did not agree to the extension, however, stating in an email to Ms. Jenkins on February
6 24, 2014 that she did not agree to the extension. Reding Decl. Ex. J. She stated: "I am not sure
7 what these 'added claims' are, and at this point I do not want to spend any additional time to
8 investigate them. Therefore, please move forward with this email with the claims that the
9 investigation is completed." *Id.*

10 On March 23, 2016, Plaintiff notified the EEOC that she had elected to pursue her
11 discrimination claim in federal district court rather than await a decision from the EEOC as her
12 EEO complaint had been pending for more than 180 days. Wallace Decl., Ex. D. Accordingly, on
13 March 24, 2016, an Administrative Judge of the EEOC issued an Order/Dismissal in Favor of U.S.
14 District Court Action. *Id.*

15 **5. The April 11, 2016 EEO Complaint**

16 On April 11, 2016, Plaintiff filed a second EEO complaint alleging discrimination on the
17 basis of "Race," "Color," "Physical or Mental Disability" and Retaliation/Reprisal for prior EEO
18 activity. Wallace Decl., Ex. E. She also hand-wrote in the section for identifying the bases for
19 alleged discrimination "Hostile Working Environment; Continuing Violations." In the attachment
20 describing the basis for the claims, Plaintiff claimed she has been subject to "Retaliation (2013-
21 2016); Disparate treatment (2013-2016); Denial of Training (2013-January 2016); Performance
22 Appraisal 2015 (February 9, 2015); [and] Hostile working environment (2013-2016)." *Id.* She
23 states that "[c]ontinuing violations have been present" and lists the following 14 examples in
24 support of her claim:

- 25 1. Calls from Angela Meeks prior to my arrival, then she basically ordered that I find
26 internet access to send her a list of things I needed to accommodate my disabilities.
27 However, equipment was not received until 2015.
- 28 2. On arrival back to work - Angela Meeks accused me of some sort of behavior, not

- 1 resembling my personality or my professionalism.
- 2 3. Angela Meeks reported something wrong to Personnel Security regarding a threat made
- 3 to me.
- 4 4. Disparate treatment on the team I was placed on.
- 5 5. Toni/Joni/Angela/Chris - assign me to a "Trainee" task book, despite my history with
- 6 FEMA or my past experiences.
- 7 6. No assignments as an 1102 until the end of 2015.
- 8 7. Accusations about a behavior and events that were not true.
- 9 8. My Performance evaluation for 2015 (when Angela Meeks attempted to add events that
- 10 were untrue). Then my rating not reflecting the removal of the negative untrue
- 11 information,
- 12 9. No deployments for three years
- 13 10. When finally deployed, no accommodations for my disabilities
- 14 11. While deployed my reasonable accommodations form sent to others.
- 15 12. While deployed my health conditions sent to others.
- 16 13. While deployed, harassed by deployed supervisor in various ways (task book, work
- 17 assignments, treated differently than others).
- 18 14. Various comments made by team-mates about me being crazy or a problem employee
- 19 (2013-2016)

20 Wallace Decl., Ex. E. As of the date Plaintiff filed her complaint initiating this action the EEOC
21 was still investigating her claim.

22 **C. The Motion**

23 In the Motion, Defendant asserts that Plaintiff's claims should be dismissed under Rule
24 12(b)(1) for lack of subject matter jurisdiction on the basis that she failed to exhaust her
25 administrative remedies. Motion at 2. Defendant further asserts that even if Plaintiff has satisfied
26 the exhaustion requirement, Plaintiff's claims should be dismissed under Rule 12(b)(6) for failure
27 to state valid claims. *Id.*

28 In arguing that Plaintiff failed to exhaust her administrative remedies, Defendant points to

1 the fact that Plaintiff challenged her two terminations in MSPB appeals, arguing that this
2 constituted an irrevocable election to proceed in that forum and bars Plaintiff's claims in this
3 action to the extent her claims are based on her terminations. *Id.* at 7-10. According to Defendant,
4 all of the remaining claims of discrimination Plaintiff asserts in this action are subject to dismissal
5 for failure to properly exhaust administrative remedies because all of the conduct listed in the
6 December 19, 2011 EEO Complaint occurred more than 45 days before she initiated EEO
7 counseling and therefore, her claims were untimely. *Id.* at 11. Defendant further contends
8 Plaintiff is barred from asserting claims in this action based on her suspension and terminations,
9 or the alleged failure to provide training in September 2011, *see* FAC ¶ 6(f), because she did not
10 challenge these actions in her EEO complaint. *Id.* at 12-13. Finally, Defendant argues that
11 Plaintiff has not alleged sufficient facts to support a plausible inference that she was subject to
12 discrimination on the basis of sex, age, race or disability; nor, Defendant contends, has Plaintiff
13 alleged facts sufficient to support an inference that she was retaliated against for EEO activity. *Id.*
14 at 13-17.

15 In her Opposition brief, Plaintiff contends the EEOC omitted certain claims from its
16 investigation of her December 19, 2011 EEO Complaint even though she notified the EEOC of the
17 omitted claims on numerous occasions. Opposition at 15-16. In fact, Plaintiff asserts, all of the
18 claims asserted in her FAC were submitted to the agency for EEO counseling within 45 days of
19 the discriminatory conduct and included in her First EEO Complaint. *Id.* at 18. Plaintiff further
20 asserts that she has alleged sufficient facts to state valid discrimination claims for the purposes of
21 Rule 12(b)(6).

22 In its Reply brief, Defendant rejects Plaintiff's assertion that all of her claims in this action
23 were raised within 45 days in her request for EEO counseling and included in the December 19,
24 2011 EEO Complaint. Defendant further points to the fact that Plaintiff did not consent to a 90-
25 day extension of time to allow the EEOC to investigate "added claims." *See* Reding Decl., Ex. J.
26 Defendant also argues that even if Plaintiff included her terminations in her EEO Complaint, she
27 abandoned any claims based on the terminations by failing to cooperate and provide further
28 information about these claims to the EEO investigator. *Id.* at 7. In support of this contention,

1 Defendant cites Plaintiff’s September 5, 2012 email to Kristena Jenkins stating that she could not
2 talk to Ms. Jenkins on the telephone about her added claims and that all of the information about
3 her claims could be found in her EEO Complaint and her communications with Mr. Neal. Reding
4 Decl., Ex. I.

5 **III. ANALYSIS**

6 **A. Legal Standards under Rule 12(b)(1) and 12(b)(6)**

7 **1. Rule 12(b)(1)**

8 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a district court must
9 dismiss an action if it lacks jurisdiction over the subject matter of the suit. *See* Fed. R. Civ. P.
10 12(b)(1). “Subject matter jurisdiction can never be forfeited or waived and federal courts have a
11 continuing independent obligation to determine whether subject-matter jurisdiction exists.” *Leeson*
12 *v. Transamerica Disability Income Plan*, 671 F.3d 969, 975 n.12 (9th Cir. 2012) (internal
13 quotation marks and citations omitted). On a motion to dismiss for lack of subject matter
14 jurisdiction under Rule 12(b)(1), it is the plaintiff’s burden to establish the existence of subject
15 matter jurisdiction. *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1197 (9th
16 Cir. 2008). A party challenging the court’s subject matter jurisdiction under Rule 12(b)(1) may
17 bring a facial challenge or a factual challenge. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
18 2000). In evaluating a facial challenge to subject matter jurisdiction, the court accepts the factual
19 allegations in the complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir.
20 2001). Where a defendant brings a factual challenge, on the other hand, “a court may look beyond
21 the complaint to matters of public record without having to convert the motion into one for
22 summary judgment.” *White*, 227 F.3d at 1242 (citation omitted). Once the moving party has
23 made a factual challenge by offering affidavits or other evidence to dispute the allegations in the
24 complaint, the party opposing the motion must “present affidavits or any other evidence necessary
25 to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.”
26 *McCarthy v. Brennan*, No. 15-CV-03308-JSC, 2017 WL 386346, at *5 (N.D. Cal. Jan. 27, 2017)
27 (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).
28

1 **2. Rule 12(b)(6)**

2 A complaint may be dismissed for failure to state a claim on which relief can be granted
3 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. “The purpose of a motion to dismiss
4 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*
5 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a claimant’s burden at the pleading stage
6 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a] pleading
7 which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim
8 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

9 In ruling on a motion to dismiss under Rule 12(b)(6), the court takes “all allegations of
10 material fact as true and construe[s] them in the light most favorable to the non-moving party.”
11 *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a
12 lack of a cognizable legal theory or on the absence of facts that would support a valid theory.
13 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A pleading must “contain
14 either direct or inferential allegations respecting all the material elements necessary to sustain
15 recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007)
16 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). “A pleading
17 that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action
18 will not do.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).
19 “[C]ourts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.”
20 *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a
21 [pleading] suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.” *Iqbal*,
22 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, the claim must be “‘plausible on its
23 face,’” meaning that the claimant must plead sufficient factual allegations to “allow[] the court to
24 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
25 *Twombly*, 550 U.S. at 570).

26 Pro se pleadings are generally liberally construed and held to a less stringent standard. *See*
27 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Even post-*Iqbal*, courts must still liberally construe
28 pro se filings. *Hebbe v. Pliler*, 627 F.3d 338 (9th Cir. 2010). As the Ninth Circuit explained in

1 *Hebbe v. Pliler*, “[w]hile the standard is higher, our obligation remains, where the petitioner is pro
2 se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner
3 the benefit of any doubt.” 627 F.3d at 342. Nevertheless, the Court may not “supply essential
4 elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*,
5 673 F.2d 266, 268 (9th Cir.1982).

6 If the Court dismisses a complaint under Rule 12(b)(6), it should “grant leave to amend
7 even if no request to amend the pleading was made, unless it determines that the pleading could
8 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
9 Cir. 2000) (en banc) (internal quotation marks and citations omitted).

10 **B. Statutes Invoked in Support of Plaintiff’s Claims**

11 Plaintiff asserts each of her claims under multiple statutes, each of which the Court
12 describes briefly below.

13 **1. Title VII**

14 Under Title VII, it is unlawful “to fail or refuse to hire or to discharge any individual, or
15 otherwise to discriminate against any individual with respect to his compensation, terms,
16 conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or
17 national origin.” 42 U.S.C. § 2000e-2(a)(1). Title VII also prohibits employers from retaliating
18 against an employee for “oppos[ing] any practice made an unlawful employment practice” under
19 Title VII. 42 U.S.C. § 2000e-3(a).

20 Title VII’s protections were extended to federal employees in 1972, when Congress
21 amended the Act to provide that “[a]ll personnel actions” affecting federal employees must be
22 “made free from any discrimination based on race, color, religion, sex, or national origin.” 42
23 U.S.C.A. § 2000e-16. The Ninth Circuit has further held that in enacting Section 2000e-16,
24 Congress intended to protect federal employees from retaliation. *See Ayon v. Sampson*, 547 F.2d
25 446, 449 (9th Cir. 1976) (“We agree with the parties that Congress, in enacting 42 U.S.C. §
26 2000e-16 and thereby extending the equal employment opportunity provisions of the Civil Rights
27 Act to federal employees, intended to include the protections from harassment and retaliation
28 embodied in the Civil Rights Act.”).

1 *Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999)).

2 **3. The ADEA**

3 Under the ADEA, it is “unlawful for an employer . . . to discharge any individual or
4 otherwise discriminate against any individual with respect to his compensation, terms, conditions,
5 or privileges of employment, because of such individual’s age.” 29 U.S.C.A. § 623. While the
6 term “employer” excludes the United States, *see* 29 U.S.C. § 630(b), the ADEA also contains a
7 “federal sector provision” that applies to federal employees and provides that “[a]ll personnel
8 actions affecting employees or applicants for employment who are at least 40 years of age . . .
9 shall be made free from any discrimination based on age.” *Gomez-Perez v. Potter*, 553 U.S. 474,
10 479 (2008) (citing 29 U.S.C. § 633a(a)).

11 In order to establish a prima facie case of discrimination under the ADEA, a plaintiff must
12 show that (1) she is a member of a protected class; (2) she was qualified for her position; (3) she
13 experienced an adverse employment action; and (4) similarly situated individuals outside her
14 protected class were treated more favorably, or other circumstances surrounding the adverse
15 employment action give rise to an inference of discrimination. *Whitman v. Mineta*, 541 F.3d 929,
16 932 (9th Cir. 2008). Further, the Supreme Court held in *Gomez-Perez* that the federal sector
17 provision protects federal employees from “retaliation for complaining about age discrimination.”
18 553 U.S. at 488.

19 **4. Lilly Ledbetter Fair Pay Act**

20 The LLA was enacted into law on January 29, 2009 in order to legislatively overturn the
21 Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In
22 *Ledbetter*, the plaintiff asserted sex discrimination claims under Title VII, alleging that throughout
23 her career with Defendant Goodyear she had been given poor evaluations based on her sex,
24 resulting in a significantly lower salary than was being paid to her male colleagues by the end of
25 her career. 550 U.S. at 621-622. The Court, however, found that the pay-setting decisions in
26 *Ledbetter* were discrete acts that triggered the running of the time allowed to file an EEOC charge,
27 even though the *effects* of those decisions, in the form of lower compensation, continued into the
28 limitations period. *Id.* at 623, 628. As a result, the plaintiff’s claims were found to be untimely.

1 In response, Congress amended 42 U.S.C. § 2000e–5(e) to provide as follows:

2 For purposes of this section, an unlawful employment practice
3 occurs, with respect to discrimination in compensation in violation
4 of this subchapter, when a discriminatory compensation decision or
5 other practice is adopted, when an individual becomes subject to a
6 discriminatory compensation decision or other practice, *or when an
individual is affected by application of a discriminatory
compensation decision or other practice, including each time wages,
benefits, or other compensation is paid, resulting in whole or in part
from such a decision or other practice.*

7 42 U.S.C. § 2000e–5(e)(3)(A) (emphasis added). Similarly, the LLA also modifies the ADEA and
8 the Rehabilitation Act “to clarify that a discriminatory compensation decision or other practice
9 that is unlawful under such Acts occurs each time compensation is paid pursuant to the
10 discriminatory compensation decision or other practice, and for other purposes.” *See* PL 111–2 [S
11 181], January 29, 2009. In other words, the LLA does not create a free-standing civil rights cause
12 of action but instead, works in tandem with existing civil rights laws to “trigger[] a new filing
13 period, in effect reviving a claim that otherwise would have been time-barred because of a failure
14 to exhaust administrative remedies within 180 days of the original discriminatory compensation
15 decision or practice.” *Johnson v. District of Columbia*, 632 F. Supp. 2d 20, 22 (D.D.C. 2009).

16 **C. Exhaustion Requirements**

17 **1. Title VII and the Rehabilitation Act**

18 In order to bring a discrimination claim in federal district court under Title VII or the
19 Rehabilitation Act, a plaintiff first must exhaust her administrative remedies. *Sommatino v.*
20 *United States*, 255 F.3d 704, 709 (9th Cir. 2001) (Title VII); *Vinieratos v. U.S., Dep't of Air*
21 *Force Through Aldridge*, 939 F.2d 762, 773 (9th Cir. 1991) (Rehabilitation Act). “While not all
22 administrative exhaustion requirements are jurisdictional in nature, Ninth Circuit ‘case law holds
23 that substantial compliance with the presentment of discrimination complaints to an appropriate
24 administrative agency is a jurisdictional prerequisite.” *McCarthy v. Brennan*, No. 15-cv-03308-
25 JSC, 2017 WL 386346, at *6 (N.D. Cal. Jan. 27, 2017) (quoting *Sommatino*, 255 F.3d at 709).
26 “The jurisdictional scope of the plaintiff’s court action depends on the scope of the EEO[] charge
27 and investigation.” *Leong v. Potter*, 347 F.3d 1117, 1121-22 (9th Cir. 2003). In particular, the
28 district court has jurisdiction over the specific claims that were presented in the administrative

1 proceeding, claims of discrimination that are “like or reasonably related to the allegations made
2 before the EEO[],” and claims that “reasonably could be expected to grow out of the allegations”
3 in the administrative complaint. *Id.* at 1122.

4 Courts must construe EEO charges “with utmost liberality since they are made by those
5 unschooled in the technicalities of formal pleading.” *Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (9th
6 Cir. 1990) (citation omitted). “[T]he crucial element of a charge of discrimination is the factual
7 statement contained therein.” *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1100 (9th Cir. 2002),
8 as amended (Feb. 20, 2002) (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th
9 Cir.1970)). In *B.K.B.*, the Ninth Circuit set forth the following factors for determining whether a
10 plaintiff has exhausted claims based on allegations that were not set forth in the administrative
11 complaint: (1) the “alleged basis of the discrimination;” (2) “dates of discriminatory acts specified
12 in the charge;” (3) “perpetrators of discrimination named in the charge;” and (4) “any locations at
13 which discrimination is alleged to have occurred.” *McCarthy v. Brennan*, 2017 WL 386346, at *6
14 (quoting *B.K.B.*, 276 F.3d at 1100). “In addition, the court should consider plaintiff’s civil claims
15 to be reasonably related to allegations in the charge to the extent that those claims are consistent
16 with the plaintiff’s original theory of the case.” *B.K.B.*, 276 F.3d at 1100.

17 **2. The ADEA**

18 Under the ADEA, federal employees can pursue their age discrimination claims through
19 the EEOC, which has the authority to enforce the statute’s federal employee non-discrimination
20 provision. *See* 29 U.S.C. § 633(b). However, “[u]nlike Title VII of the Civil Rights Act, 42
21 U.S.C. § 2000e–16(c), the ADEA contains no express *requirement* that a federal employee
22 complainant seek administrative relief, . . . except that an employee who wishes to file suit without
23 pursuing administrative remedies must give the EEOC notice of intent to sue at least 30 days
24 before filing suit.” *Bankston v. White*, 345 F.3d 768, 770 (9th Cir. 2003) (emphasis added); *see*
25 *also Boyd v. Lynch*, No. 14-56800, 2016 WL 5764439, at *1 (9th Cir. Oct. 4, 2016) (unpublished)
26 (holding that the district court had erred in dismissing an ADEA claim based on failure to exhaust
27 because “exhaustion is not required” on ADEA claims) (citing *Bankston*, 345 F.3d at 770). In
28 particular, ADEA provides that “[w]hen the individual has not filed a complaint concerning age

1 discrimination with the [EEOC], no civil action may be commenced by any individual . . . until
2 the individual has given the Commission not less than thirty days’ notice of an intent to file such
3 action.” 29 U.S.C.A. § 633a(d). The Ninth Circuit has further held that even where a plaintiff
4 initiated administrative proceedings as to an ADEA claim and then abandoned them, that
5 individual is not barred from bringing the ADEA claim in federal district court. *See Bankston*,
6 345 F.3d at 775 (citing *Bak v. Postal Service*, 52 F.3d 241 (9th Cir. 1995)).

7 **D. Administrative Procedures Governing Exhaustion of Discrimination Claims and**
8 **“Mixed Complaints”**

9 **1. Procedures for Exhaustion under Title VII**

10 The ordinary procedure for a federal employee who seeks to exhaust her Title VII or
11 Rehabilitation Act claims is to initially file an EEO complaint with her agency and then, once the
12 agency has issued its final decision, appeal that decision to either the EEOC or a federal district
13 court. *Sloan v. West*, 140 F.3d 1255, 1259 (9th Cir. 1998) (citing 29 C.F.R. § 1614.310(a)). An
14 employee may also file an action in district court if, after 180 days from the date of appealing to
15 the EEOC, the EEOC has not issued a final decision on the matter. 29 U.S.C. § 1614.407(b).

16 Before a federal employee is permitted to file an EEO Complaint with the agency, she
17 must contact an EEO counselor. *See* 29 C.F.R. § 1614.105(a) (“Aggrieved persons who believe
18 they have been discriminated against on the basis of race, color, religion, sex, national origin, age,
19 disability, or genetic information must consult a Counselor prior to filing a complaint in order to
20 try to informally resolve the matter.”). The regulations require that “[a]n aggrieved person must
21 initiate contact with a Counselor within 45 days of the date of the matter alleged to be
22 discriminatory or, in the case of personnel action, within 45 days of the effective date of the
23 action.” 29 C.F.R. § 1614.105(a)(1). This 45-day time period may be extended, however, “when
24 the individual shows that he or she was not notified of the time limits and was not otherwise aware
25 of them, that he or she did not know and reasonably should not have been known that the
26 discriminatory matter or personnel action occurred, that despite due diligence he or she was
27 prevented by circumstances beyond his or her control from contacting the counselor within the
28 time limits, or for other reasons considered sufficient by the agency or the Commission.” 29

1 C.F.R. § 1614.105(a)(2); *see also* 29 C.F.R. § 1614.604 (“The time limits in this part are subject
2 to waiver, estoppel and equitable tolling”).

3 Similarly, the Ninth Circuit and district courts within the Ninth Circuit have found that the
4 45-day limit is *not* jurisdictional and therefore is subject to waiver, estoppel and equitable tolling.
5 *See Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1043 (9th
6 Cir. 2009) (“although the regulatory pre-filing exhaustion requirement at § 1614.105 does not
7 carry the full weight of statutory authority and is not a jurisdictional prerequisite for suit in federal
8 court, we have consistently held that, absent waiver, estoppel, or equitable tolling, failure to
9 comply with this regulation [is] . . . fatal to a federal employee’s discrimination claim in federal
10 court.” (internal citations and quotations omitted)); *Lacayo v. Donahoe*, No. 14-cv-04077-JSC,
11 2015 WL 993448, at *8 (N.D. Cal. Mar. 4, 2015) (reviewing Ninth Circuit and district court
12 authority and concluding that “an employee’s failure to follow to a tee the 45-day timing
13 requirements is a ‘shortcoming [that] relates to the substantive adequacy of [a plaintiff’s]
14 complaint[,]’ not a jurisdictional flaw”) (citing *Taylor v. Blank*, No. 1:12-cv-1931 AWI JLT, 2014
15 WL 1577313, at *4 (E.D. Cal. Apr. 17, 2014); *Mendoza v. Lehigh Southwest Cement Co.*, No. 11-
16 cv-01286 LHK, 2012 WL 1534754, at *5 (N.D. Cal. May 1, 2012); *Norris v. Foxx*, No. 13-cv-
17 4928 BHS, 2014 WL 935304, at *4 (W.D. Wash. Mar. 10, 2014)).⁶

18 The timeliness requirement for the purposes of exhaustion of discrimination claims further
19 depends on whether the claim is based on discrete acts or a single discriminatory employment
20 practice. “[D]iscrete discriminatory acts are not actionable if time barred, even when they are
21 related to acts alleged in timely filed charges.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S.
22 101, 113 (2002). Thus, “[e]ach discrete discriminatory act starts a new clock for filing charges

23
24 ⁶ To the extent some district courts in the Ninth Circuit have concluded that the 45-day
25 requirement is jurisdictional, *see, e.g., Gill v. Gen. Servs. Admin.*, No. 14-cv-2999-MEJ, 2014
26 WL 6469377, at *3 (N.D. Cal. Nov. 18, 2014); *Williams v. Mabus*, No. 5:13-cv-00470 HRL,
27 2014 WL 5305819, at *4 (N.D. Cal. Oct. 16, 2014); *Goel v. Shah*, No. C 13- 3586 SBA, 2014 WL
28 460867, at *2 (N.D. Cal. Feb. 3, 2014); *Domingo v. Donohue*, Nos. 13-cv-4150-CRB & 13-cv-
4151 CRB, 2014 WL 605485, at *7-8 (N.D. Cal. Feb. 14, 2014), the undersigned agrees with
Judge Corley that these decisions are not persuasive on this question for the reasons stated in
Lacayo. *See* 2015 WL 993448, at *8-9.

1 alleging that act.” *Id.*; *see also id.* at 114 (“Discrete acts such as termination, failure to promote,
2 denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each
3 retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment
4 practice.’”).

5 On the other hand, “[h]ostile environment claims are different in kind from discrete acts”
6 because “[t]heir very nature involves repeated conduct.” *Id.* at 115. A hostile work environment
7 is an unlawful employment practice that “occurs over a series of days or perhaps years and, in
8 direct contrast to discrete acts, a single act of harassment may not be actionable on its own.” *Id.*
9 (citation omitted). “In determining whether an actionable hostile work environment claim exists,
10 [courts] look to all the circumstances, including the frequency of the discriminatory conduct; its
11 severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and
12 whether it unreasonably interferes with an employee’s work performance.” *Id.* (internal
13 quotations and citations omitted). Because a claim based on an unlawful employment practice is
14 made up of a series of separate acts, the *Morgan* Court explained, the hostile work environment
15 claim is timely so long as “an act contributing to the claim occurs within the filing period.” *Id.* at
16 117.

17 Because of the fact-intensive nature of the inquiry as to whether a claim involves discrete
18 conduct or a single ongoing employment practice, courts sometimes decline to address the
19 question of timeliness for the purposes of exhaustion at the pleading stage of the case where it
20 cannot be determined from the pleadings whether the employment practice at issue is a discrete act
21 or ongoing. *See, e.g. Guerrero v. Vilsack*, 134 F. Supp. 3d 411, 432 (D.D.C. 2015) (finding that
22 plaintiff’s claims could be construed as alleging ongoing violations and that the Court could not
23 conduct the inquiry required under *Morgan* at the pleading stage of the case, and also noting that
24 “other courts in the district have likewise refrained from deciding, based on an EEO complaint
25 alone, whether alleged violations are discrete or continuing.”)

26
27 **2. Procedures for Exhausting Where a Federal Employee Seeks to Pursue a
“Mixed Complaint”**

28 In 1978, Congress passed the Civil Service Reform Act (“CSRA”), 5 U.S.C. § 1201 *et*

1 *seq.*, “with the hope of simplifying and revising the rules and regulations governing federal
2 employees.” *Sloan v. West*, 140 F.3d 1255, 1258 (9th Cir. 1998). The CSRA created the Merit
3 System Protection Board (“MSPB”), which is a “quasi-judicial Government agency” that
4 adjudicates Federal employee appeals of agency personnel actions. *Id.* at 1258-59. The MSPB’s
5 appellate jurisdiction is limited to those appeals authorized by “law, rule, or regulation.” 5 U.S.C.
6 § 7701(a). “Generally, the Board is authorized to review ‘adverse employment actions,’ which
7 fall into one of five categories: a removal, a suspension for more than 14 days, a reduction in
8 grade, a reduction in pay, or a furlough of 30 days or less.” *Sloan*, 140 F.3d at 1259 (citing 5
9 U.S.C. § 7512(1)-(5); 5 C.F.R. § 1201.3 (1997)).

10 The Board also has pendent jurisdiction over discrimination claims brought in connection
11 with an “adverse action” otherwise appealable to it. 29 C.F.R. § 1614.302 (1997). This means
12 that an employee seeking to pursue a claim of discrimination that is related to an adverse action
13 has the option of exhausting the discrimination claim through procedures governing MSPB
14 Appeals rather than through the EEO procedures described above. *Sloan*, 140 F.3d at 1259. In
15 this scenario, the employee has two options: 1) she can file a “mixed case complaint” with the
16 agency EEO department that can then be appealed to the MPSB; or 2) she can file a “mixed case
17 appeal” directly with MPSB. 29 C.F.R. § 1614.302(b) (“An aggrieved person may initially file a
18 mixed case complaint with an agency pursuant to this part or an appeal on the same matter with
19 the MSPB pursuant to 5 CFR 1201.151, but not both.”).

20 “A mixed case complaint is a complaint of employment discrimination filed with a federal
21 agency based on race, color, religion, sex, national origin, age, disability, or genetic information
22 related to or stemming from an action that can be appealed to the . . . [MSPB].” 29 C.F.R. §
23 1614.302(a)(1). “A mixed case appeal is an appeal filed with the MSPB that alleges that an
24 appealable agency action was effected, in whole or in part, because of discrimination on the basis
25 of race, color, religion, sex, national origin, disability, age, or genetic information.” 29 C.F.R. §
26 1614.302(a)(2).⁷ While it is up to the employee to decide which route to follow, the employee

27
28 ⁷ Note, however, that the Ninth Circuit stated in *Sloan* that an appeal does not “become a ‘mixed case appeal’” until the MSPB decides that it has jurisdiction over the case. *Sloan*, 140 F.3d at

1 may pursue only one of these options and “whichever is filed first shall be considered an election
2 to proceed in that forum.” 29 C.F.R. § 1614.302(b).

3 When a mixed case is appealed to the MSPB, the MSPB must determine that it has
4 jurisdiction over the employee’s claims. *Nater v. Riley*, 114 F. Supp. 2d 17, 24 (D.P.R. 2000),
5 aff’d, 15 F. App’x 11 (1st Cir. 2001). A finding by the MSPB that it lacks jurisdiction to hear a
6 claim is appealable only to the United States Court of Appeals for the Federal Circuit. *Sloan*, 140
7 F.3d at 1261 (“Thus, if the MSPB does not have jurisdiction over the non-discrimination claim,
8 then the case is not a ‘mixed case,’ and any appeal of the jurisdictional determination must be filed
9 in the Federal Circuit Court of Appeals.”). On the other hand, if the MSPB finds it has jurisdiction
10 over the appeal, the Administrative Judge decides the claims on the merits and the employee then
11 has the option of seeking further MSPB review. *Sloan*, 140 F.3d at 1260. If the employee does
12 not appeal the AJ’s decision to the MSPB panel within 30 days, the AJ’s decision becomes final
13 and the employee can either appeal any related discrimination claims to the EEOC or file an action
14 in the federal district court as to the discrimination claim. *Id.*; see also 29 C.F.R. § 1614.310.

15 **E. Abandonment of Claims and the Scope of Claims That Were Exhausted in the**
16 **First EEO Complaint**

17 As discussed above, as of the time this action was initiated Plaintiff had received a right-
18 to-sue letter only as to her First EEO Complaint. Thus, with respect to the claims in the FAC that
19 Plaintiff is required to exhaust, Plaintiff must establish (at least) that these claims: 1) were either
20 raised in the First EEO Complaint or are “like or reasonably related to” those claims; and 2) were
21 not abandoned during the EEO administrative proceedings.⁸ Defendant raises the issue of
22 abandonment in its Reply brief when it argues that “if Plaintiff raised her termination as a basis
23 for her alleged discrimination claims, she then abandoned that claim by failing to cooperate and
24 provide further information to her EEO Specialist and Counselor.” Reply at 7. It also treats as
25 abandoned (without providing legal authority for doing so) certain claims that were included in
26 Plaintiff’s First EEO Complaint but that were omitted from the July 13, 2012 letter listing the

27
28 1259.

⁸ As discussed further below, Plaintiff must also establish that her claims are timely.

1 claims that FEMA’s EEO department intended to investigate. *See, e.g.,* Motion at 4, 12
2 (describing conduct listed in July 13, 2012 letter and later stating that Plaintiff did not assert that
3 “she was denied training opportunities and additional pay” even though the First EEO Complaint
4 included in the list of discriminatory conduct “Denial of training” and “depriv[ation] of overtime
5 hours”).

6 The Ninth Circuit has held that in certain situations, a claimant may fail to exhaust
7 administrative remedies when he or she refuses to cooperate with the Agency’s investigation. For
8 example, in *Tanious v. I.R.S.*, the court found that the plaintiff had failed to exhaust his
9 administrative remedies where he had “failed to comply with Board orders to make himself
10 available for prehearing telephone conferences, failed to appear for a scheduled hearing, and
11 refused to answer the Board’s telephone calls or receive mail,” leading the MSPB to dismiss the
12 case for failure to prosecute. 915 F.2d 410, 411 (9th Cir. 1990). On the other hand, a claim is not
13 barred – even if the plaintiff abandoned the claim in an administrative proceeding – if the
14 administrative remedy is optional. Thus, as discussed above, a plaintiff may bring an ADEA
15 claim in federal district court even if she previously abandoned that claim in an administrative
16 proceeding. *See Bankston v. White*, 345 F.3d 768, 770 (9th Cir. 2003); *Bak v. Postal Service*, 52
17 F.3d 241 (9th Cir. 1995)); *see also Bullock v. Berrien*, 688 F.3d 613, 618 (9th Cir. 2012) (finding
18 that under the reasoning of *Bankston*, the same is true where a plaintiff seeking to assert a
19 Rehabilitation Act claim initiated and then withdrew an optional appeal to the EEOC of the AJ’s
20 decision).

21 Because exhaustion of administrative remedies is optional as to ADEA claims, the
22 question of abandonment is not relevant to that claim. The Court also does not reach Defendant’s
23 argument that if Plaintiff included any discriminatory termination claims in her First EEO claim
24 she subsequently abandoned them by failing to cooperate with the Agency’s investigation of that
25 claim. It is clear from the First EEO Complaint and Plaintiff’s sworn affidavit that she did not, in
26 fact, assert any claims for discriminatory termination in her First EEO Complaint and therefore,
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1 the cases involving abandonment of claims are not on point.⁹

2 On the other hand, the Court rejects Defendant’s suggestion that Plaintiff is limited to the
3 claims that were listed in FEMA’s July 13, 2012 letter in establishing exhaustion of her claims.
4 A handful of district court cases in other Circuits have held that failure to respond to a “framing of
5 the issue” letter from the Agency EEO department that omits claims that were included in the
6 original EEO complaint results in abandonment of the omitted claims. *See, e.g., McKeithan v.*
7 *Boarman*, 803 F.Supp.2d 63, 68 (D.D.C.2011) (internal citations and quotation omitted), *aff’d* in
8 part, No. 11–5247, 2012 WL 1450565 (D.C. Cir. Apr. 12, 2012), *aff’d* sub nom., *McKeithan v.*
9 *Vance–Cooks*, 498 Fed. Appx. 47 (D.C.Cir.2013); *Sellers v. U.S. Department of Defense*, No.
10 C.A. 07–418S, 2009 WL 559795 (D.R.I. Mar. 4, 2009). On the other hand, in *Mokhtar v. Kerry*,
11 the court rejected this conclusion, finding based on the regulatory framework that governs EEO
12 investigations that “failure to cooperate during the administrative investigation must be treated as
13 factually and legally distinct from failure to respond to the acceptance-of-claims letter.” 83 F.
14 Supp. 3d 49, 66 (D.D.C. 2015), *aff’d*, No. 15-5137, 2015 WL 9309960 (D.C. Cir. Dec. 4, 2015);
15 *see also Guerrero v. Vilsack*, 134 F. Supp. 3d 411, 434 (D.D.C. 2015) (recognizing that courts in
16 the D.C. Circuit are divided as to whether a plaintiff’s failure to respond to the agency’s framing
17 of the issue supports a finding that a plaintiff has failed to exhaust her administrative remedies
18 with respect to those claims). The undersigned finds the reasoning of *Mokhtar* to be persuasive.
19 In any event, it is apparent from the record before the Court that under the facts of this case,
20 Plaintiff made clear to FEMA that she did *not* agree with the framing of her claim in the letter and
21 therefore, that Plaintiff did not through inaction abandon the claims that were omitted. Therefore,
22 the Court looks to the underlying EEO Complaint to determine whether Plaintiff has exhausted her
23 claims.

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26 ⁹The Court agrees with Defendant, however, that Plaintiff may not rely on her attempts to *add*
27 such claims for the purposes of demonstrating exhaustion where she denied the Agency’s request
28 for a 90-day extension to process those additional claims. It was Plaintiff’s right to deny the
Agency’s request and to proceed without adding any claims. As a result, however, she is limited
to the claims that were asserted in her First EEO Complaint for the purposes of exhaustion of
administrative remedies.

1 **F. Claim One (Wrongful Termination)**

2 In Claim One, Plaintiff alleges that her rights were violated under Title VII, the ADEA,
3 and the Rehabilitation Act based on allegation that Defendant “processed two wrongful
4 terminations against [P]laintiff, because she was unemployed and ill for almost two years and had
5 debt, violating [P]laintiff’s due process rights.” FAC ¶ 9. Elsewhere in the complaint, she alleges
6 that Defendant’s conduct was discriminatory based on her race, sex, age, and physical/mental
7 disability and in retaliation for prior EEO activity. Therefore, construing the complaint liberally,
8 the Court construes this claim to allege that her two terminations by FEMA were motivated by
9 discriminatory animus based on Plaintiff’s race, sex, age, and physical/mental disability and
10 retaliatory intent related to Plaintiff’s prior EEO activity.

11 **1. Whether Plaintiff has Exhausted**

12 As discussed above, Title VII and the Rehabilitation Act require, as a jurisdictional matter,
13 that a plaintiff must substantially comply with the “presentment of discrimination complaints to an
14 appropriate administrative agency.” *Sommato*, 255 F.3d at 709. Further, in mixed cases
15 involving claims that an adverse employment action was discriminatory, a federal employee must
16 make an election as to the forum in which she will exhaust as to the particular “matter.” 29 C.F.R.
17 § 1614.302(b). Here, Plaintiff elected to challenge both of her terminations before the MSPB. *See*
18 *RJN, Exs. A & E* (MSPB appeals for Plaintiff’s terminations in 2011 and 2012). The Court
19 concludes that in doing so, she made an election as to her Title VII and Rehabilitation Act claims
20 based on those terminations because the word “matter” in the regulation refers to the underlying
21 employment action, namely, her terminations. *See Macy v. Dalton*, 853 F. Supp. 350, 352 (E.D.
22 Cal. 1994) (interpreting a similar election requirement for unionized federal employees using
23 similar wording and finding that the word “matter” refers to the “underlying [employment] action”
24 rather than the discrimination claim.) As a consequence, once the Initial Decisions of the AJ
25 became final, thirty days after their issuance, Plaintiff was required to file her discriminatory
26 termination claims within 30 days if she wished to proceed on them either before the EEOC or in
27 federal district court. *See* 29 C.F.R. § 1614.310. The Initial Decisions that were issued in
28 connection with Plaintiff’s MSPB Appeals of her terminations were issued on February 9, 2012,

1 and May 29, 2013. *See* RJN, Exs. B & F. As she did not initiate this action until June 16, 2016,
2 her claims are untimely to the extent they are based on her terminations.¹⁰

3 The analysis is somewhat different for Plaintiff’s ADEA claim. As discussed above, the
4 Ninth Circuit has held that ADEA claims are not subject to the exhaustion requirements that apply
5 to Title VII and Rehabilitation Act claims. *See Bankston v. White*, 345 F.3d 768, 770 (9th Cir.
6 2003). Rather, ADEA requires only that “[w]hen the individual has not filed a complaint
7 concerning age discrimination with the [EEOC], no civil action may be commenced by any
8 individual . . . until the individual has given the Commission not less than thirty days’ notice of an
9 intent to file such action. 29 U.S.C.A. § 633a(d). Here, however, Plaintiff has not alleged that she
10 gave the required thirty days’ notice to the Agency of her intent to assert an ADEA claim in
11 federal district court. Further, as discussed above, she did not include her terminations in her First
12 EEO Complaint and therefore, she cannot rely on her exhaustion of the claims in that complaint to
13 establish that she has exhausted her administrative remedies as to the ADEA claim. Accordingly,
14 the Court finds that Plaintiff has not satisfied the prerequisites for asserting her ADEA claim in
15 federal district court.

16 **2. Whether Plaintiff has Alleged Sufficient Facts to State Valid Claims**

17 The Court further finds that the claims asserted in Claim One are insufficiently alleged
18 under Rule 12(b)(6). Plaintiff’s allegations concerning Defendant’s discriminatory motives are
19 entirely conclusory. She has alleged no specific facts that would support a plausible inference that
20 her terminations were based on her age, sex, race, or alleged physical or mental disabilities, or that
21 they were in retaliation for prior EEO activity. *See Vasconcellos v. Sara Lee Bakery*, No. C 13-
22 2685 SI, 2013 WL 4014520, at *2 (N.D. Cal. Aug. 5, 2013)(finding that employment
23 discrimination claims did not satisfy the requirements of Rule 12(b)(6) where the plaintiff did “not
24 allege any facts in support of the claims that defendants terminated plaintiff on account of his
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26 ¹⁰ The Court also notes that Plaintiff expressly omitted her 2011 termination from the EEO
27 Complaint that she filed on December 19, 2011, *see* Wallace Decl., Ex. A. Moreover, she testified
28 under oath in the EEO proceeding that she had done so intentionally because she had been
instructed that she could not simultaneously pursue her discriminatory termination claim in her
EEO proceedings and before the MSPB. *See* Wallace Decl., Ex. C at 3.

1 physical disability, exercise of family leave, age, or filing for worker’s compensation” and instead
2 “simply allege[d] in a conclusory fashion that defendants ‘considered plaintiff a problem
3 employee’ and ‘decided to terminate plaintiff on the basis that’ he exercised a right or based on his
4 age or physical disability.”) Further, she has not identified any specific disability in her FAC as
5 the basis for her Rehabilitation Act claims or provided any specific facts about her prior EEO
6 activity. Therefore, the allegations in the complaint are insufficient to support a reasonable
7 inference of discrimination as to these claims.

8 For the reasons stated above, the Court DISMISSES the claims asserted in Claim One.
9 With respect to the Rehabilitation Act and Title VII Claims, the Court concludes that Plaintiff’s
10 failure to timely file her discrimination and retaliation claims in federal district court or file an
11 appeal with the EEOC after the MSPB’s decision became final cannot be cured and therefore
12 dismisses those claims with prejudice. With respect to the ADEA claim, Plaintiff may be able to
13 establish that she gave the Agency the required 30 days’ notice of intent to sue. Therefore,
14 Plaintiff will be given leave to amend to allege facts showing that she has met this administrative
15 prerequisite for bringing her ADEA claim and to allege specific facts sufficient to support an
16 inference that her two terminations were motivated by age discrimination.

17 **G. Claim Two (Failure to Promote)**

18 Plaintiff’s failure to promote claim is asserted under the Rehabilitation Act and the LLA.
19 The claim appears to be based on an alleged failure to promote Plaintiff in April 2011. *See* FAC ¶
20 6(e). *See also* Opposition at 10 & Ex. 8 (May 13, 2011 email stating that Blackman did not meet
21 “the minimum training/education requirements” for a position described in job announcement
22 MG-2011-81369-KJD-464993D/M2). The Court further construes the claim to be based on
23 disability discrimination as the only substantive violation Plaintiff has alleged is under the
24 Rehabilitation Act.

25 **1. Whether Plaintiff Has Exhausted**

26 With respect to the alleged failure to promote, it appears that Plaintiff may, in fact, have
27 presented the same claim in her First EEO Complaint. In particular, in her First EEO Complaint,
28 she listed her rejection for a position identified by Announcement Number MG-2011-81 369-

1 KJD-464993D/M as one of the grounds for her discrimination complaint. Wallace Decl., Ex. A.
2 Plaintiff lists the same job in her opposition brief in connection with Claim Two. Opposition at
3 10. To the extent that Plaintiff did not initiate EEO counseling as to this conduct until October
4 19, 2011, however, her claim is not timely. *See Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir.
5 2002) (holding that because plaintiff had not contacted EEO counselor within 45 days of incidents
6 out of which claims arose, claims were time-barred and therefore not properly exhausted); *Nat'l*
7 *R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (“[d]iscrete acts such as termination,
8 *failure to promote*, denial of transfer, or refusal to hire are easy to identify. Each incident of
9 discrimination and each retaliatory adverse employment decision constitutes a separate actionable
10 ‘unlawful employment practice.’”)(emphasis added).

11 The Court further concludes that Plaintiff cannot avoid this result by invoking the LLA.
12 The courts that have addressed the question have found that a failure to promote does not
13 constitute an “other practice” under the LLA that gives rise to a new violation with each paycheck.
14 *See Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) (“In context,
15 therefore, we do not understand ‘compensation decision or other practice’ to refer to the decision
16 to promote one employee but not another to a more remunerative position.”); *Ekweani v.*
17 *Ameriprise Fin., Inc.*, No. CV-08-01101-PHX-FJM, 2010 WL 749648, at *5 (D. Ariz. Mar. 3,
18 2010), *aff'd*, 444 F. App’x 968 (9th Cir. 2011) (following *Schuler* and noting that “[i]n the Ninth
19 Circuit, alleging a failure to promote claim is not sufficient to state a claim for compensation
20 discrimination.”) (citing *Williams v. Boeing Co.*, 517 F.3d 1120, 1131 (9th Cir. 2008)). The
21 undersigned agrees.

22 Nonetheless, the 45-day requirement is not jurisdictional and is subject to equitable tolling,
23 waiver and estoppel, as discussed above. Although Plaintiff has not alleged any facts that would
24 support an inference that any of these doctrines apply, she may be able to allege such facts.
25 Therefore, Plaintiff’s claim is DISMISSED with leave to amend as to the failure to promote claim
26 based on the position discussed above to allege facts showing that the 45 day period was tolled
27 under any of these doctrines.

28 The Court concludes that Claim Two, as currently alleged, has not been exhausted.

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2. Whether Plaintiff has Alleged Sufficient Facts to State Valid Claims

Plaintiff alleges that she was denied promotions based on her disabilities. As discussed above, however, she has not identified the specific disability she contends was the basis of the discrimination. Nor has she alleged any specific facts that would support an inference that the promotion was denied as a result of a disability. Therefore, the Court finds that Claim Two does not satisfy the requirements of Rule 12(b)(6).

The Court DISMISSES Claim Two with leave to amend.

H. Claim Three (Retaliation)

In Claim Three, Plaintiff alleges that “[d]uring [P]laintiff’s interview with the investigator, and during the process of [P]laintiff’s investigation, [P]laintiff was harassed about her ongoing EEO case.” She asserts this claim under Title VII and the ADEA.

1. Whether Plaintiff Has Exhausted

In her First EEO Complaint, Plaintiff marked the box for EEO Retaliation and wrote “2008” and “2011” in the margin. The list of discriminatory actions in the attachment did not, however, include any conduct related to the OPM background investigation that appears to be the subject of this claim. Even if the mere fact that Plaintiff checked the box for EEO retaliation and listed her 2008 and 2011 EEO activity would have led the agency to investigate the alleged harassment by the OPM investigator, however, the record reflects that Plaintiff’s claim is not timely. In particular, the unsuitability finding that resulted from the investigation was the subject of an August 5, 2011 letter indicating that the investigation had already concluded by that date. Wallace Decl., Ex. D at 6. As a consequence, any retaliatory harassment by the investigator, even if it constituted a single ongoing employment practice, would have ended more than 45 days before Plaintiff initiated EEO counseling. Thus, in the absence of any allegations that this claim was tolled, the Court concludes that it was untimely and not properly exhausted. Plaintiff will be permitted to amend to allege, if she can, facts showing the time for initiating EEO counseling was subject to waiver, estoppel or equitable tolling.

2. Whether Plaintiff has Alleged Sufficient Facts to State Valid Claims

To establish a prima facie case of retaliation, Plaintiff must prove that (1) she engaged in a

1 protected activity, (2) she suffered an adverse employment decision, and (3) there was a causal
2 link between the protected activity and the adverse employment decision. *Xing Xing Lin v. Potter*,
3 No. C-10-03757-LB, 2011 WL 1522382, at *12 (N.D. Cal. Apr. 21, 2011) (citing *Villiarimo v.*
4 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002)). Plaintiff alleges that she was treated
5 unfairly by the OPM investigator based on her prior EEO activity but fails to provide any facts in
6 her complaint that identify this prior activity or support an inference that the investigator’s conduct
7 was motivated by her prior her prior EEO activity. Finally, as the investigator was an OPM
8 employee rather than an employee of the Department of Homeland Security, Plaintiff has not
9 alleged facts supporting an inference that the Department of Homeland Security can be held liable
10 for this conduct. Therefore, Plaintiff fails to state a valid claim. She will be permitted to amend to
11 cure this defect if she can.

12 **I. Claim Four (Denial of Training Opportunities)**

13 Plaintiff alleges that she was denied training opportunities based on her disability in
14 violation of the Rehabilitation Act and the LLA. Specifically, she alleges that she was “denied
15 training opportunities, which were later used against [her] future [deployability].” FAC ¶ 15.
16 Elsewhere in the complaint, she alleges that she was denied training in September 2011. FAC ¶
17 6(f). As noted above, although Defendant states in its brief that Plaintiff did not included a failure
18 to train allegation in her First EEO Complaint, see Motion at 12, she did include the following
19 entry in her list of discriminatory actions: “Denial of Training: CON215, CON353, Disaster
20 contracting.” The Court cannot determine, however, whether this allegation was timely as
21 Plaintiff did not state in the First EEO Complaint *when* these training opportunities were denied.
22 The Court notes that in an email exchange with her EEO counselor, Plaintiff stated that she had
23 been denied training in March 2011 and June 2011, *see* Opposition, Ex. 16. Thus, it appears likely
24 that the training opportunities identified in the First EEO Complaint were denied more than 45
25 days before Plaintiff initiated EEO counseling. It is possible, however, that the training
26 opportunities referenced in the First EEO Complaint were the ones that she alleged in the FAC
27 were denied in September 2011 (in which case, they would be timely). Because the Court cannot
28 determine from the allegations whether the Denial of Training Opportunities claim is timely, it

1 finds that the claim fails to satisfy the exhaustion requirement as currently alleged.

2 Plaintiff will be given an opportunity to amend as to this claim to allege, if she can,
3 specific facts showing either that the training opportunities listed in her EEO Complaint occurred
4 within 45 days of EEO counseling or that the 45-day counseling period was subject to waiver,
5 estoppel or equitable tolling. The Court also finds the LLA does not apply to Plaintiff's failure to
6 train claim and therefore does not render Plaintiff's claim timely in the event that the denials of
7 training occurred more than 45 days before she initiated EEO counseling. *See Daniels v. United*
8 *Parcel Serv., Inc.*, 797 F. Supp. 2d 1163, 1185–86 (D. Kan. 2011), *aff'd*, 701 F.3d 620 (10th Cir.
9 2012) (holding that “[d]enial of training is a discrete act that is governed by *Morgan*, not by the
10 [LLA]”).

11 The Court further finds that Plaintiff has failed to allege any facts that would support a
12 plausible inference that the alleged denial of training was a result of a disability for the same
13 reasons discussed above. Therefore, this claim does not satisfy the requirements of Rule 12(b)(6).
14 Plaintiff will be permitted to amend this claim to allege facts showing that Defendant's failure to
15 train was based on Plaintiff's disabilities.

16 **J. Claim Five (Failure to Pay Additional Wages)**

17 In Claim Five, Plaintiff alleges that Defendant failed to afford her additional wages, in
18 violation of the Rehabilitation Act and the LLA. In particular, she alleges Defendant “prevented
19 [P]laintiff from deploying to disaster declarations, which prevented [P]laintiff from earning
20 additional wages, which were tax free.” As this claim is asserted under the Rehabilitation Act, the
21 Court construes it is alleging that she was denied deployment on the basis of her disability.

22 **1. Whether Plaintiff Has Exhausted**

23 In her First EEO Complaint, Plaintiff included the following entry: “When my
24 deployment was cancelled, it deprived me of overtime hours.” Wallace Decl., Ex. A.¹¹ Based on
25 the records before the Court, it is reasonable to interpret this claim as referring to the cancellation
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27 _____
28 ¹¹ Although this conduct was included in the First EEO Complaint, it was omitted from the
Agency's July 13, 2012 Letter. *See* Wallace Decl., Ex. B. As discussed above, the Court relies on
Plaintiff's EEO complaint rather than the Agency letter in determining the scope of exhaustion.

1 of Plaintiff's deployment referenced in the April 10, 2012 Initial Decision in the MSPB Appeal
2 relating to Plaintiff's alleged constructive suspension. *See* RJN, Ex. (April 10, 2012 Initial
3 Decision) at 13. That cancellation occurred on September 16, 2011, within 45 days of initiating
4 EEO counseling. *Id.* As a consequence, to the extent that this claim is based on the alleged
5 discriminatory cancellation of Plaintiff's deployment in September 2011, she has exhausted that
6 claim.

7 **2. Whether Plaintiff States a Valid Claim**

8 Like the claims discussed above, Plaintiff has alleged no facts in support of her allegation
9 that her deployment was cancelled on the basis of her disability. Consequently, Plaintiff fails to
10 state a valid claim, even though she has satisfied the exhaustion requirement as to this claim.
11 Plaintiff will be given leave to amend to allege specific facts in support of this claim showing that
12 Defendant's conduct was based on her disability.

13 **K. Claim Six (Hostile Work Environment)**

14 Plaintiff alleges that she was subject to a hostile work environment in violation of Title
15 VII, the ADEA, and the Rehabilitation Act. Based on the statutes Plaintiff invokes in support of
16 this claim, the Court construes it broadly to allege that the hostile work environment was based on
17 her age, sex, race and disability, as well as her past EEO activity.

18 **1. Whether Plaintiff has Exhausted**

19 In her EEO Complaint, Plaintiff expressly stated that she had been subject to a hostile
20 work environment and, as stated above, she checked the boxes for discrimination based on age,
21 race, sex, disability, and prior EEO activity. *See* Wallace Decl., Ex. A. Defendant contends this
22 claim was not properly exhausted because Plaintiff did not timely seek EEO counseling, pointing
23 out that the specific entries in the attachment to the First EEO Complaint that were listed to show
24 a hostile work environment were dated no later than April 2011, many months before Plaintiff
25 initiated EEO counseling. The Court finds that Defendant's reading of the EEO charge is too
26 narrow. As discussed above, courts must construe EEO charges "with utmost liberality since they
27 are made by those unschooled in the technicalities of formal pleading." *Sosa v. Hiraoka*, 920 F.2d
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1 1451, 1458 (9th Cir. 1990) (citation omitted). Plaintiff included a long list of discriminatory
2 conduct in the attachment to her First EEO Complaint, listing them by number. Although number
3 “8” was labeled “hostile work environment,” many of the discrete acts listed elsewhere on her list
4 could support a hostile work environment claim. Included on the list was Plaintiff’s cancelled
5 deployment (discussed above) and a credit card charge associated with that deployment for which
6 Plaintiff apparently alleged she had not been reimbursed. The record reflects that the charge was
7 incurred in mid-September 2011. *See* Opposition Exs. 14, 15.

8 As discussed above, under *Morgan*, a hostile work environment claim is timely so long as
9 any of the acts that support the claim were raised in a timely manner. Plaintiff included in her First
10 EEO Complaint conduct that occurred within the 45-day period prior to initiating EEO counseling
11 that may be part of a hostile work environment; she also claimed that she was subject to a hostile
12 work environment. The Court concludes that at the pleading stage, that is sufficient for the
13 purposes of demonstrating exhaustion of this claim.¹² The Court does not, however, preclude
14 Defendant from challenging this claim on exhaustion grounds at later stage of the case, when the
15 Court is in a better position to evaluate whether the conduct that that occurred within the 45-day
16 period was part of a continuing practice or rather, was a discrete discriminatory act for the
17 purposes of *Morgan*.

18 **2. Whether Plaintiff Has Stated a Claim**

19 Plaintiff’s hostile work environment claim will require that she establish that the allegedly
20 discriminatory conduct of Defendant was because of Plaintiff’s membership in a protected group,
21 whether that group is based on her age, race, sex or disability. As discussed above, Plaintiff has
22 alleged no facts linking the alleged harassment to her membership in any protected class.

23 Although she alleges generally that “[o]ther similarly situated contract specialists not in plaintiff’s
24 protected class were not treated the same,” *see*, FAC ¶ 17, such conclusory allegations are not

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26 ¹² The Court notes that in Plaintiff’s Second EEO Complaint, she asserts a hostile work
27 environment claim for the period 2013 to 2016. Wallace Decl., Ex. E. That complaint has not
28 been exhausted. The Court declines to address whether there should be a particular cut-off date as
to the exhaustion of Plaintiff’s hostile work-environment claim in this action. The parties did not
brief that question and in any event, Plaintiff has not yet stated a valid hostile work environment
claim under Rule 12(b)(6).

1 sufficient to meet the requirements of Rule 12(b)(6). Plaintiff will be permitted to amend to cure
2 this defect if she can.

3 **L. Claim Seven (Disparate Treatment Discrimination)**

4 In Claim Seven, Plaintiff alleges “[d]isparate [t]reatment” in violation of Title VII, the
5 ADEA and the Rehabilitation Act based on the allegation that Plaintiff is a “tenured qualified
6 disabled employee, who is in a protected class” and “was subjected to discriminatory treatment,
7 different from other employees who were not in her protected class, but were similarly situat[ed].”
8 The Court cannot discern the basis for this claim, which is entirely conclusory, or whether it has
9 been exhausted. Therefore, the Court DISMISSES this claim pursuant to both Rule 12(b)(1) and
10 12(b)(6) with leave to amend.

11 **IV. CONCLUSION**

12 For the reasons stated above the Court GRANTS in part and DENIES in part Defendant’s
13 Motion to Dismiss and dismisses all of Plaintiff’s claims with leave to amend to cure the
14 deficiencies identified in this Order, as set forth below. In particular, the Court rules as follows:

- 15 • Claim One (Wrongful Termination): DISMISSED based on failure to exhaust
16 administrative remedies and failure to state a claim. Plaintiff may amend to show
17 that she has satisfied the administrative requirements for bringing her ADEA claim
18 in federal court and to allege facts that support a plausible inference that her
19 terminations were based on age discrimination. Leave to amend is DENIED to the
20 extent this claim is based on other forms of discrimination under Title VII and the
21 Rehabilitation Act.
- 22 • Claim Two (Failure to Promote): DISMISSED based on failure to exhaust
23 administrative remedies and failure to state a claim. Plaintiff may amend to allege
24 facts showing that the 45 deadline for initiating EEO counseling on this claim is
25 subject to waiver, estoppel or equitable tolling and to allege facts supporting a
26 plausible inference that the promotion was denied on the basis of a disability.
- 27 • Claim Three (Retaliation): DISMISSED based on failure to exhaust administrative
28 remedies and failure to state a claim. Plaintiff may amend to allege facts showing

1 that the 45 deadline for initiating EEO counseling on this claim is subject to waiver,
2 estoppel or equitable tolling and establish a reasonable inference that the
3 investigator was motivated by specific prior EEO conduct of which he had
4 knowledge, and that the Department of Homeland Security can be held liable for
5 his conduct.

- 6 • Claim Four (Denial of Training): DISMISSED based on failure to exhaust
7 administrative remedies and failure to state a claim. Plaintiff may amend to allege
8 facts showing that the training identified in her First EEO Complaint was denied
9 within 45 days of initiating EEO counseling *or* that the 45-day deadline for
10 initiating EEO counseling on this claim is subject to waiver, estoppel or equitable
11 tolling. She may also amend to allege facts supporting a plausible inference that
12 the training was denied on the basis of a disability.
- 13 • Claim Five (Failure to Pay Additional Wages): DISMISSED based on failure to
14 state a claim. Plaintiff may amend to allege facts showing that her deployment was
15 cancelled on the basis of a disability.
- 16 • Claim Six (Hostile Work Environment): DISMISSED based on failure to state a
17 claim. Plaintiff may amend to allege facts showing that she was subjected to a
18 hostile work environment because of her age, sex, race and disability, as well as her
19 past EEO activity.
- 20 • Claim Seven (Disparate Treatment): DISMISSED based on failure to exhaust
21 administrative remedies and failure to state a claim. Plaintiff may amend to allege
22 specific facts identifying the basis for this claim and that Plaintiff has exhausted
23 administrative remedies as to this claim.

24 Plaintiff, who is not represented by counsel, is encouraged to consult with the Federal Pro
25 Bono Project's Legal Help Center in either of the Oakland or San Francisco federal courthouses
26 for assistance. The San Francisco Legal Help Center office is located in Room 2796 on the 15th
27 floor at 450 Golden Gate Avenue, San Francisco, CA 94102. The Oakland office is located in
28 Room 470-S on the 4th floor at 1301 Clay Street, Oakland, CA 94612. Appointments can be

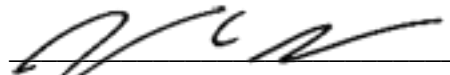
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made by calling (415) 782-8982 or signing up in the appointment book located outside either office, and telephone appointments are available. Lawyers at the Legal Help Center can provide basic assistance to parties representing themselves but cannot provide legal representation.

Plaintiff's amended complaint shall be filed within 45 days of the date of this Order.

IT IS SO ORDERED.

Dated: February 21, 2017



JOSEPH C. SPERO
Chief Magistrate Judge