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## UNITED STATES DISTRICT COURT

Northern District of California

Oakland Division

XING XING LIN,

No. C 10-03757 LB

Plaintiff,

v.

**ORDER GRANTING MOTION TO  
DISMISS, STRIKING PLAINTIFF'S  
CLAIM FOR PUNITIVE DAMAGES,  
AND GRANTING LEAVE TO AMEND**JOHN E. POTTER, POSTMASTER  
GENERAL, UNITED STATES POSTAL  
SERVICE**[ECF No. 9]**Defendant.  

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**I. INTRODUCTION**

On August 24, 2010, Plaintiff Xing Xing Lin filed this lawsuit alleging that her employer, Defendant United States Postal Service, discriminated against her based on race, national origin, and sex by delaying updating her qualifications in a register used to evaluate eligibility for promotions, in violation of Title VII of the Civil Rights Act of 1964. *See* Complaint, ECF No. 1 at 8-10, ¶¶ 34-45. Plaintiff also claims that the Postal Service retaliated against her for prior EEO activity by the delay and by refusing to abide by the terms of a May 2008 settlement agreement resolving her prior claim of wrongful denial of a promotion. *See id.* at 10, ¶¶ 46-48. Plaintiff also claims that the delay for discriminatory reasons violated 42 U.S.C. § 1983 and breached a collective bargaining agreement. *See id.* at 10-11, ¶¶ 49-54.

The Postal Service moved to dismiss the complaint for failure to state a claim and for lack of subject-matter jurisdiction based on Plaintiff's failure to include facts in her EEO complaint

1 establishing elements of her discrimination claims, and it also asked the court to strike Plaintiff's  
2 claim for punitive damages. Motion to Dismiss, ECF No. 9.

3 The court strikes the punitive damages claim and dismisses all claims in the complaint with  
4 leave to amend some claims.

5 As to claim one alleging discrimination based on race, national origin, and sex discrimination in  
6 violation of 42 U.S.C. § 1983, Title VII provides the only remedy for discrimination claims. The  
7 court dismisses the claim with prejudice.

8 As to claims two through four alleging discrimination based on race, national origin, and sex in  
9 violation of Title VII, the court dismisses the claims for failure to state a claim under Rule 12(b)(6).  
10 Plaintiff pleaded insufficient facts regarding whether she was subjected to an adverse employment  
11 action and no facts regarding whether a similarly-situated individual outside her protected class was  
12 treated more favorably. On this record, the court cannot conclude that it lacks subject-matter  
13 jurisdiction based on Plaintiff's alleged failure to timely raise in her EEO complaint the specific  
14 adverse employment actions she suffered or more favorable treatment of similarly-situated  
15 individuals. Therefore, the court dismisses the claims with leave to amend.

16 As to claim five alleging retaliation based on the 2009 delay in updating her promotional  
17 qualifications, the court dismisses the claim with leave to amend to plead facts establishing an  
18 adverse employment action and a causal link between the protected activity and the adverse action.  
19 Claim five also alleges retaliation in the form of refusal to comply with the terms of the 2008  
20 settlement agreement. Plaintiff concedes that she did not follow the specific administrative appeal  
21 processes required for settlement agreements negotiated through an EEO complaint process. *See* 29  
22 C.F.R. § 1614.50(a). The court dismisses claim five on this basis with prejudice for lack of subject-  
23 matter jurisdiction.

24 As to claim six alleging that the delay in updating Plaintiff's qualifications also violated the  
25 terms of her collective bargaining agreement, the court dismisses the claim with leave to amend.

## 26 II. FACTS

### 27 A. Plaintiff's 2007 and 2008 EEO Activity And Settlement

28 Plaintiff is a Chinese female employee of the United States Postal Service. Complaint, ECF No.

1 1 at 3, ¶ 4.<sup>1</sup> Defendant initially hired Plaintiff as a Labor Custodian on January 21, 2006. *Id.* at 3, ¶  
2 8. On about January 24, 2007, Defendant added Plaintiff’s name to the Maintenance Mechanic  
3 Promotion Eligibility Register. *Id.* Starting on February 26, 2007, Plaintiff began performing the  
4 tasks of a Maintenance Mechanic (a higher-ranked position designated as “MM7” level and  
5 previously known as “MM6” level) at Defendant’s San Francisco P&DC Finance Station without  
6 receiving a formal promotion to the position. *Id.* at 4, ¶ 8. Defendant’s management later revoked  
7 this assignment and sent Plaintiff back to being a Labor Custodian. *Id.*

8 In order to qualify for a position as a Maintenance Mechanic, Plaintiff had required training,  
9 passed a test at the end of the training, and satisfied all qualifications to be promoted to the MM6  
10 position. *Id.* at 4, ¶ 9. After completing the training program, Plaintiff became eligible not only for  
11 the MM6 position, but also for the next-level promotion to Maintenance Mechanic MPE 9 position  
12 (previously known as “MPE 8”). *Id.* Thereafter she submitted a request to update her professional  
13 qualifications (called “Knowledge, Skills and Abilities” or “KSAs”) in the Promotion Eligibility  
14 Register, a database that allows employees to bid for any open positions for which they have the  
15 required qualifications. *Id.* This update would make her eligible to receive the next promotion to  
16 MPE Level 9. *Id.* Ed Cuadra, the MSS coordinator for the San Francisco District in charge of  
17 Maintenance Craft promotions and who approves all promotion updates, did not respond to  
18 Plaintiff’s request to update her qualifications. *Id.*

19 After Plaintiff filed a grievance on November 9, 2007, Defendant offered her an MM6<sup>2</sup> position  
20 with the San Francisco Air Mail Center on January 5, 2008. *Id.* at 4, ¶¶ 10-11. Postal Service  
21 management officials, including Ed Cuadra, refused to process her request to update her to an MPE  
22 9 level. *Id.* at 4, ¶ 12.

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23  
24 <sup>1</sup> The facts relevant to the analysis of whether Plaintiff fails to state a claim under Federal  
25 Rule of Civil Procedure 12(b)(6) are all from the complaint. Additional facts submitted by the  
26 parties are identified by their source and are relevant only to the Postal Service’s factual challenge  
27 under Rule 12(b)(1) to the court’s subject-matter jurisdiction. *See Savage v. Glendale High School,*  
*Dist. No. 205, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).*

28 <sup>2</sup> Plaintiff refers to the position in different paragraphs as either MM6 or MM7. The court’s  
citations here mimic Plaintiff’s references in her complaint. According to the complaint, in 2007 the  
position was designated “MM6,” and it is now designated “MM7.” Complaint, ECF No. 1 at 4, ¶ 8.

1 On March 5, 2008, Plaintiff contacted the agency’s internal Equal Employment Opportunity  
2 Counselor to initiate a complaint alleging discriminatory denial of promotion and refusal to update  
3 her professional qualifications in the Promotion Eligibility Register. *Id.* at 4, ¶ 13. After completing  
4 mediation, the parties entered into a settlement agreement on May 6, 2008 with the following terms:  
5 (1) Defendant was ordered to schedule a review panel to evaluate Plaintiff’s request to have her  
6 KSA professional qualifications updated within 30 days, and (2) Plaintiff was retroactively  
7 promoted to an MM7 position as of October 19, 2007. *Id.* at 5, ¶ 14. Despite the settlement,  
8 Defendant did not adjust Plaintiff’s wage rates, bonuses, and benefits to “that level to which she is  
9 entitled in accordance with the retroactive promotion.” *Id.* at 5, ¶ 15.

10 The settlement agreement states that “[a]ny alleged breach arising out of the implementation of  
11 or compliance with this settlement agreement must be reported in writing to the Manager, EEO  
12 Compliance and Appeals, . . . within 30 days of the alleged breach.” Exh. 3 to Marlene Yacap  
13 Declaration, ECF No. 10 at 14. According to the Postal Service, the agency’s EEO counselor never  
14 received “any report” from Plaintiff alleging that the Postal Service breached the settlement  
15 agreement. *See* Yacap Declaration, ECF No. 10 at 3, ¶ 5. Plaintiff submitted no facts refuting this  
16 evidence.

17 **B. Events in 2009 and Plaintiff’s August 2009 EEO Activity**

18 On January 27, 2009, Plaintiff reiterated her request to have her qualifications updated to the  
19 MPE 9 level. Complaint, ECF No. 1 at 5, ¶ 16. Based on the terms of the Collective Bargaining  
20 Agreement established between the Postal Services and members of the American Postal Workers  
21 Union, including Plaintiff, the Postal Service had 37 days from the date of her request – or until  
22 March 5, 2009 – to process her updated qualifications and render a decision. *Id.* at 5, ¶ 17.  
23 Defendant did not update Plaintiff’s eligibility qualifications until the end of August 2009. *Id.* at 5,  
24 ¶ 18. Between January 27, 2009 and the end of August 2009, Plaintiff lodged multiple written  
25 grievances to Defendant’s management and Cuadra. *Id.* at 6, ¶ 18.

26 On about August 13, 2009, Plaintiff contacted an EEO counselor to request pre-complaint  
27 processing for discrimination and retaliation for Defendant’s failure to update her promotion  
28 eligibility and corresponding denial of promotion opportunities. *Id.* at 6-7, ¶ 22. She also sought

1 pre-complaint processing for Defendant’s denial of [presumably retroactive] promotion wages and  
2 benefits for the 2008 retroactive promotion and refusal to comply with the 2008 settlement  
3 agreement. *Id.*

4 According to the Postal Service, Plaintiff signed her Information for Pre-Complaint Counseling  
5 form on August 24, 2009 and her formal EEO complaint on October 28, 2009. Yacap Declaration,  
6 ECF No. 10 at 17-19, 21, Exhs. 4 & 5; *see also* Exh. 5, ECF No. 10 at 23 (initiated pre-complaint  
7 processing on August 13, 2009). The August 24 form and the October 28 complaint both alleged  
8 discrimination and retaliation beginning “on 8/3/09 and Continuing.” Exh. 4, ECF No. 10 at 17, and  
9 Exh. 5, ECF No. 10 at 21. The August 24 form also stated that Plaintiff repeatedly asked orally and  
10 in writing to have her qualifications updated, “including August 3, 2009.” Exh. 4, ECF No. 10 at  
11 17. Plaintiff also asserts that she lost wages. *Id.*

12 According to Plaintiff, the Postal Service “delayed the results of her qualification update . . .  
13 until August 31, 2009[, and] Plaintiff’s name finally was posted on the [promotion register] . . . on  
14 October 6, 2009.” Opposition, ECF No. 16 at 16 (citing Exh. F to Lin Declaration, ECF No. 17-6).  
15 On April 2 and April 17, 2009, the Postal Service posted two vacant bids for the MP-08 (now the  
16 MPE 9) position, and on August 1, 2009, the April 17 bid was awarded to Santiago Villamar (who is  
17 outside Plaintiff’s protected class) from the promotion register. *Id.* (citing Exh. C, D & E, ECF Nos.  
18 17-3, 17-4, and 17-5).

19 On October 22, 2009, Plaintiff filed her formal EEO complaint with the Postal Service alleging  
20 retaliation for her 2008 EEO activity and discrimination based on race (Asian), national origin  
21 (Chinese), and sex (female). Complaint, ECF No. 1 at 2, 7, ¶¶ 3, 23. On November 23, 2009, the  
22 agency dismissed her complaint for failure to state a claim. *Id.* at 2, ¶ 3, 14, Exh. A. Plaintiff  
23 appealed this decision to the Equal Employment Opportunity Commission (EEOC). *Id.* at 2, ¶ 3.

24 On appeal to the EEOC, Plaintiff argued in part that as a result of Defendant’s failure to update  
25 her promotion eligibility, it denied her two specific promotions for positions announced on April 2  
26 and April 17, 2009. *Id.* at 15, Exh. A. In its June 3, 2010 decision affirming the Postal Service’s  
27 dismissal and issuing the notice of a right to sue, the EEOC stated that Plaintiff had raised the two  
28 promotions for the first time on appeal and told Plaintiff to “initiate the EEO complaint process

1 regarding these matters if she chooses to pursue them further.” ECF No. 1 at 2, ¶ 3, and Exh. A,  
2 ECF No. 1 at 14-17. Plaintiff filed the complaint in this case on August 24, 2010. ECF No. 1.

### 3 III. LEGAL STANDARDS

#### 4 A. Rule 12(b)(1)

5 Dismissal of a claim is appropriate under Federal Rule of Civil Procedure Rule 12(b)(1) when  
6 the court lacks subject-matter jurisdiction over the claim. Federal subject-matter jurisdiction must  
7 exist at the time the action is commenced. *Morongo Band of Mission Indians v. California Bd. of*  
8 *Equalization*, 858 F.2d 1376, 1380 (9<sup>th</sup> Cir. 1988).

9 A Rule 12(b)(1) motion may either attack the sufficiency of the complaint to establish federal  
10 jurisdiction (a facial challenge) or allege a lack of jurisdiction that exists despite the formal  
11 sufficiency of the complaint (a factual challenge). *See White v. Lee*, 227 F.3d 1214, 1242 (9<sup>th</sup> Cir.  
12 2000); *Thornhill Publishing Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9<sup>th</sup>  
13 Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9<sup>th</sup> Cir. 1987). A facial attack asserts lack  
14 of federal jurisdiction based on the complaint alone, and the court must “accept all allegations of fact  
15 in the complaint as true and construe them in the light most favorable to the plaintiffs.” *See Warren*  
16 *v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9<sup>th</sup> Cir. 2003). By contrast, with a factual  
17 challenge, a court need not assume the truth of factual allegations but may hear additional evidence  
18 about jurisdiction and resolve factual disputes when necessary. *See Roberts*, 812 F.2d at 1177  
19 (quotation omitted). If a defendant challenges jurisdiction by presenting evidence, then the party  
20 opposing the motion must present sufficient evidence to support the court’s subject-matter  
21 jurisdiction. *See Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d  
22 1036, 1040 n.2 (9<sup>th</sup> Cir. 2003).

23 Dismissal of a complaint without leave to amend should only be granted where the jurisdictional  
24 defect cannot be cured by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052  
25 (9<sup>th</sup> Cir. 2003).

#### 26 B. Rule 12(b)(6)

27 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does  
28 not contain enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp.*

1 v. *Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads  
2 factual content that allows the court to draw the reasonable inference that the defendant is liable for  
3 the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). “The plausibility standard  
4 is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
5 defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557.) “While a complaint  
6 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s  
7 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
8 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual  
9 allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550  
10 U.S. at 555 (internal citations and parentheticals omitted).

11 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true  
12 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551  
13 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9<sup>th</sup> Cir. 2007).

14 In reviewing a motion to dismiss, courts may consider documents attached to the complaint.  
15 *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9<sup>th</sup> Cir. 1995) (citation omitted).

16 If the court dismisses the complaint, it should grant leave to amend even if no request to amend  
17 is made “unless it determines that the pleading could not possibly be cured by the allegation of other  
18 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9<sup>th</sup> Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc. v.*  
19 *Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9<sup>th</sup> Cir. 1990)).

#### 20 IV. DISCUSSION

##### 21 A. **Claim One: 42 U.S.C. § 1983 Claim Dismissed Because Title VII Provides Sole Remedy**

22 In her complaint, Plaintiff alleges discrimination during her employment at the United States  
23 Postal Service based on her race, sex, national origin, and prior EEO activity in violation of 42  
24 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964.<sup>3</sup> Complaint, ECF No. 1 at 8-10, ¶¶ 30-  
25 48. The court dismisses the section 1983 claim because Title VII is Plaintiff’s only remedy.

26 Under section 1983, a plaintiff may sue state officials acting under color of state law for

27 \_\_\_\_\_  
28 <sup>3</sup> Plaintiff’s complaint alleges a violation under “43” U.S.C. § 1983, *see* Complaint, ECF  
No. 1 at 8, but that apparently is a typographical error.

1 violating certain federal constitutional rights, but a plaintiff must sue federal officials acting under  
2 color of federal law under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,  
3 403 U.S. 388, 397 (1971). See *Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9<sup>th</sup>  
4 Cir. 1997). But as Defendant argues in the motion to dismiss, Title VII provides a plaintiff with the  
5 exclusive judicial remedy for claims of discrimination based on race, sex, religion, or national  
6 origin. See, e.g., *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 835 (1976); *White v. General Serv.*  
7 *Admin.*, 652 F.2d 913, 916 (9<sup>th</sup> Cir. 1981) (Title VII exclusive remedy for claims of discrimination in  
8 federal employment); see also *Leong v. Potter*, 347 F.3d 1117, 1122-23 (9<sup>th</sup> Cir. 2003)  
9 (Rehabilitation Act is exclusive remedy for disability discrimination).

10 Plaintiff does not dispute this in her opposition, and the complaint does not raise any factual  
11 predicates suggesting that she has a separately actionable constitutional claim against Defendant.  
12 Cf. *Otto v. Heckler*, 781 F.2d 754, 757 (9<sup>th</sup> Cir. 1986) (Title VII does not bar claims based on  
13 different factual predicates than those for the Title VII claim). Accordingly, the court dismisses  
14 Plaintiff's 42 U.S.C. § 1983 claim with prejudice because her remedy is under Title VII.

15 **B. Claims Two Through Four: Title VII Claims Dismissed Without Prejudice**

16 In claims two through four, Plaintiff claims race, national origin, and sex discrimination because  
17 the Postal Service delayed updating her qualifications in its Promotional Eligibility Register.  
18 Complaint, ECF No. 1 at 5-6, 15, ¶¶ 16-18. Plaintiff first requested an update on January 12, 2009,  
19 and submitted an update on January 27, 2009, but Plaintiff did not receive her updated results until  
20 August 31, 2009, which was after she contacted an EEO counselor on August 13, 2009 to request  
21 pre-complaint processing of her grievance. *Id.* (She also "sent multiple written grievances" to  
22 management from January 27, 2009 until the end of August 2009. *Id.* at 6, ¶ 9.) As a result,  
23 Plaintiff alleges, she was denied promotional opportunities, promotion eligibility, and promotion  
24 wages and benefits. *Id.* at 7, ¶ 22.

25 The Postal Service asserts two grounds for dismissing the claims: (1) failure to state a claim  
26 under Rule 12(b)(6) based on Plaintiff's failure to plead facts supporting all elements of the claims;  
27 and (2) lack of subject-matter jurisdiction under Rule 12(b)(1) because Plaintiff did not and cannot  
28 now allege specific facts in her EEO complaint about lost job promotions or more favorable



1 treatment of other similarly-situated persons not in her protected class. *See* ECF No. 9. Ordinarily  
2 the court addresses jurisdiction first. But here, whether Plaintiff should have alleged specific facts in  
3 her EEO complaint depends on whether the facts are needed to support her claim. Accordingly, the  
4 court addresses the 12(b)(6) arguments first. The court concludes that Plaintiff did not plead all  
5 elements of claims two through four sufficiently and dismisses the claims without prejudice with  
6 leave to amend. On this record, the court cannot evaluate whether hypothetical facts that Plaintiff  
7 might assert in her amended complaint were included in the EEO complaint (or are reasonably  
8 related to it) and thus denies the motion to dismiss for lack of jurisdiction.

9 **1. Sufficiency of Pleading of Elements of Title VII Claim**

10 To establish a prima facie case of employment discrimination under Title VII, Plaintiff must  
11 prove that (1) she belongs to a protected class, (2) she was qualified for the job (or promotion or  
12 other benefit at issue), (3) she was subject to an adverse employment action, and (4) similarly-  
13 situated individuals outside her protected class were treated more favorably. *See Leong*, 347 F.3d at  
14 1124 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Though heightened  
15 pleading standards are not mandated in Title VII cases, Plaintiff must plead sufficient facts to state  
16 the elements of a prima facie case of discrimination. *Johnson v. Riverside Healthcare System, LP*,  
17 534 F.3d 1116, 1122 (9<sup>th</sup> Cir. 2008) (citing *Williams v. Boeing Co.*, 517 F.3d 1120, 1130 (9<sup>th</sup> Cir.  
18 2008)).

19 Plaintiff sufficiently alleges facts supporting the first two elements. She alleges that she is a  
20 member of a protected class: Asian (race), Chinese (national origin), and female (sex). Complaint,  
21 ECF No. 1 at 3, ¶ 7. She also sufficiently alleges that she satisfied the eligibility criteria (meaning,  
22 the qualifications) for the promotions that should have been reflected in the Promotional Eligibility  
23 Register because she alleges that the Postal Service updated her qualifications in late August 2009.  
24 *Id.* at 5, ¶ 18.

25 As to element three, however, Plaintiff did not allege sufficiently that she was subject to an  
26 adverse employment action.

27 A benefit denied to a plaintiff need not be employment; instead, it need only be a “term,  
28 condition, or privilege of employment.” *See Hichon v. King & Spaulding*, 467 U.S. 69, 77 (1984)

1 (pension benefits qualify). For example, denial of a raise or promotion may violate Title VII. *See*  
2 *id.* (denying partnership status); *Breiner v. Nevada Dept. of Corrections*, 610 F.3d 1202, 1208 (9<sup>th</sup>  
3 Cir. 2010) (denying promotion); *Michael v. Caterpillar Fin'l Servs. Corp.*, 496 F.3d 584, 593 (6<sup>th</sup>  
4 Cir. 2007) (discharge, demotion, wage cut, or material loss of benefits); *Alvarado v. Texas Rangers*,  
5 492 F.3d 605, 613-14 (5<sup>th</sup> Cir. 2007) (denying transfer that has effect of demotion or denial of  
6 promotion); *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 654 (7<sup>th</sup> Cir. 2000); *Boone v. Goldin*, 178  
7 F.3d 253, 256-57 (4<sup>th</sup> Cir. 1999) (denying or materially delaying a promotion). Similarly, lack of  
8 notice of a promotional opportunity to qualifying employees can be an adverse employment action.  
9 *See Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1022 (6<sup>th</sup> Cir. 2003) (employer has duty to consider all  
10 those who might be reasonably interested were its availability generally known); *Carmichael v.*  
11 *Birmingham Saw Works*, 738 F.2d 1126, 1132-33 (11<sup>th</sup> Cir. 1984).

12 Also, discrimination related to job training, classification, or assignment can be an adverse  
13 employment action. Limiting, classifying, or segregating employees is prohibited when the effect is  
14 to (a) deprive or tend to deprive the employees of employment opportunities or (b) adversely affect  
15 their employment or potential employment status. 42 U.S.C. § 2000e-2(a)(2). Similarly, limiting  
16 admission to or employment in apprenticeship programs or other job training programs is prohibited  
17 if based on discriminatory motives. 42 U.S.C. § 2000e-2(d); *see Maalik v. Int'l Union of Elevator*  
18 *Constructors, Local 2*, 437 F.3d 650, 653 (7<sup>th</sup> Cir. 2006) (senior union member's discriminatory  
19 refusal to train new member).

20 The issue here is whether placement on a *qualifications list* that might lead to advancement is an  
21 adverse employment action absent something more, like loss of an opportunity to apply for a  
22 particular job. The court concludes that mere delay in updating qualifications – standing alone –  
23 does not establish an adverse employment action at the pleading stage. Plaintiff must show that the  
24 adverse employment action “materially affect[ed] the compensation, terms, conditions, or privileges  
25 of . . . employment.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9<sup>th</sup> Cir. 2008) (quoting *Chuang*  
26 *v. Univ. of Cal., Davis*, 225 F.3d 1115, 1126 (9<sup>th</sup> Cir. 2000)). Put another way, the employment  
27 action must result in a harm that matters, like a lost job, promotion, training, or other benefit. The  
28 cases in the previous paragraphs all support this conclusion. *Cf. Jackson v. Bd. of Equalization*, No.

1 C 09-1387, 2010 WL 3733983, at \*8-\*9 (E.D. Cal. Sept. 20, 2010) (addressing delay in context of  
2 retaliation claim; delay in responding to inquiries about status of discrimination complaint by Board  
3 of Equalization in and of itself does not establish an adverse employment action because it was not  
4 reasonably likely to deter protected activity).

5 Plaintiff does not argue to the contrary in her opposition, arguing only that the court has  
6 “jurisdiction over all promotions that were lost as a direct result of the Postal Service’s refusal to  
7 update Plaintiff’s Promotional Eligibility Qualifications during the pendency of the violation.”  
8 Opposition, ECF No. 16 at 10. Plaintiff confirmed this at oral argument.

9 In her complaint, Plaintiff alleges only a delay in processing her qualifications, makes a  
10 conclusory assertion that she was denied “promotion opportunities,” and does not allege facts  
11 showing a material effect on her (such as a denial of a promotion). *See* ECF No. 1 at 6-7, ¶ 22.  
12 That is not sufficient to establish an adverse employment action at the pleading stage.

13 Plaintiff nonetheless argues in her opposition that the Postal Service’s failure to update her  
14 promotional eligibility resulted in the loss of two promotions posted on April 2 and April 17, 2009.  
15 Opposition, ECF No. 16 at 18-19 (citing Exhs. C and D, ECF Nos. 17-3 and 17-4); *see* ECF No. 1 at  
16 15 (EEOC decision attached to complaint references Plaintiff’s raising these two postings for the  
17 first time on appeal). She also argues that the Postal Service awarded one of the promotions to  
18 Santiago Villamar, an individual outside Plaintiff’s protected class. Opposition, ECF No. 16 at 19  
19 (citing Exh. E, ECF No. 17-5).

20 Even assuming the court should read the EEOC decision’s fact summary into the complaint, *see*  
21 *Parks School of Business*, 51 F.3d at 1484, Plaintiff did not allege element four of her claims  
22 sufficiently because she did not allege that a similarly-situated individual outside her protected class  
23 was treated more favorably.

24 In sum, Plaintiff did not allege the elements of claims two through four sufficiently but possibly  
25 can cure the deficiencies in an amended complaint.

26 **2. Sufficiency of Allegations Raised in EEO Complaint and Rule 12(b)(1)**

27 The Postal Service nonetheless argues that Plaintiff’s second, third, and fourth claims should be  
28 dismissed with prejudice because she failed to include facts in her EEO complaint establishing an

1 adverse employment action or a similarly-situated person outside her protected class who was  
2 treated more favorably. As a result, the Postal Service argues, the court lacks subject-matter  
3 jurisdiction. Motion to Dismiss, ECF No. 9 at 16-21. On this record, the court cannot reach that  
4 conclusion and denies the motion to dismiss for lack of jurisdiction.

5 Title VII actions by federal employees are governed by 42 U.S.C. § 2000e-16. An employee  
6 must exhaust administrative remedies with her agency within the time limits specified in EEOC  
7 regulations. The plaintiff must make a complaint to an EEO counselor within 45 days of the alleged  
8 discrimination, which is the pre-complaint process, and then file a written complaint with the agency  
9 within 15 days of the final interview with the EEO counselor. 29 C.F.R. §§ 1614.105(a), .106(b). If  
10 the plaintiff takes the case to the EEOC, the plaintiff must file the complaint with the EEOC within  
11 30 days of the agency's final decision. *Id.* § 1614.402(a). When, as here, the EEOC issues a final  
12 decision, the plaintiff has 90 days from the EEOC's decision to file an action in federal court. 42  
13 U.S.C. § 200e-16(c); 29 C.F.R. § 1614.408.

14 Generally a federal court may not consider allegations outside the administrative complaint. *See*  
15 *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9<sup>th</sup> Cir. 2002). Substantial compliance  
16 with the requirement that discrimination complaints must be presented to the appropriate agency is a  
17 jurisdictional prerequisite. *Sommantino v. United States*, 255 F.3d 704, 708 (9<sup>th</sup> Cir. 2001). The  
18 time limits themselves are not jurisdictional but are subject to equitable tolling, just like claims  
19 against private employers. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 93-96 (1990).

20 According to Defendant, it is apparent facially from the complaint, which attaches the EEOC  
21 decision, that Plaintiff failed to allege in her EEO complaint the specific promotions that she did not  
22 receive based on Defendant's failure to update her qualifications on the Promotion Eligibility  
23 Register. Opposition, ECF No. 9 at 18; *see* ECF No. 1 at 15 (EEOC decision notes that Plaintiff  
24 identified specific promotions posted in April 2009 for the first time on appeal to the EEOC and  
25 advised her to initiate the EEO complaint process with the Postal Service regarding these matters if  
26 she chose to investigate them further).

27 Defendant also offers additional facts that it says demonstrates lack of jurisdiction. The only  
28 possible adverse employment actions that plaintiff could allege in an amended federal complaint are

1 the two job postings in April 2009. Motion, ECF No. 9 at 18-19 (citing Exh. 4 to Yacap  
2 Declaration). Each posting is a separate adverse employment act that required a separate EEO  
3 complaint. *Id.* at 19-20. Plaintiff should have raised them in a pre-complaint process to an EEO  
4 counselor within 45 days of the acts and then in a subsequent written complaint to the agency. *See*  
5 *id.*; 29 C.F.R. §§ 1614.105(a), .106(b). She did not, and they would be untimely now. Similarly, the  
6 information form filed on August 24, 2009 did not describe the positions denied to her or persons  
7 wrongfully promoted ahead of her, and her formal EEO complaint did not identify other employee  
8 promotions. Yacap Declaration, Exh. 4 at 1 and Exh. 5. Thus, according to Defendant, the only  
9 possible adverse employment actions and possible employee promotions were not timely raised in  
10 the EEO complaint process.

11 The issue here is whether these allegations (which Defendant assumes would be the allegations  
12 in Plaintiff's hypothetical amended complaint) are reasonably related to the allegations that Plaintiff  
13 actually made in her EEO complaint. *See* Plaintiff's Opposition, ECF No. 16 at 17 (allegations that  
14 she lost two promotions, one of which Defendant awarded to Santiago Villamar, falls within the  
15 scope of her EEO complaint); *Freeman*, 291 F.3d at 637. That inquiry requires the court to compare  
16 factual allegations in the federal complaint (which here is a hypothetical amended complaint) with  
17 the factual allegations in the EEO complaint to determine whether they are reasonably related. *See*  
18 *Freeman*, 291 F.3d at 637. The court must decide whether the allegations not included in the  
19 original charge would have fallen "within the scope of the EEOC's *actual* investigation or an EEOC  
20 investigation which *can reasonably be expected* to grow out of the charge of discrimination." *See*  
21 *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9<sup>th</sup> Cir. 1994) (internal quotation marks omitted)  
22 (emphasis in original). To make this determination, courts should consider (1) the alleged basis of  
23 discrimination, (2) the dates of discriminatory acts specified within the charge, (3) perpetrators of  
24 discrimination named in the charge, and (4) locations at which discrimination is alleged to have  
25 occurred. *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9<sup>th</sup> Cir. 2002). Additionally, "the  
26 court should consider plaintiff's civil claims to be reasonably related to allegations in the charge to  
27 the extent that those claims are consistent with the plaintiff's original theory of the case." *Id.*  
28 Courts must construe the initial EEO charge "with the utmost liberality." *Farmer Bros.*, 31 F.3d at

1 899 (internal quotation marks and citation omitted).

2 Boiled down, the issue is whether Plaintiff could amend her complaint to allege facts that are  
3 like or reasonably related to the factual allegations actually in the EEO complaint. If she can, then  
4 the court has subject-matter jurisdiction. *See B.K.B.*, 276 F.3d at 1099.

5 Based on this record, a hypothetical amended complaint that may or may not include facts that  
6 may or may not establish the court’s jurisdiction, and Rule 15(a)’s liberal amendment provisions,  
7 *see Eminence Capital*, 316 F.3d at 105, the court cannot conclude that Plaintiff’s claims should be  
8 dismissed now with prejudice for lack of subject-matter jurisdiction. The court thus dismisses the  
9 claims with leave to amend and will evaluate any jurisdictional challenges based on the factual  
10 allegations that Plaintiff actually pleads in an amended federal complaint.

11 Any revised complaint should not be based on Plaintiff’s theory that Defendant’s ongoing failure  
12 to update her promotion eligibility was an ongoing and continuing violation. *See Opposition*, ECF  
13 No. 16 at 15-18. Instead, her claims must be based on discrete acts (such as the job opening that  
14 may have been open until August 2009). *See National R.R. Passenger Corp. v. Morgan*, 536 U.S.  
15 101, 110-14 (2002). Old and new discrete acts cannot be combined into a single “continuing  
16 violation” to avoid the administrative filing requirements with the agency. *See id.* at 112. Those  
17 earlier acts and the employer’s knowledge of them may be admissible as background evidence in  
18 support of a timely claim. *See id.*

19 **C. Claim Five: Title VII Retaliation Claim Dismissed Without Prejudice**

20 In claim five, Plaintiff claims retaliation for her prior EEO activity in violation of Title VII based  
21 on the Postal Service’s (1) delay in updating her employment qualifications, and (2) failure to abide  
22 by a May 2008 settlement of a 2008 EEO complaint. *See ECF No. 1* at 10. The court dismisses the  
23 claim (1) without prejudice to the extent that it is based on the delay based on Plaintiff’s insufficient  
24 allegation of some of the elements of a retaliation claim and (2) with prejudice to the extent that is  
25 based on the settlement agreement because Plaintiff did not comply with the administrative  
26 procedures that are a prerequisite for review in federal court.

27 To establish a prima facie case of retaliation under Title VII, Plaintiff must prove that (1) she  
28 engaged in a protected activity, (2) she suffered an adverse employment decision, and (3) there was

1 a causal link between the protected activity and the adverse employment decision. *See Villiarimo v.*  
2 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9<sup>th</sup> Cir. 2002).

3 As to element one, an employee’s formal or informal complaints to a supervisor regarding  
4 unlawful discrimination is “protected activity,” and it is immaterial whether the complaints are well-  
5 founded. *See Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 506-07 (9<sup>th</sup>  
6 Cir. 2000).

7 As to element two, for purposes of a retaliation claim, a “materially adverse employment  
8 decision” is one that would dissuade a reasonable worker from exercising protected rights, which is  
9 a lower standard than that required for a Title VII discrimination claim. *See Burlington Northern &*  
10 *Santa Fe Ry. Co.*, 548 U.S. 53, 68 (2006); *Michael v. Caterpillar Fin’l Servs. Corp.*, 496 F.3d at  
11 595. Whether an employer’s action is materially adverse depends on the circumstances. For  
12 example, a change in a work schedule may matter little to some employees and materially to a parent  
13 with school-aged children. *See Burlington Northern*, 548 U.S. at 69. A supervisor’s failure to invite  
14 a subordinate to lunch may be petty and trivial, or it might be an exclusion from a weekly training  
15 lunch that contributes to the employee’s professional development. *See id.* What matters is whether  
16 it might dissuade a reasonable employee from complaining about discrimination. *See id.*; *Boone*,  
17 178 F.3d at 256-57 (denying or materially delaying a promotion is a materially-adverse employment  
18 decision).

19 As to element three, a plaintiff may establish a causal link between the protected activity and the  
20 adverse action by circumstantial knowledge, including the employer’s knowledge of the protected  
21 activity and a proximity in time between the protected action and the adverse employment act. *See*  
22 *Jordan v. Clark*, 847 F.2d 1368, 1376 (9<sup>th</sup> Cir. 1988); *Passantino*, 212 F.3d at 507 (“when adverse  
23 decisions are taken within a reasonable period of time after complaints of discrimination are made,  
24 retaliatory intent may be inferred”).

25 **1. Retaliation Regarding Defendant’s Failure To Update Plaintiff’s Promotion Eligibility**

26 Plaintiff alleges that the Postal Service retaliated against her by failing to update her promotion  
27 eligibility in a timely manner. Complaint, ECF No. 1 at 5-6, ¶ 18. Plaintiff pleaded sufficient facts  
28 that she engaged in a protected activity, but she pleaded insufficient facts about why the delay would

1 dissuade a reasonable employee from exercising protected rights or about the causal link between  
2 the protected activity and the adverse employment action. The court dismisses Plaintiff's fifth claim  
3 (to the extent it is based on the delay) without prejudice and with leave to amend.

4 **2. Retaliation By Not Abiding By Terms of 2008 Settlement Agreement**

5 In 2007 and 2008, Plaintiff complained about the Postal Service's denying her a promotion and  
6 refusing to update her qualifications. Complaint, ECF No. 1 at 4, ¶¶ 10-12. After she contacted the  
7 agency's EEO counselor on March 5, 2008, the parties reached a settlement agreement on May 6,  
8 2008 where the Postal Service agreed to (a) schedule a review panel to update Plaintiff's promotion  
9 eligibility within 30 days and (b) retroactively advance Plaintiff's promotion to MM7 to October 19,  
10 2007. *Id.* at 4-5, ¶¶ 13-14. Plaintiff now alleges that Defendant failed to abide by the terms of the  
11 settlement agreement in retaliation for her prior 2008 EEO activity. *Id.* at 3-5, ¶¶ 8-15.

12 To raise a claim that the Postal Service violated the terms of a settlement agreement, a  
13 complainant must first "notify the [agency's] EEO Director, in writing, of the alleged  
14 noncompliance within 30 days of when the [employee] knew or should have known of the alleged  
15 noncompliance." 29 C.F.R. § 1614.504(a). If the agency's EEO director does not respond or if the  
16 complainant is unhappy with the agency's resolution of the matter, the complainant may appeal to  
17 the EEOC for a decision about whether the agency has complied with the terms of the settlement  
18 agreement. *See Davis v. Secretary of Treasury*, 896 F. Supp. 978, 981 (N.D. Cal. 1995) (citation  
19 omitted). Failure to seek the mandatory review required by the C.F.R. bars review in federal court.  
20 *See id.*

21 The first line of text of the settlement agreement advised Plaintiff of the requirement that she  
22 must report any breach of the settlement agreement in writing to the agency's manager of EEO  
23 compliance and appeals within 30 days of the alleged breach. Exh. 3 to Yacap Declaration, ECF  
24 No. 10 at 14. According to Defendant, the agency's EEO counselor never received "any report"  
25 from Plaintiff alleging that the Postal Service breached the settlement agreement. *See Yacap*  
26 *Declaration*, ECF No. 20 at 3, ¶ 5. In her opposition, Plaintiff does not dispute this and presents no  
27 evidence supporting subject-matter jurisdiction. *See Roberts*, 812 F.2d at 1177. Plaintiff conceded  
28 her failure to follow this administrative process at the motion hearing.



1           Instead, in her opposition, Plaintiff argues only that Defendant’s failure to abide by the terms of  
2 the settlement agreement is an ongoing and continuing violation. Opposition, ECF No. 16 at 14.  
3 The court rejects this argument for the reasons stated in the previous section. Claims must be based  
4 on discrete acts, and old and new discrete acts cannot be bundled into a single “continuing violation”  
5 to avoid the timing requirements of administrative remedies. *See National R.R. Passenger Corp.*,  
6 536 U.S. at 110, 112, 113-14. Again, earlier acts and the employer’s knowledge of them may be  
7 admissible as background evidence in support of a timely claim. *See id.*

8           In sum, the court lacks subject-matter jurisdiction and dismisses claim five with prejudice to the  
9 extent that it is based on the breach of the settlement agreement. *See B.K.B.*, 276 F.3d at 1099.

10 **D. Claim Six: Contract Breach Claim Dismissed Without Prejudice**

11           In her sixth claim, Plaintiff alleges that by delaying the update of her qualifications in the  
12 promotion register from January 27, 2009, to August 31, 2009, Defendant breached the terms of the  
13 parties’ collective bargaining agreement giving Defendant 37 days from the date of her request – or  
14 until March 5, 2009 – to process her updated qualifications and render a decision. Complaint, ECF  
15 No. 1 at 5, ¶¶ 16-18.

16           The Postal Service argues that to the extent that Plaintiff’s claim incorporates by reference her  
17 allegations about discrimination, her sole remedy for the discrimination – just like the section  
18 1983/*Bivens* claim – is Title VII. *See Reply*, ECF No. 19 at 2-3 (citing *White*, 652 F.2d at 916 and  
19 *Lee v. Potter*, No. C 07-254, 2008 WL 4449568 (N.D. Cal. Oct. 1, 2008)); *Nolan v. Cleland*, 686  
20 F.2d 806, 815 (9<sup>th</sup> Cir. 1982); *Arnold v. United States*, 816 F.2d 1306, 1311 (9<sup>th</sup> Cir. 1987).

21           But Plaintiff may have a separate contract claim based solely on the collective bargaining  
22 agreement’s timing provisions. The agreement has a binding procedure for resolving grievances,  
23 and Plaintiff must exhaust that process before filing any federal action. *See Bowen v. United States*  
24 *Postal Serv.*, 459 U.S. 212, 220-22 (1983). According to Defendant, Plaintiff has filed a grievance  
25 and has not yet exhausted the grievance procedure. *Reply*, ECF No. 19 at 4 (citing Declaration of  
26 Adam Alvarez, ECF No. 20 at 2, ¶¶ 2-3). Plaintiff did not dispute this at the motion hearing.

27           Given these circumstances, and without objection from Plaintiff at the motion hearing, the court  
28 dismisses the claim without prejudice for failure to exhaust the mandatory grievance procedures.

1 Also, because Defendant addressed the collective bargaining claim directly only in its reply brief,  
2 the entire claim is dismissed without prejudice and with leave to amend. It is not clear from this  
3 record that Plaintiff necessarily was making a discrimination claim merely by incorporating prior  
4 allegations by reference. If Plaintiff does cast the claim as a discrimination claim in an amended  
5 complaint, the court can address the argument that Title VII is the exclusive remedy at the hearing  
6 on the motion to dismiss.

7 **E. Punitive Damages**

8 Title VII exempts government entities from punitive damages awards. *See* 42 U.S.C. §  
9 1981a(b)(1) (“A complaining party may recover punitive damages under this section against a  
10 respondent (other than a government, government agency or political subdivision)”); *Silver v.*  
11 *United States Postal Serv.*, 951 F.2d 1033, 1036 (9<sup>th</sup> Cir. 1991). Plaintiff did not contest this in her  
12 opposition and conceded it at the motion hearing. The court grants the Postal Service’s motion to  
13 strike the request for punitive damages.

14 **V. CONCLUSION**

15 The court dismisses the complaint entirely and strikes the request for punitive damages.

16 Claim one alleging a violation of 42 U.S.C. § 1983 is dismissed with prejudice.

17 Claims two through four alleging discrimination in violation of Title VII are dismissed without  
18 prejudice.

19 Claim five alleging retaliation is dismissed without prejudice to the extent that it is based on  
20 delay in updating Plaintiff’s promotional qualifications and with prejudice based on the claim of  
21 non-compliance with the settlement agreement.

22 Claim six is dismissed without prejudice.

23 This disposes of ECF No. 9.

24 **IT IS SO ORDERED.**

25 Dated: January 22, 2011



26 LAUREL BEELER  
27 United States Magistrate Judge  
28