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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN HEMENWAY,

No. C-11-505 DMR

Plaintiff(s),

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

v.

ERIC K. SHINSEKI,

Defendant(s).

Defendant Eric K. Shinseki, Secretary of the Department of Veteran Affairs (“VA”), moves pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss Plaintiff Brian Hemenway’s Title VII employment discrimination Complaint for lack of subject matter jurisdiction or, in the alternative, pursuant to Federal Rule of Civil Procedure 56 for summary judgment. Plaintiff opposes the motion. The parties have filed consents to this court’s jurisdiction pursuant to 28 U.S.C. § 636(c). [Docket Nos. 19, 32 Ex. A.] The court finds the motion appropriate for resolution without a hearing. *See* N.D. Cal. Civ. L. R. 7–1(b). For the reasons stated below, the court grants Defendant’s motion to dismiss.

I. Background and Procedural History

This employment discrimination case arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff has been an Equal Employment Opportunity (“EEO”) specialist in the VA’s Office of Resolution Management (“ORM”) since 2000, currently working as an EEO

1 case manager. (Def.'s Mot. Ex. P (Hemenway Dep., Dec. 18, 2011) at 12:12-22, 13:8-10). On or
2 about May 16, 2007, he contacted EEO counselor Thurie Kelly about various employment
3 discrimination concerns. (Compl. Attach. 1 ("EEOC Decision") at 1 & n.1; Hemenway Dep. 64:19-
4 66:3; Def.'s Mot. Ex. F.) Plaintiff was assigned to an outside counselor, Warren Triesman.
5 (Hemenway Dep. 67:3-11.) Triesman drafted a report of Plaintiff's claims on August 26, 2007 and
6 sent Plaintiff a copy. (Hemenway Dep. 63:6-64:8. *See generally* Def.'s Mot. Ex. G ("Triesman
7 Report").) The reported listed the following as Plaintiff's claims:

- 8 **CLAIM 1:** Whether the aggrieved was discriminated against on the basis of Race,
9 Color, Gender, and Reprisal when on Effective [sic] March 1, 2007,
10 the aggrieved was reassigned to an Intake Specialist Position.
- 11 **CLAIM 2:** Whether the aggrieved was discriminated against on the basis of Race,
12 Color, Gender, and reprisal when in February 2007, the agency failed
13 to process AP's CA-1 form and failed to provide AP a supervisory
14 receipt for the CA-1 form.
- 15 **CLAIM 3:** Whether the aggrieved was discriminated against on the basis of Race,
16 Color, Gender, and reprisal when in March 2007, the agency deducted
17 from AP's payroll for a previous overpayment without notice to AP.
- 18 **CLAIM 4:** Whether the aggrieved was discriminated against on the basis of Race,
19 Color, Gender, and reprisal when in approximately August, [sic] 2007,
20 the agency notified AP that management was disciplining AP.

21 (Triesman Report 7.) It also stated that Plaintiff "was informed that the claims listed above were the
22 only claim(s) addressed during the informal EEO counseling. If a formal Complaint of
23 Discrimination is filed, claims not discussed with ORM may not be accepted for formal complaint
24 processing." (Triesman Report 7.)

25 On August 15, 2007, Triesman sent Plaintiff a letter which contained a notice of right to file
26 a discrimination complaint. (Def.'s Mot. Ex. H (Right to File Letter); *accord* EEOC Decision at 1;
27 Hemenway Dep. 86:7-17.) The letter stated that Plaintiff had 15 calendar days from the receipt of
28 the notice to file a formal complaint and listed addresses at which to file it: (1) "Department of
Veterans Affairs, Office of Employment Discrimination Complaint Adjudication [OEDCA], 810
Vermont Avenue, NW, Washington, DC [sic] 20420," (2) "Secretary of Veterans Affairs,
Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, D.C., 20420," or (3)
"Deputy Assistant Secretary (08), Office of Resolution Management (ORM), 810 Vermont Avenue,

1 NW, Washington, D.C. 20420." (Right to File Letter at 2-3.) Plaintiff claims that he mailed a
2 formal complaint to the Secretary of Veterans Affairs by certified mail on September 19, 2007.
3 (Hemenway Dep. 109:13-16, 110:15-23, 115:21-116:8; *accord* EEOC Decision at 1.) Plaintiff
4 concedes that he never received an "acceptance or dismissal or partial acceptance" of his complaint,
5 "which would have typically been issued after that," (Hemenway Dep. 122:1-4), nor asked for an
6 investigation, (Hemenway Dep. 137:9-18). Defendant insists that it "never received any such
7 complaint." (Def.'s Mot. 5 (citing Def.'s Mot. Ex. B (Kelly Decl., Apr. 10, 2012) at ¶¶ 5, 8-10);
8 *accord* EEOC Decision at 1-2.)

9 Plaintiff contends that he sent a letter to Kelly on September 5, 2008 and again on January
10 16, 2009, inquiring about the status of his purported complaint. (Def.'s Mot. Ex. K.) Kelly insists
11 she never received either letter, and Plaintiff claims that they were returned to him as undeliverable.
12 (Kelly Decl. ¶ 6; Hemenway Dep. 138:22-139:8.) On February 1, 2010, over two years after
13 Plaintiff asserts that he filed his complaint, the Equal Employment Opportunity Commission
14 ("EEOC") received a hearing request from Plaintiff, who voiced concern that more than 180 days
15 had elapsed since he filed his complaint and that the agency had not investigated his case. (Def.'s
16 Mot. Ex. L (Hearing Request Letter); *accord* EEOC Decision at 1; Hemenway Dep. 149:8-150:14.)
17 Pursuant to the request, an EEOC supervisory administrative judge ("AJ") issued an order on
18 February 8, 2010, instructing Defendant to produce Plaintiff's complaint file. (Def.'s Mot. Ex. C
19 (order to Defendant); *accord* EEOC Decision at 1.) According to Defendant, the order marked the
20 first time that it had heard of Plaintiff's purported complaint. (Def.'s Mot 5 (citing Kelly Decl. ¶ 4).)
21 Defendant contacted Plaintiff and asked if he had any record of the alleged complaint's delivery.
22 (Def.'s Mot. 5 (citing Hemenway Dep. 151:23-25).) In response, Plaintiff did not provide a copy of
23 the complaint, but instead sent Defendant two copies of the same USPS Track and Confirm sheet.
24 (Def.'s Mot. Ex. M (February 26, 2010 and March 1, 2010 letters submitting USPS Track and
25 Confirm Sheet); *accord* Hemenway Dep. 151:18-22, 152:8-16.) The AJ also contacted Plaintiff
26 about the absence of a formal complaint. Again, Plaintiff failed to provide a copy of a complaint,
27 but instead submitted an e-mail from Defendant's EEO office "which makes vague reference to both
28 an informal and formal complaint." (EEOC Decision at 2; *see* Def.'s Mot. Ex. D at 1.) The AJ

1 remanded the case to Defendant on April, 28, 2010, finding that the e-mail did not substantiate that
2 Plaintiff had filed a formal complaint, and that there was not enough evidence of a formal complaint
3 to trigger the EEOC's jurisdiction:

4 Mr. Torres' email does not provide any information to substantiate [Plaintiff]'s
5 claim that this "formal complaint" corresponds to [his case number]. Furthermore,
6 *[Plaintiff] has been unable to produce a copy of a formal complaint or a letter from*
7 *the Agency accepting his claims.* Since [Plaintiff] himself is a GS-13 EEO
8 Specialist, it is unclear why he waited from September 2007 (when he contends he
9 filed his formal complaint) until February 2010 (when he requested a hearing) to
10 raise the issue of a lack of investigation. In any case, there is not enough evidence of
11 a formal complaint specifically relating to [Plaintiff's case number] for the EEOC to
12 assert jurisdiction. . . . The Agency should either formally dismiss the allegations in
13 [Plaintiff's case] for lack of a formal complaint and provide [Plaintiff] with his
14 appeal rights to OFO [Office of Federal Operations] or accept the allegations and
15 initiate an investigation.

16 (Def.'s Mot. Ex. D (order remanding case) at 1-2 (emphasis added); *accord* EEOC Decision at 2.)

17 Defendant issued a Final Agency Decision on May 21, 2010, dismissing Plaintiff's complaint
18 "because there is insufficient evidence that it was actually filed and because, in any case, the
19 complainant has not diligent pursued it." (Def.'s Mot. Ex. E at 4 (Final Agency Decision); *accord*
20 EEOC Decision at 2.)

21 Plaintiff appealed to the EEOC's OFO, which dismissed the appeal on October 29, 2010.
22 (*See generally* EEOC Decision.) During this appeal, for the first time, Plaintiff submitted a copy of
23 the first page of a formal complaint. The EEOC nevertheless affirmed the dismissal:

24 *[Plaintiff] was unable to provide a copy of the formal complaint or a letter from*
25 *[Defendant] acknowledging receipt of the complaint.* The Commission agrees with
26 the AJ's determination that the Track and Confirm sheet and the vague email are
27 insufficient evidence to establish that a formal complaint was timely filed.

28 *For the first time on appeal, [Plaintiff] presents a copy of the first page of a*
formal complaint. The document appears to be date stamped by the "Office of
Resolution Management October 11, 2007," and "received" stamped September 25,
2007. *[Plaintiff] asserts that this evidence "was not available" when the matter was*
before the AJ, and fails to explain, when or from where it was obtained. Further,
there is no basis, claim or date of occurrence reflected on the form. Although the
document repeated [sic] referenced an attachment, it is not included in the instant
record.

[Plaintiff] waited over two years after he purportedly filed his formal
complaint to request a hearing. We find that, particularly in light of the fact that
[Plaintiff] was an EEO Specialist who should have been familiar with the EEO
process, he did not diligently pursue his case. Consequently, the doctrine of laches is
applicable in the instant matter.

(EEOC Decision at 3 (emphasis added).)

1 Plaintiff appealed to this Court on February 2, 2011. [Docket No. 1.] He claims that
2 Defendant subjected him to “an ongoing pattern of harassment and hostile work environment from
3 2002 through 2007.” (Compl. ¶ 6.) The specific incidents include the following:

4 Hostile Work Environment (2002-2007); per se reprisal (2002-2007); disparate
5 treatment (2002-2007); directed reassignment (March 1, 2007); assignment of duties
6 (2002-2007); duty assignments (2002-2007); admonishment (June 14, 2007); denial
7 of flexiplace [sic] (2002-2007); denial of transfers (2002-2007); failure to process
8 OWCP [Office of Workers’ Compensation Program] paperwork (through 2007
9 ongoing); failure to repair or provide operative computer equipment (2002-2007),

10 (Compl. ¶ 4) which stemmed from discrimination based upon Plaintiff’s race or color, sex, age, and
11 “reprisal for protected EEO activity” (Compl. ¶ 5). Defendant now moves to dismiss Plaintiff’s
12 Complaint on several grounds or, in the alternative, for summary judgment.

13 II. Standard of Review

14 A court will dismiss a party’s claim for lack of subject-matter jurisdiction “only when the
15 claim is so insubstantial, implausible, foreclosed by prior decisions of th[e Supreme] Court, or
16 otherwise completely devoid of merit as not to involve a federal controversy.” *Steel Co. v. Citizens*
17 *for a Better Env’t*, 523 U.S. 83, 89 (1998) (citation and quotation marks omitted); *see* Fed. R. Civ. P.
18 12(b)(1). When reviewing a 12(b)(1) motion, the court sculpts its approach according to whether the
19 motion is “facial or factual.” *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial challenge
20 asserts that “the allegations contained in a complaint are insufficient on their face to invoke federal
21 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual
22 challenge asserts that subject-matter jurisdiction does not exist, independent of what is stated in the
23 complaint. *White*, 227 F.3d at 1242. In contrast with a facial challenge, a factual challenge – such
24 as the motion at bar – permits the court to look beyond the complaint, without “presum[ing] the
25 truthfulness of the plaintiff’s allegations.” *Id.* Even the presence of disputed material facts “will not
26 preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Roberts v.*
27 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *see Camper v. Potter*, No. CV-07-2251, 2009 WL
28 2714023, at *2 (D. Ariz. Aug. 27, 2009) (not reported in F. Supp. 2d) (“The jurisdictional issue is
fully separable from the merits of the case . . . and therefore the Court is free to consider the
extensive extrinsic evidence offered by both parties and to resolve factual disputes.”). To

1 successfully rebut a factual challenge in a motion to dismiss in cases such as this one, where the
2 facts governing subject matter jurisdiction do not go to the merits of the suit, *Cal. Sportfishing Prot.*
3 *Alliance v. Shamrock Materials, Inc.*, No. 11-2565-MEJ, 2011 WL 5223086, at *5 (N.D. Cal. Nov.
4 2, 2011), the non-moving party ““must furnish affidavits or other evidence,”” *White v. Astrue*, No.
5 10-02124-CRB, 2011 WL 900289, at *3 (N.D. Cal. Mar. 15, 2011) (quoting *Savage v. Glendale*
6 *Union High Sch.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003)), to satisfy its burden of establishing
7 subject matter jurisdiction by a preponderance of the evidence. *Remington Lodging & Hospitality,*
8 *LLC v. Ahearn*, 749 F. Supp. 2d 951, 955-56 (D. Alaska 2010); *Casillas v. United States*, No. CV-
9 07-395, 2009 WL 735188, at *4 (D. Ariz. Mar. 19, 2009) (not reported in F Supp. 2d).

10 III. Discussion

11 Defendant presents several arguments in support of its motion. First, it contends that the
12 Court lacks subject matter jurisdiction over this action because Plaintiff never filed a formal
13 administrative complaint with the VA. (Def.’s Mot. 7-14.) If the court finds that Plaintiff filed a
14 formal administrative complaint, Defendant urges the court to dismiss this action because Plaintiff
15 did not timely file suit. (Def.’s Mot. 18-19.) Defendant also argues that the court should dismiss
16 Allegation 7 of Plaintiff’s eight claims for failure to exhaust administrative remedies because
17 Plaintiff did not raise them in pre-complaint counseling.¹ (Def.’s Mot. 14-15.) Finally, Defendant
18 moves the court to grant it summary judgment on the ground that the doctrine of laches bars
19 Plaintiff’s complaint. (Def.’s Mot. 19-20.) Because the court rules that it cannot exercise subject
20 matter jurisdiction over this matter and, in addition, that Plaintiff untimely filed this action, the court
21 does not reach Defendant's latter two arguments.

22 A. Whether Plaintiff Filed a Formal Administrative Complaint

23 Failure to file a timely EEOC administrative complaint constitutes a failure to exhaust
24 administrative remedies, a “mere[] . . . statutory requirement subject to waiver, estoppel and

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26 ¹ In his opposition to Defendant’s motion, Plaintiff “completely with draws allegations 2, 6 &
27 8.” (Pl.’s Resp. 3-4 (emphasis removed).) Defendant’s original argument, which encompassed
28 Allegations 2 and 6-8, thus applies only to Allegation 7. For the same reason, Defendant’s assertion that
Allegations 2, 6, and 8 are untimely, (Def.’s Mot. 15-17), also is moot. Plaintiff’s withdrawal of his age
discrimination allegations (Pl.’s Resp. 4) renders Defendant’s argument that the Court lacks subject
matter jurisdiction over the age discrimination claims moot as well.

1 equitable tolling.” *Sommatino v. United States*, 255 F.3d 704, 709 (9th Cir. 2001) (citing *Zipes v.*
2 *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). When a plaintiff has “never presented a
3 discrimination complaint to the appropriate administrative authority,” however, “the district court
4 does not have subject matter jurisdiction” over the action. *Id.* (emphasis added) (citing *Blank v.*
5 *Donovan*, 780 F.2d 808, 809 (9th Cir. 1986); *Scott v. Perry*, 569 F.2d 1064, 1065-66 (9th Cir.
6 1978)).

7 **1. Plaintiff’s Evidence**

8 Plaintiff proffers four documents to demonstrate that he submitted a formal administrative
9 complaint to the VA: (1) a stamped copy of the first page of his purported formal complaint with an
10 attachment and the envelope he mailed them in, (Def.’s Mot. Ex. I; *accord* Hemenway Dep. 100:35-
11 101:24, 103:5-24), (2) an email from Rafael Torres, the Acting Deputy Assistant Secretary for the
12 ORM, dated November 1, 2007, (Def.’s Mot. Ex. A at 1; *accord* Hemenway Dep. 116:22-117:7), (3)
13 an email from Rosa Franco, the Associate Deputy Assistant Secretary for ORM, dated November
14 11, 2007, (Def.’s Mot. Ex. B; *accord* Hemenway Dep. 137:21-138:2), and (4) a “Track & Confirm”
15 printout from the U.S. Postal Service website, (Def.’s Mot. Ex. J; *accord* Hemenway 115:23-116:3).
16 According to Defendant, these items do not suffice to establish that Plaintiff filed a formal
17 administrative complaint, and the court must dismiss this case for lack of subject matter jurisdiction.
18 (Def.’s Mot. 9.)

19 **a. Item (1)**

20 Item (1) consists of three components: the first page of a formal complaint, an attachment
21 listing eight employment discrimination claims, and an envelope. The formal complaint page
22 indicates that Plaintiff was its author and appears to have been signed by him on September 17,
23 2007. It also evidences three date stamps, two from the ORM dated October 10 and 11, 2007 and
24 one indicating that the page was “RECEIVED” on September 25, 2007 by the Office of the
25 Secretary within the VA. The attachment has no unique identifying markers. The envelope,
26 addressed to the Secretary of Veterans Affairs in Washington, D.C., bears a stamp dated September
27 25, 2007 which reads, “Inspected Mail DVA/DOJ,” another indicating that the envelope was
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1 “RECEIVED” by the “VACO MAIL CENTER” in September of an indiscernible year, and the
2 notation “08” to the left of the address. (*See* Def.’s Mot. Ex. I.)

3 During his deposition and again in his opposition brief, Plaintiff asserts that he mailed his
4 formal complaint with the attachment to the Secretary of Veterans Affairs by certified mail and that
5 the agency mailed back the complaint and envelope, along with a notice of receipt. (Hemenway
6 Dep. 103:1-104:13, 109:13-25, 110:15-23, 112:10-17, 115:2-4; Pl.’s Resp. 2.)

7 Defendant questions the validity of this course of events. According to Defendant, any
8 formal complaint mailed to the Secretary of Veterans Affairs “would have been handled and
9 processed by OEDCA.” (Def.’s Reply 3 (citing Kelly Decl. ¶ 4).) However, in 2007, when
10 Plaintiff’s purportedly filed his formal complaint, “it was not OEDCA’s practice . . . to mail the
11 complaint and envelope back to the complainant.” (Def.’s Mot. 9 (citing Kelly Decl. ¶ 5).) At that
12 time, OEDCA would send a notice of receipt and a copy of the EEO counselor’s report to a
13 complainant upon receipt of his formal complaint. (Def.’s Mot. 9 (citing Kelly Decl. ¶ 5).)
14 Defendant also notes that nothing on the purported attachment indicates that it was a part of a formal
15 complaint or received by OEDCA. (Def.’s Mot. 9.) Furthermore, Defendant argues that the
16 stamping on the envelope undermines the validity of Plaintiff’s narrative. An envelope received by
17 OEDCA would have, “received, Office of the Secretary,” stamped on it, along with “a stamp for ‘02’
18 or ‘04’ . . . for routing to the Office of General Counsel (“OGC”). . . . Instead, [Plaintiff’s envelope]
19 has a stamp for ‘08’ – ORM – which it should not have.” (Def.’s Mot. 9 (citing McCallum Decl.
20 ¶¶ 5-6, Apr. 6, 2012).) Defendant also suggests that the timing and circumstances of Plaintiff’s
21 production of item (1) is suspicious because he failed to produce the first page of the purported
22 formal complaint until his appeal to the OFO, (Def.’s Mot. 9-10 (citing EEOC Decision at 3)), even
23 though Defendant had inquired about obtaining a copy of the formal complaint in March 2010,
24 (Def.’s Mot. Ex. N at 2-3), and did not produce the attachment and envelope until the matter reached
25 this Court, (Def.’s Mot. 10).

26 **b. Item (2)**
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1 Item (2) is an email sent by Ralph Torres to Plaintiff and CCed to Willie Hensley, Principal
2 Deputy Assistant Secretary for Human Resources and Administration, and Rosa Franco on
3 November 1, 2007. The email states in full:

4 Brian,

5 I was pleased with the results of our joint meeting and commend you and Willy for
6 your willingness to move forward towards a productive relationship. This email is to
7 memorialize our commitments. I agreed to commission a climate assessment/survey
8 of Western Operations, the nature and extent of which will be decided at a later point.
9 In exchange, you agreed to withdraw your informal EEO complaint.

10 Rosa will call you and Willy next week to finalize our discussions, get your ideas
11 about how to conduct the assessment and explore how we may be able to resolve your
12 formal EEO complaint. Rosa, Willy and I share your commitment to resolve that
13 complaint as well.

14 Ralph Torres

15 (Def.'s Mot. Ex. A at 1.)

16 Plaintiff claims that the Torres email demonstrates that the head of the ORM at the VA "was
17 aware of the filing of the formal complaint in this case, and in fact acknowledged that the VA and
18 the complainant had brought the formal complaint to the ADR process." (Pl.'s Resp. 2.) Plaintiff
19 asserts that the email additionally "advised Willie Hensley . . . of the complainant's formal EEO
20 complaint." (Pl.'s Resp. 2.)

21 Defendant contends that the email does not evidence that Plaintiff filed a formal complaint.
22 According to Defendant, "[t]he context of the email does not show that Torres was admitting or
23 acknowledging that plaintiff had filed a formal complaint, nor does it identify what that formal
24 complaint was, specifically whether it was the one at issue here." (Def.'s Mot. 11.) Bolstering
25 Defendant's assertion, Torres avers that Plaintiff has "take[n] the phrase ["formal EEO complaint"]
26 out of context and is incorrect." (Torres Decl. ¶ 4, Apr. 9, 2012.) Torres admits that "it has been a
27 long time and [he does not have] good recollection of the circumstances leading up to the effort to
28 resolve Mr. Hemenway's concerns." (Torres Decl. ¶ 6.) However, he recalls that as a matter of
practice, he attempted to resolve "all situations in which employees expressed disagreement with
management's actions, whether they involved an actual complaint or not" and that this was one such
instance. (Torres Decl. ¶ 7.) With respect to the email's reference to a formal complaint, Torres

1 insists that “[t]his would not be proof that Mr. Hemenway had actually filed a formal complaint . . .
2 by that date. It merely reflects that he communicated to me that he had.” (Torres Decl. ¶ 8.)
3 Plaintiff concedes that he does not know if Torres even saw the purported formal complaint. (*See*
4 Hemenway Dep. 123:19-125:7.)

5 **c. Item (3)**

6 Item (3) is an email that Rosa Franco sent to Earnestine Richardson, former manager in
7 charge of setting up alternative dispute resolution, and CCed to Plaintiff, Torres, and Willy Jenkins,
8 Plaintiff’s then supervisor, under the subject heading “Mediation” on November 11, 2007. (Def.’s
9 Mot. Ex. B at 1.) It states, “Please contact Brian [Hemenway] as he’s expressed interest in
10 mediating his formal complaint.” (Def.’s Mot. Ex. B at 1.) According to Plaintiff, the email
11 reaffirms the agency’s receipt of his formal complaint. (Pl.’s Resp. 3.)

12 As with the Torres email, Defendant contends that this email “does not show that Franco was
13 admitting or acknowledging that plaintiff had filed a formal complaint, nor does it identify what that
14 formal complaint was, specifically whether it was the one at issue here.” (Def.’s Mot. 11.) In line
15 with this argument, Franco declares that she is “not aware that Mr. Hemenway ever filed such a
16 complaint [and] also never received a notice from the [OEDCA] that Mr. Hemenway had filed such
17 a complaint.” (Franco Decl. ¶ 4, Apr. 9, 2012.) Addressing the email’s reference to a “formal
18 complaint,” Franco states that she does not remember “ever seeing a formal complaint filed by Mr.
19 Hemenway in September 2007.” (Franco Decl. ¶ 5.) Moreover, although Franco recalls speaking
20 with Plaintiff over the telephone in October or November 2007, she does not know if Plaintiff had
21 filed a formal complaint at that time. (Franco Decl. ¶ 5.) According to Franco, “[w]hen [she] wrote
22 in the November 11 email that [Plaintiff] had ‘expressed interest in mediating his formal complaint,’
23 it does not mean that [she] had seen such a complaint, and [she] do[es] not recall ever having seen
24 one.” (Franco Decl. ¶ 7.) She believes that Plaintiff “simply referenced a formal complaint in his
25 discussions, and that formed the basis for the November 11 email.” (Franco Decl. ¶ 7.) Plaintiff
26 admits that he does not know if Franco saw the purported complaint. (Hemenway Dep. 125:4-12.)

27 **d. Item (4)**
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1 Item (4), the Track and Confirm printout, shows that someone mailed something on
2 September 19, 2007 from Menlo Park, California, the city where Plaintiff works, and that it arrived
3 in Washington, D.C., somewhere in the same zip code as the VA's OEDCA on September 25, 2007.
4 (Def.'s Mot. Ex. J.) Defendant characterizes the printout merely as evidence for "an unidentified
5 item mailed . . . to [somewhere in] Washington, D.C., but contains no information as to what was in
6 the mailing, much less that it was plaintiff's alleged complaint." (Def.'s Mot. 11.)

7 2. Analysis

8 After evaluating these four pieces of evidence within the context of the case and its
9 procedural history, the court finds that Plaintiff has not demonstrated that he filed a formal
10 complaint. In light of Plaintiff's documented longtime expertise as an EEO specialist, (*see*
11 Hemenway Dep. 12:14-14:5), the court finds it improbable that Plaintiff could not produce a copy of
12 the formal complaint that he purportedly filed until the final steps of the administrative appeals
13 process. He, more than members of the general public, would be aware of the importance of the
14 document to the viability of his claims. Nevertheless, Plaintiff did not produce the first page of his
15 purported formal complaint until his appeals reached the OFO in 2010. As noted by the EEOC,
16 Plaintiff asserted "that this evidence 'was not available' when the matter was before the AJ, and fails
17 to explain how, when or from where it was obtained." (EEOC Decision at 3.) Plaintiff did not
18 produce the alleged attachment to the complaint, nor the return envelope, until his case reached this
19 Court. These unusual cascading late productions appear even more suspect because he still has
20 offered no explanation as to how or where he obtained the previously unavailable documents and
21 why they were "unavailable." Likewise, it is troubling that Plaintiff could have described the face
22 of the purported complaint in detail in his supposed 2008 letter to Kelly, which Plaintiff claims was
23 returned to him as undeliverable,² although he asserts that the complaint was unavailable to him for
24 an uncertain period of time for an unknown reason: "The formal complaint was stamped as received
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26 ² Plaintiff claims he sent a letter to Kelly on September 5, 2008, and that it was returned to him
27 as undeliverable, even though he mailed it to her correct address. (Hemenway Dep. 139:1-141:6, Def.'s
28 Mot. Ex. K; *see* Kelly Decl. ¶ 3.) Plaintiff apparently took no steps to reconfirm her address or redeliver
the letter. Yet he purportedly sent a second letter to Kelly on January 16, 2009 to the same address,
which he also claims was returned as undeliverable.

1 with the endorsements 'Inspected Mail DVA/DOJ Sep 25 2007' and 'Received Sep 2007 VACO Mail
2 Center,' (Def.'s Mot. Ex. K at 1).

3 It also is improbable that Defendant would have mailed a formal complaint back to Plaintiff
4 right after having first delivered it to, and subsequently retrieved it from, the ORM, as evidenced by
5 the ORM stamps on the alleged first page of the complaint; there is no explanation why the VA
6 would shuffle the complaint between those agency departments at that juncture. Similarly, nothing
7 on the face of the disputed envelope demonstrates that it contained a formal complaint, let alone one
8 relating to this case. First, the court notes that the OEDCA's contemporary practice was not to mail
9 the complaint and envelope back to the complainant; the chain of events regarding the submission of
10 the formal complaint to which Plaintiff attests would not have occurred as a normal part of VA
11 procedure. In addition, the envelope does not bear a routing number stamp that indicates that the
12 contents of the envelope were delivered to the OEDCA, as would be expected since it was addressed
13 to the Secretary of Veterans Affairs. That Plaintiff did not produce the envelope before his case
14 reached this Court further erodes the court's faith in its authenticity. Furthermore, it is improbable
15 that Plaintiff did not have access to the envelope, if it indeed is genuine, yet recalled enough about
16 its features to detail them in the letter he supposedly unsuccessfully mailed to Kelly: "The Formal
17 Complaint envelope . . . was stamped RECEIVED by the agency on September 25, 2007 at 2:25 pm.
18 The original stamp endorsement on the complaint [envelope] reflects: "RECEIVED 2007 SEP 25
19 PM 2:25 Dept. of Veterans Affairs Office of the Secretary.'" (Def.'s Mot. Ex. K at 1.)

20 Finally, Plaintiff acknowledges that the agency sends every complainant a notice of receipt
21 upon filing of an official complaint. (Hemenway Dep. 23:17-20.) Yet, Plaintiff asserts that he does
22 not have a copy of his notice of receipt because he may have accidentally shredded it. (Hemenway
23 Dep. 104:8-105:12.) It is improbable that Plaintiff, someone deeply familiar with the EEO
24 procedures, shredded the notice of receipt from the VA -- a notice that would have arrived in the
25 envelope that he produced. Such a notice would have unequivocally demonstrated delivery of the
26 complaint.

27 The court also finds that the references to a formal complaint in the nearly contextless Torres
28 and Franco emails do not substantiate Plaintiff's claim. Torres and Franco's statements do not show

1 that they knew that Plaintiff had filed a formal complaint; they simply verify that a reference to a
2 formal complaint of some sort, real or fictional, had arisen in previous communications.

3 The Track and Confirm printout, particularly in the absence of the apparently lost certified
4 mail green card, (*see* Hemenway Dep. 109:13-25), leads the court to a similar conclusion. The
5 document demonstrates only that someone mailed something from the area near Plaintiff's place of
6 employment to Washington, D.C., somewhere in the same zip code as the VA's OEDCA, in
7 September 2007. It does not clarify what that something was, who mailed it, or to whom it was
8 mailed.

9 Viewing the record as a whole, the many improbabilities and unexplained gaps weigh against
10 a finding that Plaintiff filed a complaint. Because the court concludes that Plaintiff has not
11 established that he filed a formal complaint, the Court has no subject matter jurisdiction over this
12 matter and must dismiss it with prejudice.

13 **B. Whether Plaintiff Timely Filed Suit**

14 Assuming *arguendo* that Plaintiff filed a formal complaint and that the Court has subject
15 matter jurisdiction over this case, the court finds that Plaintiff did not timely file the current action.
16 42 U.S.C. § 2000e-5(f)(1) provides that a litigant must file suit within ninety days of receiving a
17 notice of dismissal from the EEOC. § 2000e-5(f)(1); *Payan v. Aramark Mgmt. Servs. Ltd.*, 495 F.3d
18 1119, 1121 (9th Cir. 2007). If the litigant does not file suit within this time period, “the action is
19 time-barred.” *Payan*, 495 F.3d at 1121 (citing *Scholar v. Pac. Bell*, 963 F.2d 264, 266-67 (9th Cir.
20 1992)). This statute of limitations begins to run on the date that the notice arrived at the claimant’s
21 address of record. *Id.* at 1122 (citations omitted). When the delivery date is unknown, as it is here,
22 the court will deem the notice to have arrived at the claimant’s address three days after it was
23 mailed. *Id.* at 1121, 1125; *see also id.* at 1123 (noting presumption that “the letter issuance date is
24 also the date on which the letter was mailed”). Plaintiff may rebut this three-day rule presumption
25 by proffering "evidence suggesting that receipt was delayed beyond the presumed period." *Id.*
26 (citing *Kerr v. McDonald's Corp.*, 427 F.3d 947, 952 (11th Cir.2005) (holding that events causing
27 delay must be “in no way [complainant's] fault”)). For example, the Second Circuit has found that
28 “[i]f a claimant presents sworn testimony or other admissible evidence from which it could

1 reasonably be inferred either that the notice was mailed later than its typewritten date or that it took
2 longer than three days to reach her by mail, the initial presumption is not dispositive.” *Id.* (quoting
3 *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 526 (2d Cir. 1996)) (brackets in original).

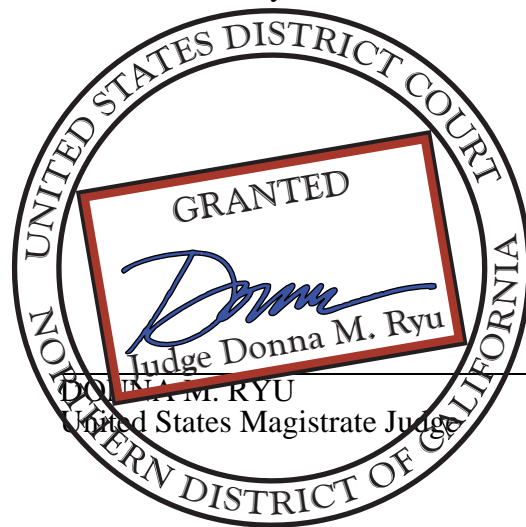
4 In his discovery responses, Plaintiff testified that he does not know when he received the
5 EEOC’s notice of dismissal, (Hemenway Dep. 164:6-20, 165:16-166:2; Def.’s Mot. Ex. S (Pl.’s
6 Resp. to Def.’s Req. for Prod. of Docs., Set One) at 3), and he offers no evidence to rebut the three-
7 day presumption rule. The court therefore must turn to the rule to calculate the imputed day of
8 receipt. The EEOC issued the letter on October 29, 2010, (EEOC Decision at 5), and the court
9 infers that the EEOC mailed the letter on the same day. *See Payan*, 495 F.3d at 1123. The ninety-
10 day window for Plaintiff to file suit therefore commenced three days later, on November 1, 2010.
11 *See id.* at 1121. To comport with the statute of limitations, Plaintiff needed to file suit no later than
12 January 30, 2011. Because Plaintiff filed his complaint on February 2, 2011 – three days after the
13 deadline – the court must dismiss the suit as untimely.

14 IV. Conclusion

15 For the foregoing reasons, the Court lacks subject matter jurisdiction over this case. Even if
16 the Court could exercise subject matter jurisdiction, Plaintiff untimely filed his suit. The court
17 therefore dismisses Plaintiff’s complaint.³

18
19 IT IS SO ORDERED.

20
21 Dated: July 9, 2012



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28 ³ The court denies Plaintiff’s request to withdraw his complaint without prejudice, [Docket No. 56], as moot.