

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NORVEL R. WRIGHT,

Plaintiff,

No. 2:08-cv-01765 GEB KJN PS

v.

SECRETARY OF DEFENSE ROBERT
GATES, DEPARTMENT OF DEFENSE
AGENCY,

Defendant.

FINDINGS AND RECOMMENDATIONS

Presently before the court is defendant's "Motion to Dismiss and/or For Summary Judgment" (Dkt. No. 44), which came before the court for hearing on the undersigned's law and motion calendar on July 8, 2010 (Dkt. No. 48). Assistant United States Attorney Bobbie J. Montoya appeared on behalf of defendant. Plaintiff, who is proceeding without counsel, appeared on his own behalf. Although the undersigned was prepared to rule on defendant's motion at the time of the hearing as a result of plaintiff's fatally flawed written opposition, the undersigned, out of an abundance of caution, provided plaintiff until August 16, 2010, to file a supplemental or revised written opposition to defendant's motion. (See Order, July 9, 2010, Dkt. No. 49.) Plaintiff did not file a supplemental or revised written opposition, and the undersigned submitted this matter. (Order, Aug. 24, 2010, Dkt. No. 50.) Having reviewed the briefs and

1 record in this case and considered the parties' respective arguments, the undersigned
2 recommends that defendant's Motion to Dismiss and/or For Summary Judgment be granted and
3 that judgment be entered in defendant's favor.

4 I. BACKGROUND

5 Plaintiff filed his complaint on July 15, 2008, and defendant filed his Motion to
6 Dismiss and/or For Summary Judgment on June 10, 2010, after the parties had conducted
7 discovery in this case. Defendant's motion includes a statement of undisputed facts. (Def.'s
8 Memo. In Supp. of Mot. to Dismiss and/or for Summ. J. ("Def.'s Memo.") at 2-7, Dkt. No. 44,
9 Doc. No. 44-2.) Defendant's statement of undisputed facts ("Def.'s SUF"), with citations to
10 admissible evidence and a declaration in the record, provides the basis for the factual recitation
11 set forth below. As discussed below, plaintiff filed only a two-page opposition brief that attaches
12 inadmissible or non-relevant evidence, and he did not file a statement of disputed facts or his
13 own statement of undisputed facts.

14 A. Plaintiff's Complaint

15 Briefly stated, plaintiff is a GS-12 level Administrative Contracting Officer
16 ("ACO"), who works for the Defense Contract Management Agency ("DCMA"), an agency or
17 division within the Department of Defense. Although his form employment discrimination
18 complaint barely alleges any facts, it alleges that: (1) defendant failed to promote plaintiff;
19 (2) "verbal abuse"; (3) "Retaliation/reprisal"; and (4) "Racism." (Compl. at 1-2, Dkt. No. 1.)
20 Plaintiff's complaint alleges that the alleged discrimination took place in "2003 / 2008" and that
21 plaintiff filed charges with the Federal Equal Employment Opportunity Commission ("EEOC")
22 or the California Department of Fair Employment and Housing on or about "2006." (Id. at 2-3.)
23 Plaintiff's complaint also alleges that plaintiff received a Notice-of-Right-to-Sue letter from the
24 EEOC on April 28, 2008. (Id. at 3.)

25 B. Undisputed Facts

26 Plaintiff is an African American male who, since approximately 1996, has been

1 employed by DCMA as an ACO, at the GS-12 level. (Def.'s SUF ¶¶ 1-2.) Plaintiff began his
2 work with DCMA in Sunnyvale, California, and in or around January 2004, plaintiff's office was
3 relocated to Lathrop, California. (Id. ¶ 2.) Plaintiff works for DCMA Northern California in the
4 Lathrop office. (Id.)

5 In or around April 2005, DCMA Northern California was reorganized or realigned
6 and, as a result, plaintiff and Craig Studley were assigned as ACOs to the Navy 2 Team and were
7 supervised by Team Supervisor Janet Lopez. (Def.'s SUF ¶ 3.) In or around July 2005, DCMA
8 performed a review of the realignment and determined that the Defense Logistics Agency
9 ("DLA") Team needed to be restructured and created a second DLA team. (Id. ¶ 4.) Because the
10 Navy 2 Team had two ACOs, plaintiff was reassigned as the ACO on the new DLA team, and
11 Robert Armstrong was plaintiff's supervisor. (Id.)

12 In Spring of 2006, management at DCMA Northern California conducted a
13 review of all of its employees' position descriptions to ensure that those descriptions were
14 accurate and reflected current job duties. (Def.'s SUF ¶ 5.) Group Chiefs and Team Supervisors
15 were assigned to review the position descriptions and make recommendations about accuracy.
16 (Id. ¶ 6.) Janet Lopez, who is a Team Supervisor and former ACO, was assigned to review the
17 ACO position descriptions. (Id. ¶ 7.)

18 At the time of the review, there were eleven ACO positions at job level GS-1102-
19 12. (Def.'s SUF ¶ 8.) Lopez determined that two of the ACO position descriptions for the ACO
20 positions held by Craig Studley and John Palmer did not accurately reflect current job duties.
21 (Id.) The ACO position held by Studley was reclassified from a GS-12 level to GS-13 level
22 because the position imposed additional duties beyond the GS-12 level, and had done so since
23 approximately fiscal year 2002.¹ (Id. ¶ 9.) The ACO position held by Palmer was reclassified
24 from a GS-12 level to GS-13 level because the position imposed additional duties beyond the

25 ¹ The specific additional duties are recounted in paragraph 9 of defendant's Statement of
26 Undisputed facts and need not be recounted in detail here.

1 GS-12 level, and had done so since approximately fiscal year 2003.² (Id. ¶ 10.) All of the
2 position descriptions were reviewed with assistance from DCMA Headquarters Human
3 Resources Division and Army Civilian Personnel Office Center classification specialists. (See
4 Def.'s SUF ¶¶ 11-14.)

5 In or around November 2006, DCMA Northern California management met with
6 Human Resources, senior management from DCMA's Carson Division, and DCMA's Western
7 Headquarters to discuss reclassifications, promotions based on an accretion of duties,³ and
8 promotions through the competitive process. (Def.'s SUF ¶ 15.) Human Resources provided the
9 following criteria to accrete positions:

10 (1) the employee will continue to perform the duties of the former position
11 and the new duties assigned; (2) the addition of new duties and
12 responsibilities will not adversely affect the grade of another occupied
13 position (e.g., result in the position being downgraded); (3) the additional
14 duties and responsibilities do not change a former non-supervisory
15 position into a supervisory position; (4) there are no other employees at the
16 same grade level performing the same work in the organization where the
employee is located who qualify for the reclassified position; (5) for an
employee to be considered for an accretion of duties, the employee must
meet all OPM qualification requirements, including time-in-grade; and
(6) the employee has performed the higher level duties for a significant
period of time.

17 (Def.'s SUF ¶ 16.) Ultimately, after review of the review recommendations, some position
18 descriptions remained unchanged, some were updated in minor respects, and others were revised
19 to reflect current duties. (Id. ¶ 15.)

20 After a further review process, ten non-competitive promotions for DCMA
21 Northern California were approved. (See Def.'s SUF ¶¶ 17-20.) In December 2006, the results
22 of the position description review were announced by email to all DCMA Northern California

23 ² The specific additional duties are recounted in paragraph 10 of defendant's Statement
24 of Undisputed facts and need not be recounted in detail here.

25 ³ In the context of this case, the phrase "accretion of duties" is used to describe the
26 process of noncompetitively promoting an employee to a higher pay grade because of that
employee's performance of duties above his grade for a period of time.

1 employees. (Id. ¶ 21.)

2 At the time of the position description review process and accretions effectuated
3 in 2006, plaintiff was an ACO assigned to the DLA Team. (Def.'s SUF ¶ 22.) At this same
4 time, Craig Studley was the only ACO on the Navy 2 Team, and John Palmer was the only ACO
5 on the TAG Team. (Id. ¶¶ 23-24.) Accordingly, under the relevant criteria, it was concluded that
6 plaintiff was not eligible to compete for the GS-13 level positions at issue because, in 2006,
7 plaintiff was in a different organizational unit or team.⁴ (Id. ¶ 25.)

8 On December 7, 2006, plaintiff initiated contact with an EEO counselor. (Def.'s
9 SUF ¶ 26.) On February 7, 2007, plaintiff filed an EEO complaint alleging discrimination based
10 on race, color, age, and sex, as well as retaliation.⁵ (Id. ¶ 27.) DCMA accepted for investigation
11 plaintiff's claims that when individuals within DCMA Northern California had received non-
12 competitive promotions to GS-13 level positions as a result of an accretion of duties, plaintiff
13 was denied the opportunity to compete for the GS-13 level positions and that management
14 allegedly manipulated the selection process. (Id.) On or about July 6, 2007, an EEO Report of
15 Investigation was issued. (Id. ¶ 28.)

16 On March 31, 2008, the EEOC Administrative Judge, Terrie Brodie, issued a
17 decision adverse to plaintiff. (Def.'s SUF ¶ 29.) On April 23, 2008, DCMA issued a final order
18 adopting Administrative Judge Brodie's decision, and, on May 28, 2008, plaintiff appealed the
19 decision to the Office of Federal Operations. (Id. ¶ 30.) On March 6, 2009, the Office of Federal
20 Operations affirmed DCMA's decision. (Id. ¶ 31.) Meanwhile, on July 15, 2008, plaintiff filed a
21

22 ⁴ Although not stated in defendant's Statement of Undisputed Facts, the Declaration of
23 Darlene Harris filed in support of defendant's motion states: "A position was only qualified for
24 promotion based on accretion of duties if it was the only such position on the team; if there were
more than one of the same position on the team, then promotion could only be accomplished
through the competitive process." (Harris Decl. ¶ 16, Dkt. No. 44, Dkt. No. 44-5.)

25 ⁵ During the EEO investigation period, plaintiff withdrew his claims premised on age and
26 sex discrimination. (Report of Investigation at 1, Ex. B to Def.'s Mot. to Dismiss and/or for
Summ. J.)

1 complaint in this court.

2 C. Plaintiff's Opposition to the Motion

3 Plaintiff filed only a two-page opposition to defendant's motion. (Pl.'s Opp'n to
4 Def.'s Mot. to Dismiss and/or For Summ. J. ("Pl.'s Opp'n"), Dkt. No. 46.) Plaintiff's opposition
5 does not rebut any of defendant's legal arguments. It also does not specifically dispute any of the
6 facts alleged in defendant's statement of undisputed facts, and does not include a statement of
7 disputed facts.⁶ It only alleges that: (1) AUSA Montoya "is grossly misstating the truth," (2)
8 defendant's statement of undisputed facts "is false," and (3) "[t]here is documented evidence to
9 support the facts." (Opp'n at 1.) Plaintiff offers no substantive explanation or documentary
10 support in this regard.

11 Plaintiff's opposition also attaches documents that are either: (1) inadmissible
12 evidence, or (2) immaterial. The undersigned briefly addresses these documents before turning
13 to the merits of the pending motion and sustains defendant's objections to some of the evidence
14 submitted by plaintiff.⁷ See Fed. R. Civ. P. 56(c)(2).

15 Documents 1 and 2 are settlement communications between Administrative Judge
16 Brodie, and the parties. Defendant correctly objects to these documents as inadmissible
17 settlement discussions because plaintiff is offering them to substantiate his entitlement to the
18 relief sought, a promotion to GS-13 status. (Def.'s Reply at 3, Dkt. No. 47.) These settlement
19

20 ⁶ Of note, defendant provided plaintiff with a separate "warning" regarding the
21 implications of a summary judgment motion and what is required to oppose such a motion. (Dkt.
22 No. 44, Doc. No. 44-6.) This notice must be given to a pro se prisoner in connection with a
23 motion for summary judgment, see Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en
banc), cert. denied, 527 U.S. 1035 (1999), but it is less clear whether the notice is required with
respect to a non-prisoner pro se party. In any event, plaintiff was warned of his obligations in
opposing a motion for summary judgment imposed by Federal Rule of Civil Procedure 56 and
Eastern District Local Rule 260. Nevertheless, plaintiff failed to meet any of these obligations.

24 ⁷ Plaintiff has not demonstrated that the evidence objected to by defendant is admissible.
25 It is plaintiff's burden, as the proponent of this evidence, to establish the admissibility of the
26 evidence. See Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments ("The burden
is on the proponent to show that the material is admissible as presented or to explain the
admissible form that is anticipated.").

1 negotiations are inadmissible to prove liability. See Fed. R. Evid. 408(a); see also Coleman v.
 2 Quaker Oats Co., 232 F.3d 1271, 1291 (9th Cir. 2000) (holding that district court did not abuse
 3 its discretion by not admitting post-termination settlement offer); Cassino v. Reichhold Chems.,
 4 Inc., 817 F.2d 1338, 1342 (9th Cir. 1987) (noting that in the Age Discrimination in Employment
 5 Act context, settlement offers made to employee after termination are not admissible under
 6 Federal Rule of Evidence 408). Accordingly, defendant's objections are sustained as to
 7 Documents 1 and 2. Even if considered, these settlement e-mails consist of the administrative
 8 judge's suggestions for how to potentially settle the case, not a statement that plaintiff's case has
 9 merit.

10 Document 3 is entitled "Complainant's Rebuttal of Agency's Motion for
 11 Summary Judgment" at the administrative level. This document, which appears to be a brief
 12 drafted by plaintiff's "representative" in the EEOC process Jerry Gandara, is of no material
 13 import at the summary judgment stage because it is not, nor does it append, evidence upon which
 14 plaintiff could rely in opposition to defendant's motion for summary judgment. Defendant also
 15 correctly objects to the consideration of this brief on the grounds that it is not the type of
 16 evidence to be considered at the summary judgment stage (Def.'s Reply at 4).⁸ See Fed. R. Civ.
 17 P. 56(c)(1). Accordingly, defendant's objection to document 3 is sustained.

18 Documents 4A and 4B are performance ratings which plaintiff alleges
 19 demonstrate that one of his supervisors, Darlene Harris, changed his rating from "Fully
 20 Successful" to "Minimally Successful" without his knowledge. Defendant has not offered any

21
 22 ⁸ The Ninth Circuit Court of Appeals has held that in the context of a motion for
 23 summary judgment where the non-moving party is pro se, a court "must consider as evidence in
 24 [the pro se party's] opposition to summary judgment all of [the pro se party's] contentions
 25 offered in motions and pleadings, where such contentions are based on personal knowledge and
 26 set forth facts that would be admissible in evidence, and where [the pro se party's] attested under
 penalty of perjury that the contents of the motions or pleadings are true and correct." Jones v.
Blanas, 393 F.3d 918, 923 (9th Cir. 2004). However, the rebuttal brief in question consists only
 of plaintiff's representative's arguments; it is not based on plaintiff's personal knowledge, is not
 verified, and is not attested to under penalty of perjury. Accordingly, this brief does not
 constitute admissible evidence.

1 explanation as to why this document creates a genuine dispute of material fact that precludes the
2 grant of summary judgment.

3 Document 5 is a letter to plaintiff from the Assistant United States Attorney who
4 is litigating this case regarding plaintiff's opportunity to review his deposition transcript. This
5 letter is entirely immaterial to the pending motion.

6 II. LEGAL STANDARDS

7 At the outset, the undersigned makes clear that to the extent that defendant's
8 motion seeks dismissal of plaintiff's claims on grounds not relating to the court's subject matter
9 jurisdiction, the motion will be treated as a motion for summary judgment filed pursuant to
10 Federal Rules of Civil Procedure 56, and will not be reviewed under the standards generally
11 applicable to a motion to dismiss or motion for judgment on the pleadings filed pursuant to
12 Federal Rules of Civil Procedure 12(b)(6) and 12(c), respectively. This distinction is because
13 defendant relies on, and the undersigned has considered, evidence that is either outside of the
14 pleadings or not subject to judicial notice. See Fed. R. Civ. P. 12(d) ("If, on a motion under Rule
15 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court,
16 the motion must be treated as one for summary judgment under Rule 56."); see also Shroyer v.
17 New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 n.6 (9th Cir. 2010) (citing Lee v. City
18 of L.A., 250 F.3d 668, 688 (9th Cir. 2001)); Debry v. Dep't of Homeland Sec., 688 F. Supp. 2d
19 1103, 1108 (S.D. Cal. 2009).

20 A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

21 A motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) or
22 12(h)(3) challenges the court's subject matter jurisdiction. Federal district courts are courts of
23 limited jurisdiction that "may not grant relief absent a constitutional or valid statutory grant of
24 jurisdiction," and "[a] federal court is presumed to lack jurisdiction in a particular case unless the
25 contrary affirmatively appears." A-Z Int'l v. Phillips, 323 F.3d 1141, 1145 (9th Cir. 2003)
26 (citations and quotation marks omitted); see also Fed. R. Civ. P. 12(h)(3) ("If the court

1 determines at any time that it lacks subject matter jurisdiction, the court must dismiss the
2 action.”).

3 When ruling on a motion to dismiss for lack of subject matter jurisdiction, the
4 court takes the allegations in the complaint as true. Wolfe v. Strankman, 392 F.3d 358, 362 (9th
5 Cir. 2004). However, the court is not restricted to the face of the pleadings and “may review any
6 evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of
7 jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489
8 U.S. 1052 (1989); see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir.
9 2003) (“A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the
10 pleadings or by presenting extrinsic evidence.”). “When subject matter jurisdiction is challenged
11 under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in
12 order to survive the motion.” Tosco Corp. v. Cmtys. for a Better Env’t., 236 F.3d 495, 499 (9th
13 Cir. 2001) (per curiam), abrogated on other grounds by Hertz Corp v. Friend, 130 S. Ct. 1181
14 (2010); see also Colwell v. Dep’t of Health & Human Servs., 558 F.3d 1112, 1121 (9th Cir.
15 2009) (“In support of a motion to dismiss under Rule 12(b)(1), the moving party may submit
16 ‘affidavits or any other evidence properly before the court It then becomes necessary for the
17 party opposing the motion to present affidavits or any other evidence necessary to satisfy its
18 burden of establishing that the court, in fact, possesses subject matter jurisdiction.” (citation
19 omitted, modification in original)).

20 B. Motion for Summary Judgment

21 Federal Rule of Civil Procedure 56(a) provides that “[t]he court shall grant
22 summary judgment if the movant shows that there is no genuine dispute as to any material fact
23 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).⁹ A shifting
24

25 ⁹ Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10,
26 2010. However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule
56, “[t]he standard for granting summary judgment remains unchanged.”

1 burden of proof governs motions for summary judgment under Rule 56. Nursing Home Pension
2 Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir.

3 2010). Under summary judgment practice, the moving party

4 always bears the initial responsibility of informing the district court
5 of the basis for its motion, and identifying those portions of “the
6 pleadings, depositions, answers to interrogatories, and admissions
on file, together with the affidavits, if any,” which it believes
demonstrate the absence of a genuine issue of material fact.

7 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c).

8 “Where the non-moving party bears the burden of proof at trial, the moving party need only
9 prove that there is an absence of evidence to support the non-moving party’s case.” In re Oracle
10 Corp. Sec. Litig., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ.
11 P. 56 advisory committee’s notes to 2010 amendments (recognizing that “a party who does not
12 have the trial burden of production may rely on a showing that a party who does have the trial
13 burden cannot produce admissible evidence to carry its burden as to the fact”).

14 If the moving party meets its initial responsibility, the opposing party must
15 establish that a genuine dispute as to a material fact actually exists. See Matsushita Elec. Indus.
16 Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). To overcome summary judgment, the
17 opposing party must demonstrate the existence of a factual dispute that is both material, i.e., it
18 affects the outcome of the claim under the governing law, see Anderson v. Liberty Lobby, Inc.,
19 477 U.S. 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.,
20 618 F.3d 1025, 1031 (9th Cir. 2010), and genuine, i.e., “the evidence is such that a reasonable
21 jury could return a verdict for the nonmoving party,” FreecycleSunnyvale v. Freecycle Network,
22 626 F.3d 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at 248). A party opposing
23 summary judgment must support the assertion that a genuine dispute of material fact exists by:
24 “(A) citing to particular parts of materials in the record, including depositions, documents,
25 electronically stored information, affidavits or declarations, stipulations . . . , admissions,
26 interrogatory answers, or other materials; or (B) showing that the materials cited do not establish

1 the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible
 2 evidence to support the fact.”¹⁰ Fed. R. Civ. P. 56(c)(1)(A)-(B). However, the opposing party
 3 “must show more than the mere existence of a scintilla of evidence.” In re Oracle Corp. Sec.
 4 Litig., 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

5 In resolving a summary judgment motion, the admissible evidence of the
 6 opposing party is to be believed. See Anderson, 477 U.S. at 255. Moreover, all reasonable
 7 inferences that may be drawn from the facts placed before the court must be viewed in a light
 8 most favorable to the opposing party. See Matsushita, 475 U.S. at 587; In re Oracle Corp. Sec.
 9 Litig., 627 F.3d at 387. However, to demonstrate a genuine factual dispute, the opposing party
 10 “must do more than simply show that there is some metaphysical doubt as to the material facts. . .
 11 . Where the record taken as a whole could not lead a rational trier of fact to find for the
 12 nonmoving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation
 13 omitted).

14 III. DISCUSSION

15 A. Defendant is Entitled To Judgment As to Plaintiff’s Unexhausted Claims

16 Plaintiff’s complaint is sparse with respect to factual allegations such that it is
 17 unclear exactly which work-related incidents form the basis of his claims. Plaintiff alleges a
 18 claim for “failure to promote” and “Verbal Abuse, Retaliation/reprisal and Racism.” (Compl. at
 19 2.) However, defendant combed through plaintiff’s deposition testimony and extracted
 20 allegations made by plaintiff related to several incidents about which plaintiff feels aggrieved,
 21 and argues that plaintiff failed to exhaust his administrative remedies as to these incidents.
 22 (Def.’s Memo. at 9-10.) Those incidents relate to the following:

23 ////

24 ¹⁰ “The court need consider only the cited materials, but may consider other materials in
 25 the record.” Fed. R. Civ. P. 56(c)(3). Moreover, “[a] party may object that the material cited to
 26 support or dispute a fact cannot be presented in a form that would be admissible in evidence.”
 Fed. R. Civ. P. 56(c)(2).

- 1 • Alleged verbal abuse by Janet Lopez, plaintiff's Team Supervisor, which
2 allegedly began in or around July 2004, when plaintiff returned to work following
3 carpal tunnel surgery, and ended once plaintiff was transferred from Lopez's team
4 in February 2005. (See Wright Dep. at 16:21–18:9, 107:5–121:6.)
- 5 • Alleged verbal abuse by Darlene Harris in May 2008. Plaintiff was allegedly put
6 in charge temporarily while his supervisor was out for illness, but Harris curtailed
7 his supervisory role, and did so in front of other employees. (See Wright Dep. at
8 140:21–146:22.)
- 9 • Alleged discrimination when plaintiff was excluded from meetings that Janet
10 Lopez conducted with Craig Studley, one of the ACOs on a different
11 organizational team who was promoted through an accretion of duties. (See
12 Wright Dep. at 59:9–60:16.)
- 13 • An alleged act of race-based discrimination that relates to plaintiff not being
14 selected to attend continuing education classes when other employees were
15 selected to attend those classes. (See Wright Dep. at 158:19–159:23,
16 192:4–193:3, 204:16–22.)
- 17 • An alleged act of race-based discrimination that relates to an unfair distribution of
18 workload. (See Wright Dep. at 193:11–14, 200:1–202:21, 204:23–205:4.)
- 19 • An alleged act of reprisal involving plaintiff's travel to Florida to view a satellite
20 launch. Due to a travel mixup, plaintiff missed one launch, but testified that
21 management corrected the problem and sent him to another launch. (See Wright
22 Dep. at 149:18–151:10, 158:19–159:2.)
- 23 • An alleged act of reprisal involving disciplinary comments because plaintiff did
24 not possess a travel credit card. (See Wright Dep. at 152:4–154:8, 159:24–160:7.)
- 25 • An alleged act of reprisal involving an unfair performance appraisal for the year
26 2004 by Janet Lopez, as a result of plaintiff's 2001 EEO activity. (See Wright

Dep. at 176:7-17.)

- An alleged act of reprisal involving a downgraded performance appraisal for the year 2004 by Darlene Harris, as a result of plaintiff's 2001 EEO activity. (See Wright Dep. at 169:5-17, 174:4-15.)

Coverage of Title VII of the Civil Rights Act of 1964 is extended to reach federal employees through 42 U.S.C. § 2000e-16, which provides that “all personnel actions affecting federal employees and applicants for federal employment shall be made free from any discrimination based on race, color, religion, sex, or national origin.” Brown v. Gen. Servs. Admin., 425 U.S. 820, 829-30 (1976) (citation and quotation marks omitted). However, an aggrieved federal employee must seek relief from the agency that allegedly discriminated against him or her as a “precondition” to filing an action in federal district court. Id. at 832.

Pursuant to 29 C.F.R. § 1614.105(a)(1), “[a]ggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult” an EEO counselor prior to filing a complaint in federal court, and such contact must occur “within 45 days of the date of the matter alleged to be discriminatory.” See also, e.g., Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch, 572 F.3d 1039, 1043 (9th Cir. 2009).¹¹ Under applicable regulations, failure to initiate contact with an EEO counselor within the time limits set forth in section 1614.105 is grounds for dismissal of a complaint, but those time limits are subject to the doctrines of waiver, estoppel, and equitable tolling. Id. (citing 29 C.F.R. §§ 1614.104(c), 1614.107(a)(2)). The Ninth Circuit Court of Appeals recently re-affirmed that “although the regulatory pre-filing exhaustion requirement at § 1614.105 ‘does not carry the full weight of statutory authority’ and is not a jurisdictional prerequisite for suit in federal court, we have consistently held that, absent waiver,

¹¹ The aggrieved employee may initiate contact not only with a person with the title “EEO Counselor,” but may also initiate contact with “agency officials with EEO counseling responsibilities or a connection to the counseling process,” regardless of that agency official’s title. Kraus, 572 F.3d at 1045.

1 estoppel, or equitable tolling, ‘failure to comply with this regulation [is] . . . fatal to a federal
 2 employee’s discrimination claim’ in federal court.” Kraus, 572 F.3d at 1043 (quoting Lyons v.
 3 England, 307 F.3d 1092, 1105 (9th Cir. 2002)) (modifications in original); accord Cherosky v.
 4 Henderson, 330 F.3d 1243, 1245 (9th Cir. 2003).

5 Because plaintiff does not argue that the doctrines of waiver, estoppel, or
 6 equitable tolling apply here such that he is excused from compliance with the pre-filing
 7 requirements of 29 C.F.R. § 1614.105, the only question presented is whether plaintiff initiated
 8 contact with an EEO counselor or other appropriate agency official within 45 days of the date of
 9 each alleged discriminatory act.¹² See Kraus, 572 F.3d at 1043-44.

10 According to plaintiff’s deposition testimony, his allegations of verbal abuse by
 11 Janet Lopez and Lopez’s exclusion of plaintiff from meetings with Craig Studley relate to the
 12 time period of July 2004 through February 2005. As a result, plaintiff would have had to contact
 13 an EEO counselor or other appropriate person in April 2005, at the latest. Plaintiff did not make
 14 contact with an EEO counselor until December 7, 2006. (See Def.’s Memo., Ex. B at 1.)
 15 Moreover, plaintiff has not pointed to evidence that he contacted another agency official with
 16 EEO counseling duties in a timely fashion. Accordingly, to the extent that plaintiff’s claims stem
 17 from those allegations, they are barred by plaintiff’s failure to timely contact an EEO counselor.

18 As to the remainder of the allegations that defendant has drawn from plaintiff’s
 19 deposition testimony, defendant argues that plaintiff did not timely contact an EEO counselor and
 20 also did not exhaust those claims in his EEO complaint. (See Def.’s Memo. at 11-12.) “The
 21 jurisdictional scope of the plaintiff’s court action depends on the scope of the EEOC charge and
 22 investigation.” Leong v. Potter, 347 F.3d 1117, 1122 (9th Cir. 2003). “[T]he district court has
 23 jurisdiction over any charges of discrimination that are ‘like or reasonably related to’ the
 24

25 ¹² As noted above, plaintiff’s complaint does not allege specific facts that form the basis
 26 of his alleged discrimination and retaliation claims. Plaintiff’s written opposition to defendant’s
 motion is similarly unhelpful.

1 allegations made before the EEOC, as well as charges that are within the scope of an EEOC
2 investigation that reasonably could be expected to grow out of the allegations.” Id. (citation
3 omitted). The court must construe an EEOC charge with “the utmost liberality.” EEOC v.
4 Farmer Bros., Co., 31 F.3d 891, 899 (9th Cir. 1994).

5 Here, plaintiff did not include any of those remaining alleged incidents in his EEO
6 complaint. (See Def.’s Memo., Ex. C.) Moreover, those allegations did not arise in the agency
7 investigation. (Id., Ex. B). Plaintiff offers no argument in response to defendant’s arguments.
8 Without more, plaintiff’s potential claims ferreted out by defendant are barred for want of
9 adequate exhaustion. Accordingly, defendant is entitled to judgment as to plaintiff’s potential
10 claims identified by defendant in plaintiff’s deposition testimony. Because defendant’s
11 exhaustion arguments are meritorious, the undersigned does not address defendant’s alternative
12 arguments, which assume proper exhaustion. (See Def.’s Memo. at 13-17.)

13 B. Defendant Is Entitled to Judgment On Plaintiff’s Failure to Promote Claim

14 At the heart of plaintiff’s complaint is his claim that he was discriminated against
15 based on his race and color because two other GS-12 ACOs—Craig Studley and John
16 Palmer—were promoted to a level of GS-13 based on accretion of duties and thus plaintiff was
17 denied the opportunity to compete for those GS-13 positions. Defendant moves for summary
18 judgment on this claim on the grounds that plaintiff failed to make out a prima facie case of
19 racial discrimination because plaintiff was not qualified for a promotion based on an accretion of
20 duties or to compete for the positions of the two other ACOs who were promoted.

21 In opposing a motion for summary judgment as to a Title VII failure to promote
22 claim premised on disparate treatment, “a plaintiff may produce direct or circumstantial evidence
23 demonstrating that a discriminatory reason more likely than not motivated the defendant’s
24 decision, or alternatively may establish a prima facie case under the burden-shifting framework
25 set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 . . . (1973).” Dominguez-Curry v.
26 Nev. Transp. Dep’t, 424 F.3d 1027, 1037 (9th Cir. 2005). Here, plaintiff has made no argument

1 in opposition to the motion for summary judgment and has offered no direct or circumstantial
2 evidence that the decision not to promote him was motivated by a discriminatory reason.
3 Accordingly, the undersigned presumes that plaintiff is proceeding under the McDonnell Douglas
4 burden-shifting framework.

5 To state a prima facie “failure-to-promote” claim under the McDonnell Douglas
6 framework, “a plaintiff must show that (1) [he] belongs to a protected class; (2) [he] applied for
7 and was qualified for the position [he] was denied; (3) [he] was rejected despite [his]
8 qualifications; and (4) the employer filled the position with an employee not of plaintiff’s class,
9 or continued to consider other applicants whose qualifications were comparable to plaintiff’s
10 after rejecting plaintiff.” Dominguez-Curry, 424 F.3d at 1037. If the plaintiff establishes a prima
11 facie case, it creates a rebuttable presumption that the employer unlawfully discriminated against
12 the plaintiff, and the “burden of production then shifts to the employer to articulate a legitimate,
13 nondiscriminatory reason for its action.” Id. If the employer meets this burden, the “plaintiff
14 then must produce sufficient evidence to raise a genuine issue of material fact as to whether the
15 employer’s proffered nondiscriminatory reason is merely a pretext for discrimination.” Id.
16 Under the McDonnell Douglas framework, “[t]he burden of persuasion, as opposed to
17 production, however, remains with the plaintiff at all times.” Bodett v. CoxCom, Inc., 366 F.3d
18 736, 743 (9th Cir. 2004).

19 Here, defendant acknowledges that plaintiff is a member of a protected class and
20 that ACOs not of plaintiff’s class were promoted to GS-13 level positions based on an accretion
21 of duties. (Def.’s Memo. at 18.) However, defendant contends that plaintiff has not shown that
22 he was qualified for a promotion to GS-13. Defendant makes two arguments. First, defendant
23 argues that “[p]laintiff fails to show that he performed additional duties and responsibilities that
24 justified a reclassification or non-competitive promotion of his position to the GS-13 level.” (Id.)
25 Defendant argues that Craig Studley and John Palmer, the promoted ACOs, were both
26 performing specific, higher-level duties and were the only ACOs performing those tasks at the

1 time of their non-competitive promotions. Second, defendant argues that Studley and Palmer
2 were properly promoted through an accretion of duties, and a competitive process was not
3 required because they were the only GS-12 ACOs in their respective organizational units at the
4 time of the promotions. (*Id.* at 19; *see also* Harris Decl. ¶¶ 24-27.)

5 Plaintiff has not presented any legal argument or admissible evidence in response
6 to defendant's argument that plaintiff was not qualified for a promotion. Plaintiff appears to rely
7 on inadmissible emails that pertain to settlement negotiations to substantiate that he was qualified
8 for a promotion. (Opp'n, Dkt. No. 46 at 5-8.) However, as discussed above, those e-mails are
9 inadmissible evidence. Moreover, the e-mails only demonstrate that Administrative Judge
10 Brodie thought that a temporary promotion to GS-13 and priority consideration going forward
11 might resolve the dispute, not that plaintiff was qualified for a promotion. The e-mails indicate
12 that the government rejected this proposal, and Administrative Judge Brodie ultimately ruled
13 against plaintiff.

14 Plaintiff also appears to rely on a brief filed during the EEO administrative
15 process, which alleges that plaintiff was performing three times the amount of contract
16 administration that Studley and Palmer were performing. (Opp'n, Dkt. No. 46 at 11.) Even
17 assuming this brief constitutes evidence sufficient to withstand a motion for summary
18 judgment—which it does not—it does not suggest that plaintiff was performing work beyond a
19 GS-12 level. Moreover, defendant submitted an undisputed supplemental declaration of Darlene
20 Harris, which declares that plaintiff was only performing work at a GS-12 level and below.
21 (Harris Suppl. Decl. ¶ 5, Dkt. No. 47, Doc. No. 47-1.)

22 As to defendant's first argument, plaintiff simply has not provided any evidence to
23 create a genuine dispute of material fact regarding whether he was qualified for the promotion he
24 contends he was entitled to receive. Accordingly, his failure-to-promote claim fails, and
25 defendant is entitled to summary judgment on that claim.

26 Defendant's second argument—that a promotion through accretion of duties was

appropriate because Studley and Palmer were the only GS-12 ACOs in their respective organizational units—does not appear to be relevant to defendant’s argument that plaintiff failed to establish a prima facie case of discrimination. This argument does not relate to whether plaintiff was qualified and denied a promotion despite his qualification. It is, however, relevant to defendant’s argument that assuming plaintiff established a prima facie case, defendant had a legitimate, non-discriminatory reason for not promoting plaintiff and not allowing plaintiff to compete for a GS-13 promotion. Defendant appears to be arguing that, under the accretion criteria, the agency did not need to consider plaintiff for, or allow him to compete for, the GS-13 positions because Studley and Palmer were the only ACOs on their respective teams. The agency was permitted to non-competitively promote Studley and Palmer. Plaintiff offers no argument in his opposition brief on this point. Although defendant’s argument is well-taken, the undersigned need not reach this argument because, as discussed above, plaintiff has not provided evidence that substantiates a prima facie case. Accordingly, defendant’s motion for summary judgment should be granted.

C. Plaintiff’s Title VII Retaliation Claim

Plaintiff’s complaint also alleges, however conclusorily, a claim for “Retaliation/reprisal.” (Compl. at 2.) Plaintiff’s EEO complaint alleges that plaintiff was retaliated against in response to his prior EEO activity, which took place in 2001 and was settled in 2002.¹³ (See Def.’s Memo., Ex. B at 1-2; Def.’s SUF ¶ 32.) Plaintiff alleges that he was retaliated against by being denied an opportunity to compete for the GS-13 ACO positions in 2006. (See id., Ex. B at 1, 6, and Ex. C at 2-3.) Defendant moves for summary judgment on the grounds that plaintiff has not established a prima facie case of retaliation. (Def.’s Memo. at 19-20.)

¹³ Plaintiff previously filed an EEO claim in March 2001 that was settled in or around August 2002. (Def.’s SUF ¶ 32.) That prior claim is not directly related to the present underlying claims, except as it relates to plaintiff’s claim of retaliation.

1 “Title VII prohibits, among other things, retaliation against an employee for
2 making a charge or otherwise participating in a Title VII proceeding.” Nilsson v. City of Mesa,
3 503 F.3d 947, 953 (9th Cir. 2007) (citing 42 U.S.C. § 2000e-3(a)); see also Davis v. Team Elec.
4 Co., 520 F.3d 1080, 1093 (9th Cir. 2008) (“Employers may not retaliate against employees who
5 have ‘opposed any practice made an unlawful employment practice’ by Title VII.”) (quoting 42
6 U.S.C. § 2000e-3(a)). “To establish a claim of retaliation, a plaintiff must prove that (1) the
7 plaintiff engaged in a protected activity, (2) the plaintiff suffered an adverse employment action,
8 and (3) there was a causal link between the plaintiff’s protected activity and the adverse
9 employment action.” Poland v. Chertoff, 494 F.3d 1174, 1179-80 (9th Cir. 2007); accord Davis,
10 520 F.3d at 1093-94. If the plaintiff establishes a prima facie case of retaliation, “the burden
11 shifts to the defendant to set forth a legitimate, non-retaliatory reason for its actions; at that point,
12 the plaintiff must produce evidence to show that the stated reasons were a pretext for retaliation.”
13 Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1108 (9th Cir. 2008).

14 Here, defendant concedes that plaintiff engaged in protected activity by filing his
15 EEO claim in 2001. (See Def.’s Memo. at 20.) He also concedes that it is “arguable” that
16 plaintiff’s claim of non-promotion could be construed as a materially adverse employment
17 action. (Id.) However, defendant challenges plaintiff’s retaliation claim on the ground that
18 plaintiff has produced no evidence of a causal connection between his EEO activity in 2001 and
19 the claim of failure to promote in 2006 and, as a result, plaintiff cannot establish a prima facie
20 case of retaliation.

21 Plaintiff’s written opposition does not address defendant’s argument.
22 Furthermore, plaintiff has provided no evidence or argument establishing causation between his
23 protected EEO activity in 2001 and being denied the opportunity to compete for GS-13 level
24 ACO positions in 2006. Thus, plaintiff is apparently proceeding on a theory of causation based
25 on timing alone, which is a permissible theory. See, e.g., Davis, 520 F.3d at 1094 (“We have
26 held that causation can be inferred from timing alone where an adverse employment action

follows on the heels of protected activity” (citation and quotation marks omitted).). However, the temporal proximity between an employer’s knowledge of protected activity and an adverse employment action must be “very close” to support a theory of causation based on timing alone. See, e.g., Clark County Sch. Dis. v. Breeden, 532 U.S. 268, 273 (2001) (holding that an adverse employment action taken 20 months after the protected conduct “suggests, by itself, no causality at all”). The Ninth Circuit Court of Appeals has held that a nine-month gap between protected activity and alleged retaliatory action is too long to support a finding of causation based on timing alone. See Manatt v. Bank of Am., 339 F.3d 792, 802 (9th Cir. 2003); see also Davis, 520 F.3d at 1094 (“We have held that an eighteen-month gap is too long to support a finding of causation based on timing alone.”) (citing Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1064 (9th Cir. 2002)). Here, the gap between plaintiff’s EEO activity and the alleged retaliatory act is on the order is approximately four to five years. Accordingly, plaintiff has not met his burden to establish a prima facie case of retaliation, and defendant is entitled to summary judgment on plaintiff’s retaliation claim.¹⁴

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

1. Defendant’s “Motion to Dismiss and/or For Summary Judgment” (Dkt. No. 44) be granted.
2. Judgment be entered in defendant’s favor.
3. This case be closed and all dates in this case be vacated.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written

¹⁴ Because plaintiff has not established a prima facie case of retaliation, the undersigned need not address defendant’s additional argument that defendant had legitimate, non-discriminatory reasons for its decisions that plaintiff did not, and apparently cannot, rebut. (Def.’s Memo. at 20-23.)

1 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
2 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
3 Recommendations.” Any response to the objections shall be filed with the court and served on
4 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
5 Failure to file objections within the specified time may waive the right to appeal the District
6 Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
7 1153, 1156-57 (9th Cir. 1991).

8 IT IS SO RECOMMENDED.

9 DATED: January 25, 2011

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12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE
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