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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LETICIA NAVARRO,

Plaintiff,

v.

CHAD F. WOLF, ACTING
SECRETARY, DEPARTMENT OF
HOMELAND SECURITY,

Defendant.

Case No.: 3:20-cv-0394-L-AHG

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

Pending before the Court in this action alleging discrimination and retaliation in violation Title VII of the Civil Rights Act of 1964, is Defendant’s motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff filed an opposition, and Defendant replied. The Court decides this matter on the briefs without oral argument. See Civ. L. R. 7.1.d.1. For the reasons stated below, Defendant’s motion to dismiss is granted.

I. BACKGROUND

Plaintiff is a Hispanic American female of Mexican descent, and a citizen of the United States of America. (Complaint ¶ 2). She is a resident of Imperial County, in the State of California. (*Id.*) At the time she filed her complaint, Plaintiff was employed as a

1 Group Supervisor, GS-1811-14, with Immigration and Customs Enforcement (ICE),
2 Department of Homeland Security (DHS). (Comp. ¶ 3). DHS is a cabinet department of
3 the U.S. federal government, tasked with anti-terrorism, border security, immigration and
4 customs, cyber security, and disaster prevention and management. (Comp. ¶4).

5 Plaintiff has been employed with ICE for more than 20 years. (Comp. ¶8). During
6 her employment, Plaintiff has received commendations and distinctions including fourteen
7 (14) special act awards for merit and job performance between 1999 through 2016, which
8 included an award for outstanding performance as a Special Agent within ICE, and the
9 JTF-1 Directors Award for Distinguished Service in July 2016. (Comp. ¶11 ((i),(k),(m)).
10 Plaintiff created and supervised multiple programs including the first child Exploitation
11 Investigation Group, and first computer forensic program. (Comp. ¶11 (b),(c)). There have
12 been no complaints resulting in disciplinary action concerning Plaintiff's job performance
13 during her tenure with ICE. (Comp. ¶ 10).

14 In November 2014, Plaintiff informed her supervisor, Ronnie Martinez, that she was
15 interested in becoming an acting Assistant Special Agent in Charge (ASAC). (Ex. 9 at 84
16 [ECF No. 6-2.]) Plaintiff was informed by Martinez in November 2017 that she would be
17 the acting ASAC after Martinez left for Seattle. (*Id.*) However, on March 15, 2017,
18 Plaintiff learned she was not chosen to serve as Acting Assistant Special Agent in Charge
19 (ASAC) in Calexico, California. (Comp. ¶12). Instead, John Reed (Reed) was placed in the
20 position. (Mot. Ex. 9 at 84). According to Plaintiff, the normal advancement procedures
21 were not followed and she was purposefully excluded. (*Id.*) Plaintiff states that Reed is a
22 white male who had been previously admonished for retaliating against a previous EEO
23 filer. (Comp. ¶13).

24 On April 25, 2017, the Acting ASAC, Reed, came to Plaintiff's office to discuss her
25 mid-year performance, however he was not her immediate supervisor, did not know her
26 performance, is less experienced and was a junior supervisor. (*Id.* at 86). Instead of
27 conducting the review, Plaintiff claims Reed instructed Plaintiff to sign a form stating the
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1 discussion had occurred and left. Reed purportedly was confrontational with Plaintiff and
2 did not leave when she asked him to. (*Id.*)

3 During the April 25, 2017, review, Reed misrepresented to Plaintiff that another
4 Special Agent, Robert Robbins, had decided not to join the Financial Group which Plaintiff
5 supervised, despite the fact that Reed had expressed interest in that position. (Comp. ¶14)
6 Plaintiff later learned that Reed had not changed his mind. (Mot. Ex 9 at 86). The addition
7 of Special Agent Reed would have assisted Plaintiff in performing her job. (*Id.*) On the
8 same day, Plaintiff discovered that Acting ASAC Reed falsely told her that a government
9 vehicle could not be assigned to her because it had been assigned to another Special Agent.
10 (Comp. ¶15).

11 Plaintiff also learned that day that Reed would not return a financial investigation
12 case entitled “Rabobank,” to Plaintiff, despite the fact that she was the financial supervisor
13 and one of her agents was assigned to the case. (Mot. Ex. 9 at 90). Instead, Reed was
14 going to keep the case himself. (Comp. ¶16).

15 On April 28, 2017, Plaintiff learned she was denied the opportunity to serve as an
16 Acting ASAC, and the position was given to someone less experienced and qualified than
17 Plaintiff. (Comp. ¶17). On May 2, 2017, Plaintiff was not allowed to compete for one of
18 three Special Agent in Charge (SAC) positions in San Diego, and a position as a Resident
19 Agent in Charge (RAC) in Oceanside, California. (Comp. ¶18).

20 On May 30, 2017, Reed berated Plaintiff for moving an employees’ cubicle because
21 it was moved to an area that was designated for remodeling. (Comp. ¶19). On November
22 1, 2017, Plaintiff was denied a promotion to the position of GS-15, Assistant Special Agent
23 in Charge (ASAC), Vacancy Announcement No. DAL-INV-10028383-MP-ET. (Comp.
24 ¶20). On December 1, 2017, Plaintiff claims a co-employee was elevated to Plaintiff’s first-
25 line supervisor despite numerous complaints of harassment. (Comp. ¶21).

26 In addition to the above actions, Plaintiff was treated differently than other Group
27 supervisors in the same position because she was not be notified about executive meetings
28 while other male Group Supervisors were invited and allowed to attend. (Comp.¶22).

1 Plaintiff asserts that the above actions were taken to discriminate and retaliate against her
2 for her prior EEO complaints/actions which consisted of filing grievances and pursuing
3 remedies for acts she believed violated constitutional and other protected activities. (Comp.
4 ¶23).

5 On May 15, 2017, Plaintiff initiated contact with the Agency’s EEO office, alleging
6 “RETALIATION BECAUSE OF PREVIOUS EEO ACTIVITY/CONTINUATION OF
7 SEXUAL DISCRIMINATION (FEMALE).” (Motion Ex 1; see also Ex. 2 (Counselor’s
8 Report)). On August 23, 2017, Plaintiff filed a formal charge of discrimination with her
9 agency’s Equal Employment Opportunity Office (EEO). (Mot. Ex. 3).

10 On October 28, 2019, an Administrative Judge with the Equal Employment
11 Opportunity Commission (EEOC) issued a Decision and Order, granting the Agency’s
12 motion for summary judgment on Plaintiff’s EEO complaint. (Mot. Ex. 10.) On December
13 4, 2019, the DHS Office for Civil Rights and Civil Liberties (CRCL) issued a Final Order,
14 implementing the Administrative Judge’s decision and finding that the Agency was entitled
15 to summary judgment as a matter of law. (*Id.*)

16 Plaintiff asserts three causes of action against Defendants: (1) race and sex
17 discrimination in violation of Title VII of the Civil Rights Act of 1964; (2) retaliation in
18 violation of Title VII of the Civil Rights Act of 1964; and (3) intentional infliction of
19 emotional distress. Plaintiff seeks \$500,000 in actual and compensatory damages against
20 Defendant including lost earnings, employee benefits, and reasonable attorney’s fees.

21 Defendant filed the present motion to dismiss, arguing the Court lacks jurisdiction
22 because Plaintiff failed to exhaust her administrative remedies, Plaintiff’s IIED claim is
23 preempted by Title VII, and even if not, Plaintiff failed to administratively exhaust a tort
24 claim under the FTCA, and Plaintiff’s request for compensatory damages exceeds the
25 statutory cap imposed by Title VII. Plaintiff opposes the motion. The matter is fully briefed.
26 For the reasons set forth below, the Court grants Defendant’s motion to dismiss.

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1 **II. LEGAL STANDARD**

2 **A. Motion to Dismiss**

3 A motion to dismiss under Rule 12(b)(1) challenges the subject matter jurisdiction
4 of the motion. Fed. R. Civ. P. 12(b)(1). Jurisdiction is not presumed, and the party asserting
5 jurisdiction has the burden to establish that it exists. *Kokkonen v. Guardian Life. Ins. Co.*
6 *of America*, 511 U.S. 375, 377 (1994).

7 A motion under Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v.*
8 *Block*, 250 F.3d 729, 732 (9th Cir. 2001).¹ Dismissal is warranted where the complaint
9 lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d
10 1035, 1041 (9th Cir. 2010). Alternatively, a complaint may be dismissed if it presents a
11 cognizable legal theory yet fails to plead essential facts under that theory. *Robertson v.*
12 *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). A pleading must contain “a
13 short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.
14 R. Civ. P. 8(a)(2). Plaintiffs’ allegations must provide “fair notice” of the claim being
15 asserted and the “grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S.
16 544, 555 (2007).

17 In reviewing a Rule 12(b)(6) motion, the Court must assume the truth of all factual
18 allegations and construe them most favorably to the nonmoving party. *Huynh v. Chase*
19 *Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006). However, legal conclusions
20 need not be taken as true merely because they are couched as factual allegations. *Twombly*,
21 550 U.S. at 555. Similarly, “conclusory allegations of law and unwarranted inferences are
22 not sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d
23 696, 699 (9th Cir. 1998).

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28 ¹ Unless otherwise noted, internal quotation marks, ellipses, brackets, citations and
footnotes are omitted from all quotations.

1 **III. DISCUSSION**

2 Defendants move to dismiss Plaintiff’s complaint arguing that (1) the Court lacks
3 jurisdiction over Plaintiff’s complaint because she did not administratively exhaust her race
4 discrimination claim with the EEO; (2) Plaintiff’s intentional infliction of emotional
5 distress claim is preempted by Title VII, and if not, she has failed to administratively
6 exhaust a tort claim under the FTCA; and (3) Plaintiff’s claim for compensatory damages
7 should be dismissed because it exceeds the statutory cap. The Court discusses each issue
8 in turn.

9 **A. Jurisdiction and Administrative Exhaustion**

10 Discrimination in employment on the basis of race, color, religion, sex, or national
11 origin is prohibited under Title VII of the Civil Rights Act of 1964. 78 Stat. 255, 42 U.S.C.
12 § 2000e–2(a)(1). Retaliation against persons who assert rights under the statute is also
13 prohibited. § 2000e–3(a). Before a complainant may file a Title VII action in court, he or
14 she must submit a charge with the the Equal Employment Opportunity Commission
15 (EEOC). § 2000e–5(e)(1), (f)(1). Filing a timely charge with the EEOC is required to
16 exhaust administrative remedies for Title VII violations, including discrimination and
17 retaliation. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 644 (9th Cir. 2004). Title
18 VII’s requirement to file a complaint with the EEO before commencing an action in court
19 is considered a “claim-processing” rule, rather than a “charge-filing” jurisdictional
20 requirement. *See Fort Bend County, Texas v. Davis*, 139 S.Ct. 1843, 1846 (2019).

21 Defendant contends that the Court should dismiss Plaintiff’s race/national origin
22 discrimination claim because she did not properly exhaust this claim by filing it along with
23 her sex discrimination and retaliation claims with the EEO. (Mot. at 6). Defendant argues
24 that Plaintiff’s complaints to the EEO made no mention of race or national origin
25 discrimination, nor was it included in any of her amendments to the EEO complaint. (*Id.*
26 at 7). As a result, DHS did not investigate any claim of race or national origin
27 discrimination, and the final decision of DHS does not refer to or analyze a claim for race
28 or national origin discrimination. (*Id.*) Defendant claims the Court lacks jurisdiction on

1 this claim because Plaintiff did not “substantially comply with the presentment
2 requirement.” (*Id.*)

3 Plaintiff does not dispute that she failed to raise a claim of race or national origin
4 discrimination in any of her EEO complaints, but contends that the Court should permit
5 her to assert the current claims because they are reasonably related to the sex discrimination
6 claims she raised in her EEO complaints. (Oppo. at 8). Plaintiff claims that the Court must
7 look to the facts as alleged in not only the EEO complaints, but the pre-complaint
8 questionnaire, because the facts supporting her sex discrimination claims also support her
9 claims for race or national origin discrimination. (*Id.* at 7). According to Plaintiff, race
10 discrimination often manifests as sex discrimination, therefore, the claims are closely
11 related to the allegations made in the EEO charges. (*Id.* at 8).

12 “Incidents of discrimination not included in an EEOC charge may not be considered
13 by a federal court unless the new claims are like or reasonably related to the allegations
14 contained in the EEOC charge.” *Lyons v. England*, 307 F.3d 1192, 1103-04 (9th Cir. 2002).
15 The Court looks to the scope of the administrative charge to determine the appropriate
16 scope of the subsequent civil action. *Id.* To determine whether a claim under Title VII is
17 reasonably related to claims in a prior EEO charge, a court must determine whether the
18 original EEO investigation would have “encompassed the additional charges.” *Green v.*
19 *Los Angeles County Superintendent of Schools*, 883 F.3d 1472, 1476 (9th Cir. 1989).
20 Charges filed before the EEO are to be construed liberally due to “[t]he remedial purpose
21 of Title VII and the paucity of legal training among those whom it is designed to protect.”
22 *Stache v. International Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1233
23 (9th Cir. 1975).

24 Plaintiff alleged only sex discrimination and retaliation for prior EEO activity in her
25 initial EEO contact, formal complaint, and amendments. (Mot. Ex. 1, 2, 3-5, 7). Although
26 the dates and locations of the alleged discrimination, along with the named perpetrators,
27 were purportedly the same for both claims, the EEO was not on notice to conduct an
28 investigation into the alleged race discrimination. *Rodriguez v. Airborne Express*, 265

1 F.890, 897 (9th Cir. 2001)(claims of race discrimination would not reasonably trigger
2 investigation into disability discrimination because “claims involve totally different kinds
3 of allegedly improper conduct, and investigation into one claim would not likely lead to
4 investigation of the other.”) The final DHS Investigative Report demonstrates that the
5 agency focused its inquiries and interviews on whether Plaintiff was the subject of sex
6 discrimination, and retaliation, but no mention of race, or inquiry surrounding race or
7 national origin, was made. *See* Mot. Ex 9. The EEO investigation would likely have been
8 different if a race discrimination claim was added to the EEO complaint, with the agency
9 conducting an examination of the race and national origin of the alleged perpetrators. While
10 the Court construes the facts supporting Plaintiff’s sex discrimination claims raised with
11 the EEO liberally, they were not reasonably related to claims of race discrimination to put
12 DHS or the EEO on notice to make sufficient inquiry.

13 Accordingly, Plaintiff failed to exhaust administrative remedies with respect to her
14 claim for race or national origin discrimination because that claim falls outside the scope
15 of her timely administrative complaint alleging sex discrimination. The Court grants
16 Defendant’s motion to dismiss this claim for Plaintiff’s failure to satisfy the claim-
17 processing procedural requirement of Title VII. *See Fort Bend County, Texas*, 139 S.Ct.
18 at 1846.

19 **B. Intentional Infliction of Emotional Distress**

20 Defendant claims that Plaintiff’s Intentional Infliction of Emotional Distress (IIED)
21 claim is properly characterized as a tort claim under California law. (Mot. at 7). Further,
22 Defendant contends that the Federal Tort Claims Act (FTCA) is the exclusive remedy for
23 tortious conduct by any employee of the federal government, therefore, the claim is
24 improper because Plaintiff did not name the United States as defendant. (*Id.*) In addition,
25 Defendant argues that the claim is preempted by Title VII, which can only be supplemented
26 by state law tort claims where the alleged violations involve “physical or emotional injuries
27 that are highly personal,” such as rape, assault, or physical abuse, quoting *Sommatino v.*
28 *United States*, 255 F.3d 704, 711 (9th Cir. 2001). (*Id.* at 8). The facts supporting Plaintiff’s

1 sex discrimination claim with the EEO do not rise to the level required for the exception to
2 Title VII's preemption to apply, according to Defendant. (*Id.*) Finally, Defendant argues
3 that the Court does not have jurisdiction because all FTCA claims must be exhausted prior
4 to filing in federal court but Plaintiff's IIED claim was not administratively exhausted. (*Id.*
5 at 8-9).

6 Plaintiff claims she suffered "humiliation, mental anguish, and emotional and
7 physical distress" due to the actions of her supervisory chain of command, for which she
8 seeks damages in excess of \$500,000. (Complaint ¶¶ 43, 44). She argues that her IIED
9 claim does not require administrative exhaustion and is not preempted by the FTCA
10 because "[f]ederal Courts sit in diversity as to an IIED claim, therefor[sic] the court must
11 apply California's choice of law rules to determine the controlling substantive law,
12 including the applicable statute of limitations." (Oppo. at 10). She contends the Court
13 should deny Defendant's motion to dismiss because she has sufficiently asserted a claim
14 under controlling state law. (*Id.* at 11-12).

15 As a primary matter, the federal court does not maintains diversity jurisdiction over
16 Plaintiff's IIED claim. "Diversity jurisdiction requires complete diversity between the
17 parties—each defendant must be a citizen of a different state from each plaintiff." *In re*
18 *Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir. 2008). An agency such
19 as DHS is not considered to be a citizen of any particular state for purposes of diversity.
20 *See Hancock Fin. Corp. v. Fed.Sav.& Loan Ins. Corp.*, 492 F.2d 1325, 1329 (9th Cir.
21 1974). As a result, agencies of the United States cannot be sued in diversity. *General Ry.*
22 *Signal Co. v Corcoran*, 921 F.2d 700, 703 (7th Cir. 1991).

23 In contrast, federal question jurisdiction requires that the complaint (1) arise under
24 a federal law or the U.S. Constitution, (2) allege a "case or controversy" within the meaning
25 of Article III, § 2 of the U.S. Constitution, or (3) be authorized by a federal statute that both
26 regulates a specific subject matter and confers federal jurisdiction. *Baker v. Carr*, 369 U.S.
27 186, 198 (1962). Plaintiff's claim of race or national origin discrimination is properly
28 before this Court under federal question jurisdiction, because she alleged Defendant

1 violated Title VII and the FTCA, federal statutes. § 704(a), 42 U.S.C.A. § 2000e-3(a); 28
2 U.S.C. §2679(b)(1).

3 The United States government, along with its agencies and employees, is immune
4 from suit as a sovereign unless it has “expressly waived immunity and consented to be
5 sued.” *McGuire v. United States*, 550 F.3d 903, 910 (9th Cir. 2008); *Gilbert v. DaGrossa*,
6 756 F.2d 1455, 1458 (9th Cir. 1985). Here, Plaintiff filed suit against the Acting Secretary
7 of the Department of Homeland Security, thereby implicating the sovereign immunity bar.

8 However, the FTCA provides a waiver of sovereign immunity, and is the exclusive
9 remedy for filing a tort action against a federal agency such as DHS. “The FTCA [Federal
10 Tort Claims Act] is the exclusive remedy for tortious conduct by the United States, and it
11 only allows claims against the United States. Although such claims can arise from the acts
12 or omissions of United States agencies, an agency itself cannot be sued under the FTCA.”
13 *F.D.I.C. v. Craft*, 157 F.3d 697, 706 (9th Cir.1998).

14 To advance a tort claim under the FTCA, it must be administratively exhausted. *See*
15 28 U.S.C. §§ 2401(b), 2675(a); *Valdez-Lopez v. Chertoff*, 656 F.3d 851, 855 (9th Cir.
16 2011). “The timely filing of an administrative claim is a jurisdictional prerequisite to the
17 bringing of a suit under the FTCA and, as such, should be affirmatively alleged in the
18 complaint.” *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980)(internal citations
19 omitted). Once a claim is exhausted, it may be asserted against the United States, but not a
20 federal agency or individual employee. *See* 28 U.S.C. §2679(a); *FDIC v. Craft*, 157 F.3d
21 697, 706 (9th Cir.1998).

22 In her Complaint, Plaintiff does not state that she administratively exhausted her
23 IIEED claim, nor does she present any evidence showing that it has been exhausted. *See*
24 *Gillespie*, 629 F.2d at 640; *Hutchinson v. United States*, 677 F.2d 1322. 1327 (9th Cir.
25 1982)(FTCA claim barred based on plaintiff’s failure to demonstrate administrative
26 exhaustion of claim with federal agency). As a result, the Court does not have jurisdiction
27 over Plaintiff’s IIED claim, and Defendant's motion to dismiss the claim is granted.

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