

1 claims alleged in the action. “A motion to dismiss for lack of subject matter jurisdiction may
2 either attack the allegations of the complaint or may be made as a ‘speaking motion’ attacking the
3 existence of subject matter jurisdiction in fact.” Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.,
4 594 F.2d 730, 733 (9th Cir. 1979).

5 When a Rule 12(b)(1) motion attacks the existence of subject matter jurisdiction in fact,
6 no presumption of truthfulness attaches to the plaintiff’s allegations. Thornhill Publ’g Co., 594
7 F.2d at 733. “[T]he district court is not restricted to the face of the pleadings, but may review any
8 evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of
9 jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). When a Rule
10 12(b)(1) motion attacks the existence of subject matter jurisdiction in fact, plaintiff has the burden
11 of proving that jurisdiction does in fact exist. Thornhill Publ’g Co., 594 F.2d at 733.

12 Defendant moves to dismiss plaintiff’s tort claims, contending these claims are barred
13 because plaintiff failed to present an administrative tort claim to the FAA.¹ The Federal Torts
14 Claims Act (“FTCA”) provides the exclusive remedy for torts committed by federal employees,
15 as alleged in this action. 28 U.S.C. § 1346 (b)(1); see Pereira v. U.S. Postal Serv., 964 F.2d 873,
16 876 (9th Cir. 1992) (FTCA provides waiver of sovereign immunity only if such torts committed
17 by private person would have given rise to liability under state law). Under the FTCA, an
18 aggrieved party must timely file an administrative claim with the appropriate federal agency
19 before commencing litigation against the United States. See Blain v. United States, 552 F.2d 289
20 (9th Cir. 1977); 28 U.S.C. § 2675(a); 28 U.S.C. § 2401(b) (tort claim against United States barred
21 unless presented in writing to appropriate Federal Agency within two years after claim accrues).
22 This requirement is jurisdictional and cannot be waived. Marley v. United States, 548 F.3d 1286,
23 1287 (9th Cir. 2008); see also Vacek v. United States Postal Serv., 447 F.3d 1248, 1250 (9th Cir.
24 2006) (exhaustion requirement jurisdictional and must be interpreted strictly).

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27 ¹ Defendant asserts three additional grounds for dismissal of the tort claims, all of which appear
28 to be well taken. However, plaintiff’s failure to present an administrative claim is dispositive and
the court need not reach defendant’s additional arguments.

1 The declaration submitted by defendant in support of the motion to dismiss establishes
2 that plaintiff never presented an administrative tort claim. Garcia Decl. ¶ 4. In opposition to the
3 pending motion, plaintiff does not contest defendant’s argument and presents no evidence that she
4 timely presented a claim. The motion to dismiss plaintiff’s tort claims for defamation and perjury
5 should therefore be granted.

6 Defendant also moves to dismiss plaintiff’s claim under the Rehabilitation Act for failure
7 to accommodate plaintiff’s disability of high blood pressure. Defendant contends this claim
8 should be dismissed for lack of subject matter jurisdiction because plaintiff failed to exhaust this
9 claim through the EEO process. Exhaustion of administrative remedies is a precondition to filing
10 suit under section 501 of the Rehabilitation Act. See Boyd v. United States Postal Serv., 752 F.2d
11 410, 412-413 (9th Cir. 1985) (exhaustion of administrative remedies required). To exhaust
12 administrative remedies, plaintiff must first contact and consult with an EEO counselor at the
13 agency within 45 days of the allegedly discriminating action. Cherosky v. Henderson, 330 F.3d
14 1243, 1245 (9th Cir. 2003). After this consultation, the plaintiff must then file a formal complaint
15 of discrimination with the agency. 29 C.F.R. §§ 1614.105(d), 1614.106(b). Although plaintiff
16 filed an EEO complaint based on sex discrimination and reprisal in April 2004, she did not file an
17 EEO complaint for failure to accommodate a disability. LaDuke Decl. ¶ 4.

18 In opposition, plaintiff contends that she pursued her discrimination claims through the
19 grievance procedure provided under her union contract and that she requested reconsideration by
20 an Employee’s Compensation Appeals Board of the determination made in that grievance
21 procedure. See 5 U.S.C. § 7121(d) (federal employee who alleges employment discrimination
22 must elect to pursue claim under either a statutory procedure or a union-assisted negotiated
23 grievance procedure; cannot pursue both avenues and election irrevocable). Plaintiff’s decision
24 here to pursue her discrimination claim under the grievance procedure is irrevocable. See
25 Vinieratos v. Air Force, 939 F.2d 762, 768-769 (9th Cir. 1991). To exhaust administrative
26 remedies through the negotiated grievance procedure, plaintiff must take the decision resulting
27 from the grievance procedure to the Merit System Protection Board (“MPSB”) before seeking
28 judicial review. See AFGE v. Reno, 992 F.2d 331, 333-336 (D.C. Cir. 1993); 5 U.S.C. § 7703.

1 Plaintiff adduces no evidence that she has exhausted the negotiated grievance by taking the
2 grievance decision to the MPSB. Plaintiff has therefore failed to establish this court has subject
3 matter jurisdiction over plaintiff's Rehabilitation Act claim for failure to accommodate plaintiff's
4 disability of high blood pressure.

5 Accordingly, IT IS HEREBY RECOMMENDED that:

- 6 1. Defendant's motion to dismiss (ECF No. 14) be granted;
- 7 2. Plaintiff's tort claims for defamation and perjury and disability accommodation claim
8 under the Rehabilitation Act be dismissed for lack of subject matter jurisdiction;
- 9 3. Plaintiff be granted thirty days after adoption of these findings and recommendations to
10 file an amended complaint that does not include the claims dismissed for lack of subject matter
11 jurisdiction. Each allegation in the First Amended Complaint should be separately numbered in
12 accordance with Federal Rule of Civil Procedure 10(b); and
- 13 4. Defendant be granted thirty days to respond to the First Amended Complaint.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
19 within the specified time may waive the right to appeal the District Court's order. Martinez v.
20 Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: November 22, 2013



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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