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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
8 AT SACRAMENTO
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10 CHRISTOPHER COULTER,

11 Plaintiff,

12 v.

13 THE DEPARTMENT OF THE AIR
14 FORCE, DEBORAH LEE JAMES,
15 SECRETARY OF THE DEPARTMENT
16 OF THE AIR FORCE, UNITED STATES
17 OF AMERICA, AND DOES 1-20,

18 Defendants.
19

No. 2:16-cv-02076-SB

**ORDER GRANTING MOTION
TO DISMISS, IN PART;
ORDERING BRIEFING ON
MOTION TO STAY**

20 Before the Court is Defendant's Motion to Dismiss, ECF No. 18. The
21 motion was heard without oral argument. Plaintiff is represented by Waukeen Q.
22 McCoy; Defendants are represented by Gregory T. Broderick.

23 Plaintiff Christopher Coulter brought suit against his former employer, the
24 Department of the Air Force, alleging he was the target of retaliation and
25 harassment, and wrongful termination as a result of him reporting various safety
26 concerns. He is bringing five claims: (1) violation of the Whistleblower Protection
27 Act, 5 U.S.C. § 2301 *et seq*; (2) Violation of Due Process / Liberty Interest; (3)
28 Retaliation in violation of Cal. Lab. Code § 6310 (against the Department of the

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1 Air Force); (4) Retaliation in violation of Cal. Lab. Code § 6310, 1102 (against the
2 Department of the Air Force); and (5) Intentional Infliction of Emotional Distress
3 under the Federal Tort Claims Act.

4 Defendants now move to dismiss these claims, asserting the Court does not
5 have jurisdiction to hear these claims because (1) the Whistle Blower Act does not
6 provide a private cause of action and Plaintiff failed to exhaust his administrative
7 remedies; (2) the United States may not be sued for constitutional claims; (3) the
8 United States did not waive its sovereign immunity with respect to California
9 employment statutes; and (4) Plaintiff has not complied with the administrative
10 claim requirements of the Federal Tort Claims Act.

11 In his response, Plaintiff indicates that he recently filed a claim with the
12 Merit Systems Protection Board and also filed an administrative tort claim. He
13 asks the Court to stay his first claim (Whistleblower), as well as his fifth claim
14 (Intentional Infliction of Emotional Distress).

15 **BACKGROUND FACTS**

16 The following facts are taken from Plaintiff's Complaint:

17 Plaintiff worked at Travis Air Force Base as a civilian Air Traffic
18 Controller. He was eventually promoted to Senior Airfield Operations Automation
19 Manager. In early 2013, there was a mishap at the Travis AFB where two Air
20 Force planes nearly collided in air. Plaintiff believed the mishap was caused by the
21 "Local Wind Resource Ares Windmills," which had de-sensitized controllers from
22 effectively applying Primary Merging Target procedures. As a result, he began
23 compiling Automation Continuity of Operation information for self-
24 inspection/mitigation purposes. He reported the data he had collected, but his
25 supervisors took no action.

26 After he reported his safety concerns, he began experiencing allegedly
27 retaliatory behavior from his supervisors. He was the only civilian Air Traffic
28 Controller not to receive a year-end bonus or time-off reward for a three-year

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1 period. Also, he was denied overtime pay, had false accusations made against him,
2 and his security clearance was placed under review.

3 Plaintiff filed multiple union grievances complaining about the retaliation
4 and harassment he was experiencing. The retaliation, harassment and hostile work
5 environment continued. Eventually he was placed on administrative leave and an
6 investigation regarding Plaintiff's job performance was initiated. As a result,
7 Plaintiff began to experience symptoms of stress and dizziness and was diagnosed
8 with Neurocardiogenic Syncope.

9 Plaintiff was terminated from his position at Travis AFB in February, 2016.

10 LEGAL STANDARDS

11 1. Rule 12(b)(1)

12 Pursuant to Fed. R. Civ. P. 12(b)(1), a district court must dismiss an action
13 if it lacks jurisdiction over the subject matter of the suit. A party seeking to invoke
14 federal jurisdiction bears the burden of establishing that jurisdiction exists "for
15 each claim he seeks to press" and for "each form of relief sought." *Oregon v.*
16 *Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *DaimlerChrysler*
17 *Corp. v. Duno*, 547 U.S. 332, 352 (2006)). In deciding a 12(b)(1) motion, courts
18 assume the plaintiff's factual allegations to be true and draw all reasonable
19 inferences in his favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

20 2. Civil Service Reform Act (CSRA) - Merit Systems Protection 21 Board (MSPB)

22 The Civil Service Reform Act ("CSRA") limits federal employees
23 challenging their supervisors' "prohibited personnel practices" to an
24 administrative remedial system. If the conduct an employee challenges falls within
25 the scope of the CSRA's "prohibited personnel practices," the CSRA's
26 administrative procedures are the employee's only remedy. *Orsay v. United States*
27 *Dep't of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002) (abrogated on other grounds
28 by *Millbrook v. United States*, __ U.S. __, 133 S. Ct. 1441 (2013)); *see also*

1 *Collins v. Bender*, 195 F.3d 1076, 1079 (9th Cir. 1999) (“[E]ven if no remedy
2 were available to [the employee] under the CSRA, he still could not bring [his]
3 action if the acts complained of fell within the CSRA’s confines.”); *Saul v. United*
4 *States*, 928 F.2d 829, 835–43 (9th Cir. 1991) (holding the CSRA precludes both
5 constitutional and common-law tort claims).

6 The CSRA defines “prohibited personnel practices” as any “personnel
7 action” taken for an improper motive by someone who has authority to take
8 personnel actions. 5 U.S.C. § 2302(b) (delineating improper motives). “Personnel
9 action” as defined by the statute includes any appointment, promotion, disciplinary
10 or corrective action, detail transfer, reassignment, reinstatement, restoration,
11 reemployment, performance evaluation, pay or benefits decision, mandatory
12 psychiatric examination, or any other significant change in duties, responsibilities,
13 or working conditions. 5 U.S.C. § 2302(a)(2)(A)(i)-(xi).

14 “[A]lthough a federal district court can exercise federal question jurisdiction
15 under 28 U.S.C. § 1331, that general grant of jurisdiction does not apply where it
16 is fairly discernible that Congress intended a statutory review scheme to provide
17 the exclusive avenue to judicial review.” *Kerr v. Jewell*, 836 F.3d 1048, 1050 (9th
18 Cir. 2016). This principle applies to the CSRA. *Elgin v. Dep’t of Treasury*, __ U.S.
19 __, 132 S. Ct. 2126, 2132-33 (2012) (“Given the painstaking detail with which the
20 CSRA sets out the method for covered employees to obtain review of adverse
21 employment actions, it is fairly discernible that Congress intended to deny such
22 employees an additional avenue of review in district court.”).

23 The CSRA’s remedial scheme is “both exclusive and preemptive because
24 permitting Federal Tort Claim Act claims to supplant the CRSA’s remedial
25 scheme” would defeat Congress’ purpose of creating “a single system of
26 procedures and remedies, subject to judicial review.” *Rivera v. United States*, 924
27 F.2d 948, 951 (9th Cir. 1991). “[W]here Congress has provided a process for
28 processing prohibited personnel practices, other potential employee remedies are

1 preempted.” *Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir 2008). “Both
2 the CSRA and its legislative history show that Congress did not intend that state
3 tort law operate within the interstices of the act.” *Saul*, 928 F.2d at 842.

4 In determining whether the CSRA preempts a claim, the court looks to the
5 conduct challenged in the lawsuit to determine whether it “falls within the scope
6 of the CSRA’s ‘prohibited personnel practices.’” *Mangano*, 529 F.3d at 1246. If it
7 does, the lawsuit is preempted and the CSRA’s administrative procedures are the
8 employee’s only remedy. *Id.*

9 The Merit Systems Protection Board (“MSPB”) was created by Congress
10 under the CSRA as a quasi-judicial government agency with the specific task of
11 adjudicating appeals of agency personnel actions for federal employees. 5 U.S.C.
12 § 1201 *et seq.*; 5 C.F.R. § 1200.1. Generally, the MSPB is limited to review of
13 “adverse employment actions” that fall into one of five categories: (1) removal; (2)
14 suspension for more than 14 days; (3) reduction in grade; (4) reduction in pay; or
15 (5) a furlough of 30 days or less. 5 U.S.C. § 7512(1)-(5); *Sloan v. West*, 140 F.3d
16 1255, 1259 (9th Cir. 1998).

17 3. Whistleblower Protection Act

18 The Whistleblower Protection Act (“WPA”) prohibits retaliation against an
19 employee for disclosing “any violation of any law, rule, or regulation, or . . . gross
20 mismanagement, a gross waste of funds, an abuse of authority, or a substantial and
21 specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8). Federal
22 employees can obtain administrative and judicial review of their WPA claims.
23 *Kerr*, 836 F.3d at 1053. As a general matter, WPA claims must be presented
24 initially to either the Office of Special Counsel (OSC) or the MSPB. 5 U.S.C.
25 §§ 1214, 1221(a); 5 C.F.R. § 1209.2

26 The Whistleblower Protection Act is part of the CSRA and thus, WPA
27 claims are within the exclusive original jurisdiction in the MSPB. *Kerr*, 836 F.3d
28 at 1056 (quoting the D.C. Circuit, which observed that “[u]nder no circumstances

1 does the WPA grant the District Court jurisdiction to entertain a whistleblower
2 cause of action brought directly before it in the first instance”).

3 **4. Federal Tort Claim Act**

4 The Federal Tort Claims Act grants federal courts jurisdiction over damages
5 claims against the United States “for injury or loss of property, or personal injury
6 or death caused by the negligent or wrongful act or emission of any employee of
7 the Government while acting within the scope of his office or employment.”

8 28 U.S.C. § 1346(b). Under the FTCA, the government may be held liable for
9 negligence “in the same manner and to the same extent as a private individual
10 under like circumstances.” 28 U.S.C. § 2674.

11 **ANALYSIS**

12 **1. Whistleblower Protection Act claim**

13 In his first cause of action, Plaintiff asserts he is a federal employee who
14 reported valuable trend information regarding safety violations that occurred at
15 Travis AFB and as a result, he was retaliated against, constantly harassed, placed
16 in a hostile work environment, wrongfully terminated and had his security
17 clearance placed under review, which prevented him from seeking other similar
18 employment, in violation of the WPA.

19 Defendant argues because there is no private right of action under the WPA
20 (an employee must bring a claim under the rubric of the CSRA) and because
21 Plaintiff’s complaint does not allege exhaustion of his CSRA remedies or that he
22 sought review from the MSPB, his WPA claim is barred.

23 In his response, Plaintiff concedes he did not pursue all administrative
24 remedies under the CSRA. He asks that, because he is in the process of appealing
25 to the MSPB, the Court to stay his Whistleblower Act claim until the
26 administrative process is resolved. Defendants object to Plaintiff’s request for a
27 stay.

28 The Ninth Circuit instructs that a district court has discretion to stay or

1 dismiss without prejudice a case within an administrative agency’s primary
2 jurisdiction. *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9th Cir.
3 2006). A court may stay the case and retain jurisdiction or, “if the parties would
4 not be unfairly disadvantaged, . . . dismiss the case without prejudice.” *Id.* The
5 factor most often considered in determining whether a party will be disadvantaged
6 by dismissal without prejudice is whether there is a risk that the statute of
7 limitations may run on the claims pending agency resolution of threshold issues.
8 *Id.* Also, where the court stays proceedings to give preliminary deference to an
9 administrative agency anticipating further judicial proceedings, jurisdiction should
10 ordinarily be retained by staying the action, rather than dismissing the
11 proceedings. *N. Cal. Dist. Council of Hod Carriers, Bldg. & Constr. Laborers,*
12 *AFL–CIO v. Opinski*, 673 F.2d 1074, 1076 (9th Cir. 1982). In an unpublished
13 opinion the Ninth Circuit examined the prejudice factor to determine whether
14 claims should be dismissed or stayed for failing to exhaust administrative
15 remedies before the MSPB. *Toyama v. Sebelius*, 2009 WL 2241606, *1 (9th Cir.
16 2009). It concluded that because there was no risk that the statute of limitations
17 might run on the claim, it was appropriate to dismiss the claims without prejudice.
18 *Id.*

19 Because neither party has addressed the prejudice issue or the statute of
20 limitations question, the Court orders additional briefing on this issue before
21 making a determination on whether it should stay Plaintiff’s WPA claim.

22 **2. Constitutional Claims – Due Process, Liberty Interest**

23 In his second cause of action, Plaintiff alleges a violation of his due process
24 rights, and specifically his liberty interest. He asserts he has a liberty interest in his
25 reputation as an employee and argues his reputation has been damaged by
26 Defendants. He asserts that Defendants have continued to disseminate a false and
27 defamatory impression about Plaintiff in regards to his termination, which has
28 deprived him of similar employment with other Air Force bases around the world.

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1 Also, Defendants have held his security clearance under review, which has denied
2 him the opportunity to seek other similar employment.

3 Defendants argue the United States has not waived sovereign immunity for
4 direct constitutional claims. In his response, Plaintiff did not address Defendants'
5 argument regarding sovereign immunity and the requested dismissal of his
6 constitutional claims.

7 Under the doctrine of sovereign immunity, the United States "is immune
8 from suit save as it consents to be sued, and the terms of its consent to be sued in
9 any court define that court's jurisdiction to entertain the suit." *United States v.*
10 *Mitchell*, 445 U.S. 656, 538 (1980). Thus, sovereign immunity is jurisdictional in
11 nature. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). In *Meyer*, the U.S. Supreme
12 Court held the United States did not waive its sovereign immunity for
13 constitutional tort claims. *Id.* at 478; *see also Roundtree v. United States*, 40 F.3d
14 1036, 1038 (9th Cir. 1994) ("[I]t is pellucid that the United States cannot be sued
15 on the theory that there has been a violation of [the plaintiff's] constitutional
16 rights."). Additionally, the United States may not be held liable in damages for the
17 constitutional torts of its officers. *Clemente v. United States*, 766 F.2d 1358, 1363
18 (9th Cir. 1985).

19 Here, Plaintiff has not alleged any facts to suggest that Ms. James
20 personally participated in any alleged constitutional violation. *See Taylor v. List*,
21 880 F.2d 1040, 1045 (9th Cir. 1989) (holding supervisors are only personally
22 liable for damages under 42 U.S.C. § 1983 when the evidence shows that they
23 participate in, directed, or knew of the alleged constitutional violations, and failed
24 to intervene to prevent them); *Clemente*, 766 F.2d at 1363-64 (holding a *Bivens*
25 remedy is unavailable against federal officials being sued, not in their individual
26 capacity for their individual actions, but simply because of the offices they hold).

27 Given that Plaintiff has not challenged the United States' claim of sovereign
28 immunity, the Court grants Defendants' Motion to Dismiss with respect to

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1 Plaintiff's constitutional due process claims.

2 **3. California Employment Law Claims**

3 In his third and fourth causes of action, Plaintiff alleges his termination
4 from employment violated California law prohibiting the discharge by an
5 employee who has made any oral or written complaint to his employer. Cal. Lab.
6 Code § 6310. His termination also allegedly violated public policy under
7 California law. Cal. Labor Code § 1102(b).

8 Defendants argue that under the Supremacy Clause of the U.S. Constitution,
9 the United States is not subject to state law. Also, the United States has not waived
10 its sovereign immunity for state employment laws. Moreover, because federal
11 employees are governed by CSRA, state employment laws do not apply to disputes
12 between the United States and its employees.

13 Here, the allegations regarding the state labor law violations involve
14 "personnel actions" as defined by the CSRA. As such, Plaintiff's California Labor
15 Code claims are pre-empted and subject to dismissal.

16 **4. Intentional Infliction of Emotional Distress – Tort Claim (FTCA)**

17 In his fifth cause of action, Plaintiff alleges Defendants, through its agents
18 and employees, treated him in a deplorable manner. The retaliation, harassment,
19 wrongful termination, and withholding of Plaintiff's security clearance allegedly
20 constitute extreme and outrageous conduct by Defendants that caused him severe
21 emotional and physical distress.

22 Defendants argue that Plaintiff failed to plead compliance with the FTCA's
23 administrative exhaustion requirements, which are a condition of the waiver of
24 sovereign immunity. Because he failed to comply with the prerequisites for a tort
25 claim against the United States, his tort claim is barred by sovereign immunity.

26 In his response, Plaintiff indicated he recently filed a claim under the
27 Federal Tort Claims Act. He asks the Court to allow him to amend his complaint
28 to include the fact that he has complied with the FTCA by filing an administrative

1 tort claim and to stay the action.

2 Although not addressed by the parties, it is questionable whether this claim
3 survives under the reasoning of *Mangano v. United States*, 529 F.3d 1243 (9th Cir.
4 2008). In that case, a part-time physician employed by the Veterans Health
5 Administration brought an action in district court, seeking damages against the
6 United States under the FTCA for intentional infliction of emotional distress and
7 intentional interference with the right to practice a lawful profession in retaliation
8 for his whistleblowing activities. *Id.* The Ninth Circuit held the physician’s claim
9 that he was unfairly terminated falls squarely within the definition of a personnel
10 action as a “significant change in duties, responsibilities or working conditions”
11 under the CSRA. *Id.* at 1247. Ultimately, the Circuit concluded the physician’s
12 FTCA claims involved personnel actions that could be challenged as prohibited
13 personnel practices and as such the CSRA preempted those claims. *Id.* The
14 physician’s remedy, if any, lay within the CSRA procedures. *Id.*
15 This case is directly on point with respect to whether the CSRA preempts
16 Plaintiff’s FTCA claim. In addition to addressing whether this claim should be
17 stayed, the parties are directed to address whether Plaintiff’s FTCA claim should
18 be dismissed under *Mangano*.

19 CONCLUSION

20 As set forth above, it is appropriate to dismiss with prejudice Plaintiff’s
21 constitutional claims and his California Labor Code claims. The Court declines to
22 rule on whether dismissal is proper for the Whistleblower Act claims and the
23 FTCA claim without further briefing from the parties.

24 Accordingly, **IT IS HEREBY ORDERED:**

- 25 1. Defendants’ Motion to Dismiss, ECF No. 18, is **GRANTED**, in part.
- 26 2. On or before **July 5, 2017**, Plaintiff shall file additional briefing
27 addressing the request for a stay and the *Mangano* decision.
- 28 3. On or before **July 15, 2017**, Defendants shall file its responsive

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1 briefing.

2 4. On or before **July 26, 2017**, Plaintiff shall file any reply.

3 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
4 and forward copies to counsel.

5 **DATED** this 22nd day of June, 2017.

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Stanley A. Bastian
United States District Court Judge