

UNITED STATES DISTRICT COURT
For the Northern District of California

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UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

KAREN LAU,

No. C 13-00763 LB

Plaintiff,

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

v.

ERIC WONG,

[Re: ECF No. 5]

Defendant.

INTRODUCTION

Plaintiff Karen Lau, an employee of the Social Security Administration (“SSA”), sought, in California Superior Court, a restraining order against her supervisor, Defendant Eric Wang.¹ Notice of Removal, Exh. 1 (“Request”), ECF No. 1 at 6-12.² Mr. Wang removed the case to federal court. Notice of Removal, ECF No. 1 at 1-4. The facts underlying Ms. Lau’s request for a restraining order request suggest claims for employment discrimination, hostile work environment, and harassment claims in addition to claims arising in tort. *See* Request, ECF No. 1 at 6-12. Mr. Wang now moves to dismiss himself as a improper defendant and to dismiss Ms. Lau’s claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction or, alternatively, under Fed. R. Civ. P. 12(b)(6) for

¹ Ms. Lau erroneously sued Mr. Wang as “Eric Wong,” with an “o” rather than an “a.”

² Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page numbers at the top of the document.

1 failure to state a claim upon which relief can be granted. Motion, ECF No. 5. Pursuant to Civil
2 Local Rule 7-1(b), the court finds this matter suitable for determination without oral argument and
3 vacates the June 6, 2013 hearing. Upon consideration of the parties' filings and the record in this
4 case, the court **GRANTS** Mr. Wang's motion to dismiss.

5 **STATEMENT**

6 Ms. Lau is a claims representative at the San Francisco Mission branch office of the SSA.
7 Arcilla Declaration, ECF No. 5-1, ¶ 4. Mr. Wang, an operations supervisor in the same office, is
8 Ms. Lau's first-level supervisor. *Id.* Ms. Lau alleges that, from July 2012 through September 2012,
9 Mr. Wang committed various acts in the workplace that caused her to feel "emotional[] . . . distress
10 and psychological[] disturb[ance]." Request, ECF No. 1 at 8. Specifically, Ms. Lau alleges:

- 11 • In July 2012, Mr. Wang ordered her into a room and allowed her to "sit down on a broken
12 chair." *Id.* at 12. In addition, he ordered her into his office every morning for reasons not clear
13 to her, and berated her throughout the month by calling her "stupid." *Id.*
- 14 • On the morning of August 31, 2012, Mr. Wang approached her and demanded "[at the] top
15 of his lung[s]" to see her. *Id.* at 8. Ms. Lau does not specify what Mr. Wang said or did on this
16 occasion, but explains that his "demeanor" appeared "belligerent" and "abusive" and his "words"
17 and "actions" were "intimidating and violent." *Id.* She felt "scared and fearful" and
18 subsequently suffered various physical symptoms ("excruciating abdominal pain, headache, and
19 chest pain") of emotional distress. *Id.* As a result, she requested three days off work to seek
20 treatment for her "pain and suffering" at Kaiser Hospital. *Id.* at 8, 12. Following her return to
21 work in early September 2012, Mr. Wang "kept following [her] to the manager's office." *Id.* at
22 12. She subsequently filed a police report against him later that week. *Id.*
- 23 • On September 11, 2012, Mr. Wang stood within 24 inches of her and angrily demanded to
24 see her. *Id.* at 8. Mr. Wang threw a "reprimand letter" in the direction of her "vaginal area" and
25 demanded that she sign it. *Id.* Forty-five minutes after that encounter, Mr. Wang formally
26 issued her the reprimand letter with her signature appended. *Id.* Ms. Lau reports that Mr.
27 Wang's course of conduct has caused her to "feel threatened" and suffer from "acute stress
28 disorder related to work stress" that has manifested in an array of symptoms ("post traumatic

1 stress disorder, chest pain, neck pain, abdominal pain, [and] leg sore[ness]”). *Id.*

2 On September 26, 2012, Ms. Lau went on a leave of absence from work and did not specify a
3 return date. Arcilla Decl., ECF No. 5-1, ¶ 4. On September 28, 2012, she called the SSA’s Civil
4 Rights and Equal Opportunity (“CREO”) Office and left a message about filing an equal
5 employment opportunity (“EEO”) complaint against Mr. Wang. *Id.*, ¶ 5. On October 5, 2012, an
6 EEO counselor responded to her request by email, *id.* ¶ 6, but Ms. Lau was unable to respond to the
7 counselor because of her leave from work, *id.* ¶ 7. From October 5-9, 2012, a CREO manager
8 arranged to meet with Ms. Lau in his office in Richmond, California to discuss her EEO claims. *Id.*
9 ¶ 8. Ms. Lau, however, did not appear for her appointment with the CREO manager and did not
10 schedule another appointment. *Id.*

11 On February 5, 2013, Ms. Lau filed a request for a civil harassment restraining order against Mr.
12 Wang in California Superior Court alleging the facts discussed above. Request, ECF No. 1 at 6-12.
13 She asked the Superior Court to require that Mr. Wang stay at least 50 yards away from her person,
14 home, workplace, school, and vehicle. *Id.* On February 6, 2013, the Superior Court denied her
15 request until it could hear the matter on February 22, 2013. Notice of Removal, Exh. 2
16 (“Restraining Order”), ECF No. 1 at 14-22.

17 The SSA received notice of this matter on February 15, 2013, and the United States Attorney’s
18 Office received notification of this matter from the SSA on February 19, 2013. Notice of Removal,
19 ECF No. 1, ¶ 5. On February 21, 2013, the United States Attorney’s Office removed this matter to
20 this court, Notice, ECF No. 1, and in support of its Notice of Removal, certified on behalf of the
21 Attorney General that Mr. Wang was acting within the course and scope of his employment with the
22 SSA with respect to Ms. Lau’s allegations. *Id.* ¶ 7; Certification Pursuant to 28 U.S.C. § 2679(d)
23 (“Certification”), ECF No. 3.

24 On February 28, 2013, Mr. Wang moved to dismiss this matter. Motion, ECF No. 5. Around
25 the time her opposition was due, Ms. Lau filed the following documents: (1) a document titled
26 “Sexual Harassment Historical Accounts in Chronological Events”; (2) an “EEO Counselor’s
27 Report” dated April 22, 2013; (3) a letter from Ms. Lau to SSA EEO Manager Nelson Arcilla dated
28 April 5, 2013; (4) a “Claim for Disability Insurance Benefits - Doctor’s Certificate”; (5) a San

1 Francisco Police Department Incident Report; and (6) a “Standard Grievance Form” dated August
2 10, 2012 . *See* ECF Nos. 27-32.

3 Further events are described in the EEO Counselor’s Report and the Sexual Harassment
4 Historical Accounts in Chronological Events. On April 2, 2013, Ms. Lau contacted the Equal
5 Employment Opportunity (“EEO”) office and was interviewed by an EEO counselor in connection
6 with her claims against Defendant. EEO Counselor’s Report, ECF No. 28 at 1. Ms. Lau complained
7 of harassment and sex discrimination. *Id.* at 2. Specifically, she complained that on December 24,
8 2011, her supervisor yelled at her, and on June 20, 2012, he called her “stupid.” *Id.* at 3. She also
9 said that her supervisor told her to be more positive and open-minded when it comes to feedback,
10 but that he had a mean and angry demeanor. *Id.* She also states that “she never followed through”
11 with her initial EEO complaint, but is now requesting traditional EEO counseling because she is “in
12 better condition.” *Id.* And in the “Sexual Harassment Historical Accounts in Chronological
13 Events,” Ms. Lau alleges that on a number of occasions from December 2011 through September
14 2012, Mr. Wang yelled at her and/or engaged in other discriminatory practices. *See* Sexual
15 Harassment Historical Accounts in Chronological Events, ECF No. 27 at 1-7.

16 Mr. Wang filed a reply in which he argues that none of the additional information Mr. Lau
17 provided undermines the arguments he made in his motion. Reply, ECF No. 33.

18 ANALYSIS

19 I. LEGAL STANDARD

20 A. Rule 12(b)(1)

21 Federal courts are courts of limited jurisdiction; thus, the court presumes lack of jurisdiction, and
22 the party seeking to invoke the court’s jurisdiction bears the burden of proving that jurisdiction
23 exists. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Federal Rule of Civil
24 Procedure 12(b)(1) allows a party to challenge a federal court’s jurisdiction over the subject matter
25 of the complaint. *See* Fed. R. Civ. Pro. 12(b)(1). The party invoking the jurisdiction of the federal
26 court bears the burden of establishing that the court has the requisite subject matter jurisdiction to
27 grant the relief requested. *See Kokkonen*, 511 U.S. at 377 (1994) (citation omitted).

28 A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal

1 jurisdiction either “facially” or “factually.” *Thornhill Pub’g Co., Inc. v. Gen. Tel. & Elecs. Corp.*,
2 594 F.2d 730, 733 (9th Cir. 1979). When the complaint is challenged for lack of subject matter
3 jurisdiction on its face, all material allegations in the complaint will be taken as true and construed
4 in the light most favorable to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).
5 But in deciding a Rule 12(b)(1) motion which mounts a factual attack on jurisdiction, “no
6 presumption of truthfulness attaches to plaintiff’s allegations, and the existence of disputed material
7 facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.
8 Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.” *Mortensen*
9 *v. First Fed. Savings & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977); *see St. Clair v. City of Chico*,
10 880 F.2d 199, 201 (9th Cir. 1989) (“It then becomes necessary for the party opposing the motion to
11 present affidavits or any other evidence necessary to satisfy its burden of establishing that the court,
12 in fact, possesses subject matter jurisdiction.”). “In resolving a factual attack on jurisdiction, the
13 district court may review evidence beyond the complaint without converting the motion to dismiss
14 into a motion for summary judgment.” *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see*
15 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (“[W]hen considering a motion to
16 dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but
17 may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning
18 the existence of jurisdiction.”).

19 **B. Rule 12(b)(6)**

20 Rule 8(a) requires that a complaint contain a “short and plain statement of the claim showing that
21 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a
22 defendant with “fair notice” of the claims against it and the grounds for relief. *See Bell Atlantic*
23 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted).

24 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does
25 not contain enough facts to state a claim to relief that is plausible on its face. *See Twombly*, 550 U.S.
26 at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court
27 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
28 *Iqbal*, 129 S.Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability

1 requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
2 (quoting *Twombly*, 550 U.S. at 557). “While a complaint attacked by a Rule 12(b)(6) motion to
3 dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of
4 his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of
5 the elements of a cause of action will not do. Factual allegations must be enough to raise a right to
6 relief above the speculative level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals
7 omitted).

8 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true
9 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551
10 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). In
11 addition, courts may consider documents attached to the complaint. *Parks School of Business, Inc.*
12 *v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted). If the court dismisses the
13 complaint, it should grant leave to amend even if no request to amend is made “unless it determines
14 that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203
15 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc. v. Northern California*
16 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

17 **II. APPLICATION**

18 **A. Mr. Wang Is Not the Proper Defendant**

19 Although Ms. Lau requests a restraining order pursuant to California Code of Civil Procedure §§
20 527.6 and 527.9, the facts underlying that request suggest claims for employment discrimination,
21 hostile work environment, and harassment under Title VII of the Civil Rights Act of 1964 (“Title
22 VII”), 42 U.S.C. § 2000e *et seq.*, and/or claims arising in tort under the Federal Tort Claim Act
23 (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680. *See Chan v. Salas*, No. C 10-04348 MEJ, 2011 WL
24 2493730, at *3 (N.D. Cal. June 23, 2011). Mr. Wang argues that, in this situation, he is not the
25 proper defendant.³ The court agrees.

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28 ³ Ms. Lau does not respond to this argument in any of the papers she submitted in opposition
to Mr. Wang’s motion. *See generally* ECF Nos. 27-32.

1 The proper defendant in a Title VII case involving a federal employee is the head of the agency
2 or department. 42 U.S.C. § 2000e-16(c). Mr. Wang is not the head of the SSA. For tort claims
3 under the FTCA arising out of the course of federal employment, 28 U.S.C. § 2679(d) states that
4 “[u]pon certification by the Attorney General that the defendant employee was acting within the
5 scope of his office or employment at the time of the incident out of which the claim arose, any civil
6 action . . . commenced upon such claim in a United States district court shall be deemed an action
7 against the United States . . . and the United States shall be substituted as the party defendant.” *Id.*;
8 *see also Pauly v. United States Dep’t of Agri.*, 348 F.3d 1143, 1150-51 (9th Cir. 2003) (finding that a
9 federal employee is immune from an FTCA suit upon certification by the Attorney General that he
10 was acting within the scope of his employment at the time of the underlying incident). Here, the
11 United States’s Attorney’s Office certified that Mr. Wang was acting within the course and scope of
12 his employment with the SSA at all times material to the alleged incidents. Certification, ECF No.
13 3. Therefore, the only proper defendant to a tort claim under the FTCA is the United States. 28
14 U.S.C. §§ 1346(b), 2679(a); *Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984) (“The
15 [FTCA] provides that the United States is the *sole* party which may be sued for personal injuries
16 arising out of the negligence of its employees.”) (emphasis added). Accordingly, Mr. Wang must be
17 dismissed as a defendant to this action.

18 **B. The Court Lacks Subject-Matter Jurisdiction Because Ms. Lau Has Not Exhausted Her**
19 **Administrative Remedies**

20 *1. Exhaustion under Title VII*

21 Title VII is the exclusive judicial remedy for discrimination on the basis of race, religion, sex, or
22 national origin in federal employment. *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 829-30 (1976);
23 *see Boyd*, 752 F.2d at 413-14. Hostile work environment is cognizable as a form of unlawful
24 discrimination under Title VII. *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 871 (9th Cir.
25 2001).

26 To establish subject matter jurisdiction over a Title VII claim, a plaintiff must exhaust his or her
27 administrative remedies. *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1099 (9th Cir. 2002) (citing
28 *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)). “Under Title VII, a plaintiff must

1 exhaust her administrative remedies by filing a timely charge with the EEOC, or the appropriate
2 state agency, thereby affording the agency an opportunity to investigate the charge.” *B.K.B.*, 276
3 F.3d at 1099) (citing 42 U.S.C. § 2000e-5(b)). “The administrative charge requirement serves the
4 important purposes of giving the charged party notice of the claim and ‘narrow[ing] the issues for
5 prompt adjudication and decision.’” *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995)
6 (quoting *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 n.325 (D.C. Cir. 1976)); *see B.K.B.*,
7 276 F.3d at 1099 (citing *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985) (“Allowing
8 a complaint to encompass allegations outside the ambit of the predicate EEOC charge would
9 circumvent the EEOC’s investigatory and conciliatory role, as well as deprive the charged party of
10 notice of the charge . . .”). “For these reasons, Title VII requires that the charge be sworn,
11 [citation], and that the EEOC send notice of the charge to the named respondent.” *Id.* (citing 42
12 U.S.C. § 2000e-5(b)).

13 To satisfy this requirement, under federal regulations promulgated by the EEOC, a federal
14 employee complaining of discrimination by a governmental agency “must consult a[n] EEO
15 Counselor prior to filing a complaint in order to try to informally resolve the matter,” 29 C.F.R. §
16 1614.105(a), and he or she “must initiate contact with a Counselor within 45 days of the date of the
17 matter alleged to be discriminatory,” 29 C.F.R. § 1614.105(a)(1). “Although it does not carry the
18 full weight of statutory authority, failure to comply with this regulation has been held to be fatal to a
19 federal employee’s discrimination claim.” *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002)
20 (citing *Johnson v. United States Treasury Dept.*, 27 F.3d 415, 416 (9th Cir. 1994) (per curiam)). In
21 addition, a plaintiff must bring a civil action under Title VII within 90 days of receipt of a notice of
22 right to sue from the EEOC. 42 U.S.C. § 2000e-5(f)(1). “This ninety-day period is a statute of
23 limitations.” *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 383 (9th Cir. 1997) (citing *Scholar v.*
24 *Pacific Bell*, 963 F.2d 264, 266-67 (9th Cir. 1992)). “Therefore, if a claimant fails to file the civil
25 action within the ninety-day period, the action is barred.” *Id.* (citing *Scholar*, 963 F.2d at 267).

26 Here, all of the allegedly discriminatory conduct by Mr. Wang occurred on or before September
27 2012. *See* Request, ECF No. 1 at 6-12; Sexual Harassment Historical Accounts in Chronological
28 Events, ECF No. 27; EEO Counselor’s Report, ECF No. 28. Ms. Lau’s initial attempt to contact the

1 CREO office on September 28, 2012 arguably satisfies the timeliness requirement for contacting an
2 EEO counselor (even though she failed to follow-up with the CREO office after having missed the
3 appointment), *see* 29 C.F.R. § 1614.105, but there is no evidence to show that she ever filed a sworn
4 administrative charge or received a notice of right to sue. To allow her claims to proceed now
5 would be to allow her to “circumvent the EEOC’s investigatory and conciliatory role, as well as
6 deprive the charged party of notice of the charge.” *Babrocky*, 773 F.2d at 863. Thus, because Ms.
7 Lau has not shown that she exhausted her administrative remedies, to the extent her claims arise
8 under Title VII, they must be dismissed. But because it may be possible for her exhaust her
9 administrative remedies now that she apparently is proceeding with an EEOC complaint, *see* EEO
10 Counselor’s Report, ECF No. 28, the court dismisses her claims without prejudice.

11 2. *Exhaustion under the FTCA*

12 The doctrine of sovereign immunity bars actions against the United States except where it clearly
13 and explicitly consents to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976). The terms of
14 such consent, as expressly set forth by Congress, define the Court’s subject matter jurisdiction to
15 entertain suits against the United States. *United States v. Sherwood*, 312 U.S. 584, 590-91 (1940).
16 Absent a waiver, the sovereign immunity doctrine shields the federal government, its agencies, and
17 its federal employees acting in their official capacity from suit. *FDIC v. Meyer*, 510 U.S. 471, 475
18 (1992); *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).

19 The FTCA, which is the exclusive remedy for torts against federal officers acting in the scope of
20 their employment, 28 U.S.C. § 2679(b)(1), provides such a waiver, 28 U.S.C. § 2675(a). The FTCA
21 permits civil actions against the United States where federal employees commit negligent or
22 wrongful acts or omissions within the scope of their employment such that the law of the forum state
23 would consider the act or omission a tort. 28 U.S.C. § 1346(b)(1). Before filing suit, a plaintiff
24 must present his or her administrative claim to the appropriate agency within two years of the
25 incident, *see* 28 U.S.C. § 2401(b), and the agency must either “finally den[y]” her claim or fail to
26 arrive at a “final disposition of [her] claim within six months after it is filed,” *see* 28 U.S.C. §
27 2675(a). “The claim requirement of section 2675 is jurisdictional in nature and may not be waived.”
28 *Burns v. United States*, 764 F.2d 722, 723 (9th Cir. 1985). Where plaintiff fails to satisfy the claim

1 requirement, the district court cannot assert subject matter jurisdiction over the plaintiff's FTCA
2 claim. *See* 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 111-12 (1993); *Burns*, 764
3 F.2d at 723. The plaintiff in an action seeking relief under the FTCA bears the burden of showing
4 that he or she complied with the FTCA's administrative claim requirement. *See Bruce v. United*
5 *States*, 621 F.2d 914, 918 (8th Cir. 1980)

6 Here, there is nothing in the record to suggest that Ms. Lau ever presented a claim to the SSA,
7 and she argue otherwise in any of the documents she submitted in opposition to Mr. Wang's motion.
8 To the contrary, Mr. Wang provided evidence that the SSA has no record of receiving any
9 administrative complaint from her asserting the same claims raised in the present suit. Ledford
10 Declaration, ECF No. 5-2, ¶¶ 2-5. Thus, to the extent her claims arise under the FTCA, they must be
11 dismissed. But because she may still be able to present an administrative claim to the SSA, the court
12 dismisses her claims without prejudice.

13 **CONCLUSION**

14 Based on the foregoing, the court **GRANTS** Defendant's motion to dismiss. As stated above,
15 her claims, which arise either under Title VII or the FTCA, are **DISMISSED WITHOUT**
16 **PREJUDICE**. The Clerk of the Court shall close the file. Should Ms. Lau exhaust her
17 administrative remedies within the time allowed, she may file a new action.

18 This disposes of ECF Nos. 5.

19 **IT IS SO ORDERED.**

20 Dated: May 20, 2013



21 LAUREL BEELER
22 United States Magistrate Judge
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