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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CYNTHIA WHITTEN, an individual,
Plaintiff,
v.
MEGAN J. BRENNAN,
Postmaster General of the United States,
Defendant.

Case No.: 18-CV-2827 JLS (BGS)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS AND
DISMISSING WITHOUT
PREJUDICE PLAINTIFF’S
COMPLAINT**

(ECF No. 5)

Presently before the Court is Defendant Megan J. Brennan’s Motion to Dismiss Plaintiff’s Complaint (“Mot.,” ECF No. 5). Also before the court are Plaintiff Cynthia Whitten’s Opposition to (“Opp’n” ECF No. 6) and Defendant’s Reply in Support of (“Reply,” ECF No. 7) the Motion. The Court vacated the hearing and took the matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). ECF No. 8. Having carefully considered Plaintiff’s Complaint, the Parties’ arguments, and the law, the Court **GRANTS** Defendant’s Motion.

BACKGROUND

Plaintiff is an employee of the United States Postal Service (“USPS”). ECF No. 1 (“Compl.”) ¶ 11. Plaintiff alleges that she was the victim of both sexual harassment and racial discrimination in violation of Title VII because of certain conduct by her supervisor.

1 *See generally id.* ¶¶ 11–49. The alleged conduct by Plaintiff’s supervisor includes
2 Plaintiff’s supervisor “grabbing his penis suggestively and saying: ‘Good Morning![,]’
3 taunting her,” and “ogling and leer[ing] at Plaintiff in a sexual and intimidating manner.”
4 *Id.* ¶ 16.

5 Plaintiff filed a complaint with the EEOC on or about April 16, 2012. *Id.* ¶ 8.
6 Following an administrative hearing, the EEOC denied Plaintiff’s claims. *See id.*
7 Although Plaintiff appealed the EEOC’s denial, the EEOC dismissed Plaintiff’s appeal on
8 September 18, 2018, because the appeal was “untimely.” *See id.* ¶ 9; *see also* Compl. Ex.
9 A, ECF No 1-2.

10 On December 17, 2018, Plaintiff filed this lawsuit, alleging two causes of action for
11 sexual harassment and racial discrimination under Title VII of the Civil Rights Act, 42
12 U.S.C. § 2000e-2(a)(1). *See generally* ECF No. 1. Claiming that Plaintiff’s action is
13 legally infirm because Plaintiff failed to exhaust her administrative remedies by failing to
14 file a timely EEOC appeal, Defendant filed the instant Motion on June 10, 2019. *See*
15 *generally* ECF No. 5.

16 **LEGAL STANDARD**

17 Federal Rule of Civil Procedure 12(b)(1) allows a party to assert by motion the
18 defense that there is a lack of subject matter jurisdiction. Fed. R. Civ. P. 12. “A Rule
19 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*,
20 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th
21 Cir.2000). “A ‘facial’ attack accepts the truth of the plaintiff’s allegations but asserts that
22 they ‘are insufficient on their face to invoke federal jurisdiction.’” *Leite v. Crane Co.*, 749
23 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air*, 373 F.3d at 1039). “The district court
24 resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the
25 plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s favor,
26 the court determines whether the allegations are sufficient as a legal matter to invoke the
27 court’s jurisdiction.” *Id.* (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)).

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1 ANALYSIS

2 Defendant argues that jurisdiction is lacking because Plaintiff failed to exhaust her
3 administrative remedies, “which is a precondition to filing suit in district court.” *See* ECF
4 No. 5-1 at 2 (citing *Vinieratos v. U.S. Dept. of Air Force*, 939 F.2d 762, 768 (9th Cir.
5 1991)). Defendant specifically argues that Plaintiff failed to exhaust her administrative
6 remedies by failing to submit a timely appeal to the EEOC. *Id.* at 3. Defendant therefore
7 argues that Plaintiff’s Complaint “should be dismissed without leave to amend.” *Id.* at 4.
8 Plaintiff seemingly concedes that she failed to exhaust her administrative remedies but
9 nonetheless argues that she is “excused from the exhaustion requirement because her claim
10 is administratively futile[] and she would suffer irreparable harm if the requirement is
11 enforced against her.” Opp’n at 7. Defendant counters that there are no exceptions to the
12 mandatory exhaustion of administrative remedies under Title VII and Plaintiff does not
13 establish eligibility for equitable tolling. Reply at 1–2. Consequently, the Court must first
14 determine whether there are exceptions to the exhaustion of administrative remedies
15 requirement and, if so, whether Plaintiff is covered by any of those exceptions.

16 Plaintiff relies on *Daly-Murphy v. Winston*, 837 F.2d 348 (9th Cir. 1988), in asserting
17 that there are exceptions to Title VII’s requirement for exhaustion of administrative
18 remedies. *See* Opp’n at 4. In *Daly-Murphy*, the district court granted summary judgment
19 against an anesthesiologist with the United States Department of Veterans Affairs who
20 alleged that her clinical privileges had been suspended in violation of the Administrative
21 Procedure Act and Privacy Act. 837 F.2d at 350. The Ninth Circuit affirmed, finding that
22 the district did not abuse its discretion in requiring the appellant to exhaust her
23 administrative remedies because “the administrative procedures involved . . . [we]re valid
24 and no irreparable injury [wa]s involved.” *Id.* at 354. In reaching this conclusion, the court
25 explained:

26 Under normal circumstances, a party must exhaust its remedies
27 before it can obtain judicial review of an agency decision.” . . .
28 The purpose of the exhaustion doctrine is to allow the
administrative agency in question to exercise its expertise over

1 the subject matter and to permit the agency an opportunity to
2 correct any mistakes that may have occurred during the
3 proceeding, thus avoiding unnecessary or premature judicial
4 intervention into the administrative process. . . . There are
5 several exceptions to the exhaustion requirement, however.
6 Exhaustion of administrative remedies is not required where the
7 remedies are inadequate, inefficacious, or futile[;] where pursuit
8 of them would irreparably injure the plaintiff[;] or where the
9 administrative proceedings themselves are void. . . . Unless it is
10 specifically required by statute, application of the doctrine of
11 exhaustion of administrative remedies is within the sound
12 discretion of the district court. . . . We will not disturb a district
13 court’s determination of whether exhaustion is required unless
14 that has been a clear abuse of this limited discretion.

15 *Id.* (first, second, fifth, and sixth alterations in original) (quoting *United Farm Workers v.*
16 *Ariz. Agr. Empm’t*, 669 F.2d 1249, 1253 (9th Cir. 1982)).

17 Consequently, although the Ninth Circuit in *Daly-Murphy* acknowledged the
18 existence of exceptions to the doctrine of exhaustion of administrative remedies, it also
19 made clear that those exceptions are “limited” and that there is significant importance in
20 preserving the administrative process. Further, neither the district court nor the Ninth
21 Circuit determined that application of any of the enumerated exceptions was required in
22 *Daly-Murphy*.

23 Nonetheless, Plaintiff argues—without citation to any binding or persuasive
24 authority—that she should be excused from the exhaustion requirement because
25 presentation of her claim would have been “administratively futile” and she would be
26 “irreparably harmed” if the exhaustion requirement was enforced against her. *See Opp’n*
27 6 at 4. As to her futility argument, Plaintiff states that “[f]utility is shown where the EEOC
28 . . . will clearly reject the claims brought forth, despite the showing made by the claimant.”
Id. (citing *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 176 (5th Cir. 2012)).
Plaintiff claims that filing an appeal here would have been futile for two reasons: First,
although the EEOC obtained affidavits from several women corroborating Plaintiff’s
allegations of sexual harassment, the EEOC ultimately denied Plaintiff’s claims following

1 an administrative hearing. *Id.* at 4. Second, since Plaintiff filed her EEOC complaint,
2 several other women have come forward with similar allegations concerning Plaintiff's
3 supervisor; nonetheless, "the EEOC has yet to find that the USPS has discriminated against
4 any of these women" and "the USPS has not properly reprimanded [Plaintiff's
5 supervisor]." *Id.*

6 Despite Plaintiff's invitation, the Court declines to speculate as to the outcome of
7 the EEOC appeal from which Plaintiff abstained. It is possible that the EEOC may have
8 denied Plaintiff's appeal, but Plaintiff introduces no evidence that her appeal would have
9 been *futile*, *i.e.*, that the EEOC clearly would have denied her appeal. *Cf. Fowlkes v.*
10 *Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015) (reversing district court's dismissal
11 for failure to exhaust administrative remedies because the appellant "may have a colorable
12 argument that filing a charge alleging discrimination based on his transgender status would
13 have been futile" because "the EEOC had developed a consistent body of decisions that
14 did not recognize Title VII claims based on the complainant's transgender status").

15 Further, concluding that Plaintiff has demonstrated futility under these
16 circumstances would undermine the very purpose of the exhaustion doctrine, which "is to
17 allow the administrative agency in question to exercise its expertise over the subject matter
18 and to permit the agency an opportunity to correct any mistakes that may have occurred
19 during the proceeding, thus avoiding unnecessary or premature judicial intervention into
20 the administrative process." *United Farm Workers*, 669 F.2d at 1253. Had Plaintiff timely
21 appealed, the EEOC would have been afforded the opportunity to use its expertise and
22 decide if there were any mistakes that had occurred that needed to be corrected; however,
23 because Plaintiff declined timely to appeal, the EEOC justifiably denied review.

24 This Court must protect the integrity of the administrative process; allowing an
25 exception to the exhaustion requirement because a plaintiff merely fears that the EEOC
26 would not find in her favor on appeal does not do so. If the Court were to permit a plaintiff
27 to miss the administrative appeal deadline and then file suit arguing that exhaustion would
28 have been futile, the Court would be "encourag[ing] the deliberate bypass of the

1 administrative scheme, and . . . undermining the agency’s ability to ‘correct its own
2 mistakes and to preclude the need for judicial review.’” *See Montes v. Thornburgh*, 919
3 F.2d 531, 537 (9th Cir. 1990). The Court therefore concludes that Plaintiff has failed to
4 show that exhaustion would be futile on the facts as alleged.

5 Plaintiff also argues that she should be excused from the exhaustion requirement
6 because she will be irreparably harmed if she is not permitted to bring this action. *See*
7 *Opp’n* at 6. In making this argument, Plaintiff relies on the Fifth Circuit’s decision in *Gulf*
8 *Restoration Network*. *See Opp’n* at 6. In *Gulf Restoration Network*, however, the Fifth
9 Circuit concluded that the plaintiffs did not qualify for, let alone argue for the application
10 of, any established exception to the exhaustion requirement. 683 F.3d at 158, 176, 180.
11 The court “explained that exceptions [to administrative exhaustion] apply . . . only in
12 extraordinary circumstances and that [t]here are limited bases for excusing administrative
13 exhaustion.” *Id.* at 176 (alterations in original) (citations omitted) (internal quotation
14 marks omitted). Although the Fifth Circuit noted that “[a] court may . . . excuse the failure
15 to exhaust where ‘irreparable injury will result absent immediate judicial review,’” such
16 circumstances simply did not exist in *Gulf Restoration Network*. *Id.* (citation omitted).

17 Plaintiff claims that she “will be irreparably harmed if she is not permitted to bring
18 this civil action” because “[i]t took the EEOC over two years to dismiss Plaintiff’s appeal”
19 and “the USPS has done *little to nothing* to remedy [her supervisor]’s continuing
20 harassment,” while “Plaintiff continues to be harmed, as she was forced to leave her
21 preferred position and transfer to a less favorable location due to Defendant’s apathy and
22 ineptitude.” *Opp’n* at 6. Plaintiff cites no authority, however, supporting her position that
23 this alleged harm qualifies as irreparable absent immediate judicial review.

24 On the other hand, Defendant cites persuasive authority cautioning against
25 “allow[ing] a plaintiff to circumvent the administrative procedures set up by Congress”
26 under circumstances such as these. *See* ECF No. 5-1 at 3 (quoting *Jenkins v. Potter*, 271
27 F. Supp. 2d 557, 563 (S.D.N.Y. 2003)). In *Jenkins*, the court granted summary judgment
28 in favor of the USPS where the plaintiff had failed timely to appeal an EEOC decision, and

1 therefore also failed to exhaust his administrative remedies. 271 F. Supp. 2d at 563.
2 Although the plaintiff had filed his lawsuit within 90 days of the dismissal of his untimely
3 EEOC appeal, the court noted that the timely filing of the lawsuit could “[]not cure the
4 untimeliness of the original appeal.” *Id.*

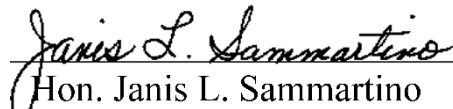
5 So, too, here. Plaintiff has failed to demonstrate either that she failed timely to
6 appeal the EEOC’s denial because of futility or irreparable harm or that she is entitled to
7 equitable tolling. *See* ECF No. 5-1 at 3; Reply at 2–3. The Court therefore **GRANTS**
8 Defendant’s Motion. Although the Court harbors serious doubts that Plaintiff can allege
9 additional facts that will allow her to cure the above-mentioned deficiencies, the Court
10 **GRANTS** Plaintiff’s request for leave to amend. *See* Opp’n at 7.

11 **CONCLUSION**

12 In light of the foregoing, the Court **GRANTS** Defendant’s Motion to Dismiss and
13 **DISMISSES WITHOUT PREJUDICE** Plaintiff’s Complaint. Plaintiff **MAY FILE** an
14 amended complaint within thirty (30) days of the electronic docketing of this Order.
15 *Should Plaintiff fail to file an amended complaint within that time, this action shall remain*
16 *dismissed without prejudice without further Order of the Court.*

17 **IT IS SO ORDERED.**

18
19 Dated: October 28, 2019


Hon. Janis L. Sammartino
United States District Judge