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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LETICIA NAVARRO,  
  
Plaintiff,  
  
v.  
  
KEVIN MCALEENAN, ACTING  
SECRETARY, UNITED STATES  
DEPARTMENT OF HOMELAND  
SECURITY,  
  
Defendant.

Case No.: 3:18-cv-2908-BEN-NLS

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS PLAINTIFF'S  
AMENDED COMPLAINT  
[Doc. 31]**

Defendant Kevin McAleenan, Acting Secretary of the United States Department of Homeland Security, moves to dismiss Plaintiff Leticia Navarro's Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for her failure to name him as the proper defendant within the applicable statute of limitations period. For the following reasons, the motion to dismiss is **GRANTED**.

1 I. BACKGROUND<sup>1</sup>

2 Plaintiff Leticia Navarro is a Hispanic woman who works as a Group Supervisor  
3 (GS-14) for Immigration and Customs Enforcement (“ICE”). On May 15, 2012, ICE  
4 announced a “Merit Promotion Opportunity” for a GS-15 position. Plaintiff applied for  
5 the position and was one of seven individuals interviewed. One of Plaintiff’s supervisors  
6 was the “Selecting Official” for the position and appointed a three-person panel to rank  
7 and assess the applicants. The panelists ranked Plaintiff fifth, lower than the Hispanic male  
8 applicant. After the official for the open position retired, Plaintiff was removed from her  
9 position as acting supervisor of her department.

10 Plaintiff claims she was not selected for the promotion because of her national origin  
11 and sex. She further alleges that two members of the selection panel discriminated against  
12 her because they were aware of her past EEO complaints against the Agency. Following  
13 an Administrative Judge’s denial of Plaintiff’s claims, Plaintiff appealed to the Equal  
14 Employment Opportunity Commission (“EEOC”). On October 18, 2018, the EEOC  
15 affirmed the Administrative Judge’s decision, finding that Plaintiff did not establish her  
16 qualifications were “plainly superior to those of the selectee” and that there was no  
17 evidence showing “prior EEO activity or lack thereof of the candidates played any role in  
18 the final determination.” Ex. A to Complaint at 5-6.

19 On December 29, 2018, Plaintiff filed the present lawsuit against ICE and her two  
20 supervisors. Doc. 1. On May 13, 2019, the Court dismissed Plaintiff’s Complaint because  
21 she failed to state a claim, did not name the proper defendant, and did not properly serve  
22 her Complaint. Doc. 23. The Court’s dismissal order cautioned that should Plaintiff “re-  
23 file her lawsuit, [she] would do well to heed our Ninth Circuit jurisprudence on the  
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26 <sup>1</sup> On a motion to dismiss, the Court accepts as true the factual allegations set forth in  
27 the Complaint and reasonably construes the pleadings in the light most favorable to the  
28 nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th  
Cir. 2008).

1 parameters within which an individual may sue the federal government under Title VII.”  
2 *Id.* at 6. In addition, the Court expressly declined to decide whether Plaintiff’s lawsuit was  
3 barred by the applicable statute of limitations, finding the issue premature because it had  
4 not been fully briefed by the parties. *Id.* at 2, n.3.

5 On May 20, 2019, Plaintiff filed a First Amended Complaint against “James M.  
6 Murray, Secretary, United States Department of Homeland Security.”<sup>2</sup> Doc. 24. On May  
7 21, 2019, Plaintiff filed a Second Amended Complaint against “Kevin M. McAleenan,  
8 Acting Secretary of the Department of Homeland Security,” instead. Doc. 26. The next  
9 day, Plaintiff withdrew both her First and Second Amended Complaints and replaced them  
10 with an “Amended Complaint,” Doc. 29. Docs. 27-28. In her Amended Complaint,  
11 Plaintiff brings claims for discrimination and retaliation under Title VII against Kevin M.  
12 McAleenan.

## 13 II. DISCUSSION

14 Kevin McAleenan, Acting Secretary of the Department of Homeland Security (“the  
15 Secretary”), moves to dismiss Plaintiff’s Amended Complaint, arguing that Plaintiff’s  
16 failure to timely name him as the proper defendant bars her action as a matter of law. The  
17 Court agrees: the Amended Complaint is untimely and cannot be saved under Rule 15(c)’s  
18 relation back doctrine or by equitable tolling.

### 19 A. Timeliness

20 Under 42 U.S.C. § 2000e-5(f)(1), a claimant challenging an EEOC dismissal has 90  
21 days to bring her civil action in district court.<sup>3</sup> “The requirement for filing a Title VII civil  
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24 <sup>2</sup> The Court notes that Mr. Murray is the Director of the United States Secret Service,  
not the Secretary of the DHS. See [www.secretservice.gov/about/leadership](http://www.secretservice.gov/about/leadership).

25 <sup>3</sup> The EEOC is also required to notify the claimant of the dismissal and that the  
26 claimant has 90 days from receipt of its letter to file a civil action. See 42 U.S.C. § 2000e-  
27 5(f)(1) (1988). The parties do not dispute the EEOC’s compliance with that requirement.  
Indeed, Plaintiff’s right-to-sue letter attached to her Complaint, Exhibit A, reflects that the  
28 EEOC informed Plaintiff of that information. See Ex. A at p. 7 (“You have the right to file  
a civil action in an appropriate United States District Court **within ninety (90) calendar**

1 action within 90 days from the date the EEOC dismisses a claim constitutes a statute of  
2 limitations.” *Scholar v. Pacific Bell*, 963 F.2d 264, 266-67 (9th Cir. 1992). Accordingly,  
3 “[i]f [a] claimant fails to file within [the] 90-day period, the action is barred.” *Id.*

4 Here, the parties agree that Plaintiff had until January 16, 2019—90 days from the  
5 October 18, 2018 EEOC letter—to file a complaint naming the Secretary as the proper  
6 defendant.<sup>4</sup> *See* Doc. 31-1 at 5:1; Doc. 33 at 6:18. Although Plaintiff’s initial Complaint  
7 was filed within the 90-day statute of limitations on December 29, 2018, it was dismissed  
8 in part because it failed to name the proper defendant; rather, it improperly named the  
9 agency, itself, and two supervisory employees. *See* Doc. 23. Plaintiff then filed a First  
10 Amended Complaint on May 20, 2019, again naming the wrong defendant—this time, the  
11 Director of the United States Secret Service. Finally, on May 21, 2019, Plaintiff filed a  
12 Second Amended Complaint properly naming as defendant the Acting Secretary of the  
13 Department of Homeland Security.

14 Unfortunately for Plaintiff, her May 21, 2019 Amended Complaint falls well outside  
15 of the 90-day statute of limitations, and thus, it is barred. *See Mahoney v. U.S. Postal*  
16 *Service*, 884 F.2d 1194, 1196 (9th Cir. 1989) (“Failure to name the proper defendant within  
17 the limitations period deprives the district court of jurisdiction over the matter.”). In  
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19 \_\_\_\_\_  
20 **days** from the date that you receive this decision. . . . [Y]ou must name as the defendant in  
21 the complaint the person who is the official Agency head or department head, identifying  
22 that person by his or her full name and official title. Failure to do so may result in the  
dismissal of your case in court.”) (emphasis in original).

23 <sup>4</sup> The Court addressed the proper defendant requirement in its prior order of  
24 dismissal, explaining:

25 In a Title VII action, the proper defendant is the head of the department,  
26 agency, or unit, as appropriate.” *Sommartino v. United States*, 255 F.3d  
27 704, 707, n. 1 (9th Cir. 2001). Put another way, the “agency itself is  
28 not a proper defendant.” *Parker v. Shinseki*, 2013 WL 12202711, at \*6  
(C.D. Cal. Sep. 17, 2013) . . .

Doc. 23 at 5.

1 *Mahoney*, the Ninth Circuit affirmed the district court's dismissal under a similar set of  
2 facts. There, the pro se plaintiff timely filed a Title VII lawsuit against the United States  
3 Postal Service but failed to name the correct defendant, the Postmaster General. Mahoney  
4 later amended her complaint to name the Postmaster General, but she did so after the statute  
5 of limitations period had expired. The Ninth Circuit affirmed the district court's dismissal  
6 of Mahoney's complaint for lack of jurisdiction, holding that, although the original  
7 complaint was timely filed, Mahoney's claims were barred because she did not attempt to  
8 add the Postmaster General until "well after the limitations period had run." *Id.* at 1197.

9 As in *Mahoney*, Plaintiff did not name the proper defendant until well after the 90-  
10 day limitations period had run. *See id.* Thus, the Court must dismiss her Amended  
11 Complaint, unless she can establish either: (1) that her Amended Complaint relates back to  
12 her original December 29, 2018 Complaint under Federal Rule of Civil Procedure 15(c),  
13 or (2) the 90-day statute of limitations should be equitably tolled. As discussed below,  
14 Plaintiff establishes neither.

#### 15 **B. Relation Back**

16 Rule 15(c)(1)(C) permits an amendment to a pleading to "relate back" to the original  
17 pleading's filing date when:

18 the amendment changes the party or the naming of the party against whom a  
19 claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period  
20 provided by Rule 4(m) for serving the summons and complaint, the party to  
be brought in by amendment:

- 21 (i) received such notice of the action that it will not be prejudiced in  
defending on the merits; and
- 22 (ii) knew or should have known that the action would have been brought  
23 against it, but for a mistake concerning the proper party's identity.

24 Fed. R. Civ. P. 15(c)(1)(C). Importantly, where "a United States officer or agency is added  
25 as a defendant by amendment," Rule 15(c)(1)(C)(i) and (ii)'s notice requirements "are  
26 satisfied if, during the stated period, process was delivered or mailed to the United States  
27 attorney or the United States attorney's designee, to the Attorney General of the United  
28 States, or to the officer or agency." Fed. R. Civ. P. 15(c)(1)(C)(2). "In other words, the

1 agency is considered to have received notice for purposes of relation back even if it was  
2 not served, so long as at least one of either the U.S. Attorney or Attorney General received  
3 delivery or mailing of process within 90 days of the original complaint being filed.”  
4 *Silbaugh v. Chao*, 2018 WL 3769798, at \*2 (W.D. Wash. Aug. 9, 2018).

5 Here, Plaintiff did not serve either the United States Attorney or the Attorney  
6 General prior to the statute of limitation’s January 16, 2019 deadline. Likewise, Plaintiff  
7 did not serve the Secretary within the limitations period, despite delivering a copy of her  
8 original complaint to a local ICE supervisor on January 9, 2019. *See, e.g., Schoo v. United*  
9 *States Postal Service*, 865 F.2d 1259, 1988 WL 142904, at \*2 (4th Cir. 1988) (“a  
10 supervisory employee of a local post office is not such an official” within the meaning of  
11 Rule 15(c)(2)); *see also Dacus v. United States Postal Service*, 1987 WL 14368, at \*2 (S.D.  
12 Tex. June 15, 1987) (“Service on a local post office official is not equivalent to service on  
13 the Postmaster General.”). Because Plaintiff failed to serve notice on the Secretary within  
14 the 90-day statute of limitations, her Amended Complaint does not relate back under Rule  
15 15(c).<sup>5</sup>

### 16 C. Equitable Tolling

17 The doctrine of equitable tolling also cannot save Plaintiff’s Amended Complaint.  
18 Because the 90-day filing period is a statute of limitations, it is subject to the doctrine of  
19 equitable tolling. *Scholar v. Pacific Bell*, 963 F.2d 264, 266-67 (9th Cir. 1992). “Equitable  
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22 <sup>5</sup> The Court notes Plaintiff’s concession that, in fact, her Amended Complaint does  
23 *not* relate back to her original Complaint. Doc. 33 at 3-5. The Court is not persuaded by  
24 Plaintiff’s unsupported argument that the Court’s order setting a deadline by which she  
25 could file an amended complaint somehow trumps the statute of limitations or the need for  
26 her amended complaint to “relate back” to the original complaint’s timely filing. Indeed,  
27 the Court’s order dismissing Plaintiff’s original complaint explained that it declined to  
28 resolve the timeliness of her complaint because that issue was not “fully briefed.” Doc. 23  
at 2, n. 3. Instead, the Court gave Plaintiff an opportunity to amend and explain why she  
failed to name the proper defendant in her original complaint within the statute of  
limitations period. Despite that opportunity, Plaintiff has not offered any justification.

1 tolling, however, is only applied 'sparingly,' and the court is 'much less forgiving in  
2 receiving late filings where the claimant failed to exercise due diligence in preserving his  
3 legal rights.'" *Long v. Paulson*, 349 Fed. Appx. 145, 146 (9th Cir. 2009) (quoting *Irwin v.*  
4 *Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Plaintiff does not offer any justification  
5 for her failure to name the proper defendant within the 90-day period, despite being  
6 represented by a licensed attorney. Moreover, the Ninth Circuit's precedent is clear that  
7 "ordinary negligence will not justify equitable tolling." *Spitsyn v. Moore*, 345 F.3d 796,  
8 800 (9th Cir. 2003). Accordingly, Plaintiff cannot invoke equitable tolling to save her  
9 Amended Complaint. *See also, e.g., Long*, 349 Fed. Appx. at 147 (affirming district court's  
10 dismissal of Title VII complaint filed two days after the statute of limitations deadline, as  
11 well as district court's conclusion that "a garden variety claim of excusable neglect" did  
12 not warrant equitable tolling).<sup>6</sup>

### 13 III. CONCLUSION

14 For the previous reasons, Defendant's Motion to Dismiss Plaintiff's Amended  
15 Complaint is **GRANTED**, and this action is **DISMISSED with prejudice**.

16 **IT IS SO ORDERED.**

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18 Dated: November 15, 2019

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21 **HON. ROGER T. BENITEZ**  
22 United States District Judge  
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26 <sup>6</sup> Although Plaintiff suggests Defendant's motion is a "disguised summary judgment  
27 motion," the Court construes it as a motion to dismiss. *See* Doc. 33 at 11-12. The issues  
28 before this Court are legal ones and do not require it to weigh evidence or the merits of  
Plaintiff's factual allegations. Moreover, Plaintiff does not raise any matters outside of the  
pleadings.