

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

Eastern District of Kentucky
FILED
APR 01 2021
AT LEXINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

JOYCE SEARS,

Plaintiff,

V.

UNITED STATES OF AMERICA,

Defendant.

CIVIL NO. 6:21-06-KKC

OPINION AND ORDER

*** **

This matter is before the Court on the United States' Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The United States' motion to dismiss is predicated on the plaintiff's alleged failure to present and exhaust her administrative claims, under the Federal Tort Claims Act, as expressly required by 28 U.S.C. § 2675(a). (DE 6). In response, Plaintiff argues that she has presented her claims to the Department of Health and Human Services (HHS), and that she expects to receive a response from the HHS as to her claims no later than April 14, 2021. She asks the Court to hold this case in abeyance pending exhaustion. (DE 7). However, case law suggests that dismissal is the appropriate result.

In *McNeil v. United States*, 508 U.S. 106 (1993), the Supreme Court clarified that a prematurely filed FTCA claim must be dismissed even if the plaintiff ultimately exhausts his administrative remedies before "substantial progress" has occurred in the case. 508 U.S. at 110-13. There, the plaintiff filed a FTCA claim against the United States in federal court before exhausting his administrative remedies. After exhausting, the plaintiff notified the district court that his administrative claim had been denied. The district court granted the

United States' motion to dismiss the plaintiff's complaint as premature due to the failure to exhaust before filing. The Supreme Court affirmed, settling a circuit split over whether a premature FTCA complaint could survive dismissal if administrative exhaustion occurred before "substantial progress" had been made in the federal litigation. *See id.* at 110-13.

Accordingly, for these reasons, the Court hereby ORDERS that the United States' motion to dismiss (DE 6) is GRANTED. The Court shall enter a corresponding Judgment.

Dated April 1, 2021



Signed By:
Karen K. Caldwell
United States District Judge