

HONORABLE RICHARD A. JONES

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JOSEPH ESSILFIE,

11 Plaintiff,

12 v.

13 ELIZABETH KRACEN MD,

14 Defendant.
15

CASE NO. C18-828 RAJ

ORDER

16
17 This matter comes before the Court upon the United States' Motion to Dismiss.
18 Dkt. # 7. For the reasons set forth below, the Court **GRANTS** the Motion to Dismiss.

19 **I. BACKGROUND**

20 This lawsuit arises from Plaintiff's encounters with his doctor, Defendant Dr.
21 Kracen. During her care of the Plaintiff, Dr. Kracen was employed as a treating
22 physician at Neighborcare Heath, a federally funded healthcare clinic located in Seattle,
23 Washington deemed eligible for Federal Tort Claims Act malpractice coverage. Dkt. # 8
24 at pp. 1-2, ¶ 5. On March 5, 2018, Plaintiff filed a Complaint in King County Superior
25 Court alleging that he approached Dr. Kracen with a request to check his blood for
26 poison. Dkt. # 1-4 at 1. Plaintiff alleges Dr. Kracen "refused several times," then
27 referred him to the University of Washington Occupational Medicine Clinic for further

1 treatment, but later withdrew the referral.¹ *Id.* Plaintiff alleges Dr. Kracen’s conduct
2 indicated she wanted him dead, and accordingly asserts an intentional infliction of
3 emotional distress claim against her. *Id.* at 2. Plaintiff seeks \$10,000,000 in damages.
4 *Id.*

5 Plaintiff initially filed in state court, but Dr. Kracen later removed this action to
6 this Court. Dkt. # 1. On June 13, 2018, the United States moved to dismiss pursuant to
7 Fed. R. Civ. P. 12 (b)(1).² Dkt. # 7. Plaintiff’s response was due July 2, 2018, but
8 Plaintiff did not file any response by this deadline. Instead, Plaintiff filed a “letter”
9 stating that he would appear before the Court on July 24 on direction by “Defendants’
10 attorney.” Dkt. # 10. The United States later filed a “status memorandum” explaining
11 that they gave no such direction. Dkt. # 11. Plaintiff finally filed a Response on August
12 7, 2018. Dkt. # 11. The United States did not file a reply.

13 II. DISCUSSION

14 The United States has moved to dismiss this case for lack of subject matter
15 jurisdiction. Fed. R. Civ. P. 12(b)(1). When considering a motion to dismiss pursuant to
16 Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any
17 evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v.*
18 *United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989);
19 *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court
20 is presumed to lack subject matter jurisdiction until the plaintiff establishes otherwise.
21 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v.*

23 ¹ Correspondence from the University of Washington Occupational and Environmental Medicine
24 Clinic, which Plaintiff attaches as exhibits to his Complaint, confirms Dr. Kracen referred
25 Plaintiff to the University of Washington clinic, but the clinic elected not to schedule an
26 appointment for the Plaintiff because it did not have “the necessary and/or appropriate service or
27 specialist to treat [Plaintiff] at this time.” Dkt. # 1-4 at 5.

² The United States defends this action due to Dr. Kracen’s status as an employee at a federally
funded health clinic.

1 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the
2 burden of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at
3 1225; *Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th
4 Cir. 1979).

5 Because Plaintiff is proceeding *pro se*, the Court must construe his pleading
6 liberally, and the pleading, “however inartfully pleaded, must be held to less stringent
7 standards than formal pleadings drafted by lawyers[.]” *Erickson v. Pardus*, 551 U.S. 89,
8 94 (2007) (citation omitted). Nonetheless, *pro se* litigants are still “bound by the rules of
9 procedure.” *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995).

10 **A. The Court Lacks Jurisdiction Over Plaintiff’s Claims**

11 The United States seeks to dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ.
12 P. 12(b)(1) based on Plaintiff’s failure to exhaust his administrative remedies, thereby
13 denying this Court subject matter jurisdiction. Dkt. # 7 at 1. The Federal Tort Claims
14 Act (“FTCA”) is the exclusive remedy for state law torts committed by federal
15 employees within the scope of their employment. 28 U.S.C. § 2679(b)(1). Under the
16 Federally Supported Health Centers Assistance Act, 42 U.S.C. § 233(a), employees of
17 federally funded medical clinics are deemed to be federal employees for purposes of the
18 FTCA.

19 The FTCA bars claimants from bringing suit in federal court until they have
20 exhausted their administrative remedies. *McNeil v. United States*, 508 U.S. 106, 113
21 (1993). Specifically, the FTCA provides: “An action shall not be instituted upon a claim
22 against the United States . . . unless the claimant shall have first presented the claim to the
23 appropriate Federal agency and his claim shall have been finally denied by the agency . . .
24 .” 28 U.S.C. § 2675(a). Failure of an agency to make final disposition of a claim within
25 six months is deemed to be a final denial of the claim. *Id.* “The requirement of an
26 administrative claim is jurisdictional.” *Brady v. United States*, 211 F.3d 499, 502 (9th
27 Cir. 2000). “Because the requirement is jurisdictional, it must be strictly adhered to.” *Id.*

1 “This is particularly so since the FTCA waives sovereign immunity.” *Id.* On this issue,
2 the statutory language is clear that a court does not have jurisdiction before
3 administrative remedies have been exhausted, and a court must dismiss any action that is
4 initiated prematurely. *McNeil*, 508 U.S. at 111.

5 In this case, Plaintiff’s Complaint fails to establish that the Court has subject
6 matter jurisdiction, because Plaintiff has failed to show that he has exhausted his
7 administrative remedies under the FTCA. Plaintiff did not file an administrative tort
8 claim with the United States Department of Health and Human Services (“HHS”)—the
9 appropriate agency in this case—before filing suit in court. Dkt. # 8 at p. 1, ¶¶ 3-4.
10 Moreover, Plaintiff did not file a timely response to the Motion to Dismiss; accordingly,
11 the Court considers Plaintiff’s lack of response as an admission that the Motion to
12 Dismiss has merit. W.D. Wash. Local Civil Rule 7(b)(2). However, even if the Court
13 were to consider Plaintiff’s untimely Response (Dkt. # 12), it would reach the same
14 result. Plaintiff’s Response is a two-page filing that does not dispute the basic
15 jurisdictional arguments of the Motion to Dismiss. Dkt. # 12. Plaintiff apparently
16 concedes that Dr. Kracen is a “federal employee,” but asserts that the Court should reject
17 the Motion to Dismiss because he was not initially given a “doctor-patient law form” by
18 Dr. Kracen. Dkt. # 12 at 2. This is not a legal requirement of the FTCA, nor does it
19 diminish or excuse Plaintiff’s failure to exhaust his administrative remedies.

20 Accordingly, this Court lacks subject matter jurisdiction over Plaintiff’s claims.
21 The United States’ Motion to Dismiss is **GRANTED**. Dkt. # 7.

22 **B. The Court Grants Plaintiff Leave to Amend**

23 Dismissal of a *pro se* complaint without leave to amend is proper only if it is clear
24 that the deficiencies cannot be cured by amendment. *Terrell v. JPMorgan Chase Bank*
25 *N.A.*, C14-930 MJP, 2014 WL 5449729, at *1 (W.D. Wash. Oct. 24, 2014) (citing
26 *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002)). “A district court,
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1 | however, does not abuse its discretion in denying leave to amend where amendment
2 | would be futile.” *Id.*

3 | The Court is skeptical that Plaintiff can overcome the jurisdictional deficiencies in
4 | his Complaint. Nonetheless, in considering Plaintiff’s *pro se* posture, the Court finds it
5 | premature to dismiss this case with prejudice at this juncture. The United States does not
6 | argue that permitting leave to amend would be futile, and indeed requests this Court
7 | dismiss the Complaint “without prejudice.” Dkt. # 7 at 5. The Court shall thus afford
8 | Plaintiff one opportunity to amend his Complaint to cure the deficiencies identified
9 | above. **Plaintiff shall file his amended pleading no later than two weeks after the**
10 | **date of this Order.** If Plaintiff fails to adequately allege subject matter jurisdiction, or if
11 | Plaintiff fails to file an amended pleading by this deadline, this Court will dismiss this
12 | action with prejudice either *sua sponte* or by motion.

13 | **III. CONCLUSION**

14 | For the foregoing reasons, the United States’ Motion to Dismiss is **GRANTED.**
15 | Dkt. # 7. Plaintiff shall file an amended pleading within two weeks of the date of this
16 | Order; otherwise, the Court will dismiss this case with prejudice.

17 | Dated this 31st day of August, 2018.

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21 | The Honorable Richard A. Jones
22 | United States District Judge