

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDY GUTTKNECHT : CIVIL ACTION
 :
 v. :
 :
 :
 :
 UNITED STATES OF AMERICA : NO. 97-866

MEMORANDUM of DECISION

Norma L. Shapiro, J.

April 28, 1998

Plaintiff Judy Guttknecht ("Guttknecht") slipped and fell on a patch of ice while working at the Naval Aviation Supply Office (the "Naval Office") in northeast Philadelphia on the morning of January 28, 1994. She filed an action against the United States (the "government") under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671, et seq. The case proceeded to a non-jury trial. The court will enter the following findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a).

I. Findings of Fact

1. In August, 1993, Guttknecht was a federal prisoner incarcerated in West Virginia. (N.T. 3/9/98 at 97).

2. In August, 1993, Guttknecht was selected to participate in a work-release program at the Naval Office in Philadelphia. The Naval Office participated in the work-release program by an inter-agency agreement with the Bureau of Prisons. Guttknecht was relocated to Philadelphia where she was placed in a half-way house of the Kintock Group ("Kintock"). (N.T. 3/9/98 at 29-33).

3. Kintock provided a secured facility. Guttknecht was allowed to leave the facility to report to the Naval Office for work; she was driven to and from the Naval Office by naval personnel. (N.T. 3/9/98 at 33-34).

4. Guttknecht worked at the Naval Office five days per week. She performed a variety of jobs, ranging from snow or ice removal to carpentry work. (N.T. 3/9/98 at 30, 33, 93-94).

5. Guttknecht was paid 75¢ per hour for her services at the Naval Office, although it is disputed whether she was paid by the Bureau of Prisons or Kintock. (Edward Hughes Decl. ¶ 5; Guttknecht Decl.).

6. At the Naval Office, Guttknecht was supervised by Mark Gallagher ("Gallagher") when at the carpentry shop, and two naval employees known as Mike and Chuck who oversaw the work-release participants. (N.T. 3/9/98 at 32).

7. After reporting to the Naval Office's main building on January 28, 1994, Guttknecht was assigned to work in the carpentry shop. At about 9:00 a.m., Guttknecht walked between the main building and the carpentry shop across the road. (N.T. 3/10/98 at 134-36).

8. In the middle of the crosswalk, Guttknecht slipped, fell and hit her head on the asphalt. (N.T. 3/9/98 at 84, 88; 3/10/98 at 152).

II. Discussion¹

Guttknecht filed her claim against the United States under the FTCA, 28 U.S.C. § 2671, et seq.² She alleges the government's negligence in failing to clear the crosswalk of excessive ice caused her fall and subsequent injuries. The government has moved for judgment as a matter of law because Guttknecht, a federal inmate at the time of the accident, has no cause of action under the FTCA.

The government argues the Federal Prison Industries Act ("FPIA"), 18 U.S.C. § 4126, precludes recovery under the FTCA. The government failed to raise this claim until the court questioned the parties regarding the issue of workers' compensation during trial. The government never argued the lack of jurisdiction until the conclusion of Guttknecht's case in chief, after a year of discovery and litigation. In fact, the government's Answer maintained that Guttknecht's "[c]ause of action is subject to, and limited by, the Federal Tort Claims Act.," (Answer at 2).

¹ To the extent the "Discussion" portion of this decision contains additional findings of fact and/or conclusions of law, those determinations are deemed to be part of the "Findings of Fact" and "Conclusions of Law" sections even if not expressly stated.

² The FTCA provides that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674.

Under the FPIA, the Federal Prison Industries is a government corporation "administered by a board of six directors, appointed by the President to serve at the will of the President without compensation." 18 U.S.C. § 4121. All monies acquired by Federal Prison Industries are deposited into the federal Treasury and can be withdrawn for limited purposes; in particular, funds can be withdrawn for "compensation to inmates or their dependents for injuries suffered in any industry." 18 U.S.C. § 4126.

According to FPIA regulations promulgated by the Attorney General, benefits "may be awarded to former federal inmates or their dependents for physical impairment or death resultant from injuries sustained while performing work assignments in Federal Prison Industries, Inc., in institutional work assignments involving the operation or maintenance of a federal correctional facility, or in approved work assignments for other federal entities." 28 C.F.R. § 301.101. Judicial review is available for denial of an inmate's claim for worker's compensation benefits from the Federal Prison Industries Fund. See Thompson v. United States, 492 F.2d 1082, 1084 n.5 (5th Cir. 1974); Johnstone v. United States, 980 F. Supp. 148, 155 (E.D. Pa. 1997).

Under § 4126, it is immaterial whether the inmate's injury occurred from the work activity itself or from the actions of a fellow employee while working. "[W]hether the plaintiff's

injuries were caused by the performance of work is irrelevant; as long as the plaintiff's injuries occurred while the prisoner was on the job § 4126 is [the] exclusive remedy." Love v. United States, No. 90-7450, 1991 WL 95291, at *2 (E.D. Pa. May 31, 1991); see Wooten v. United States, 825 F.2d 1039, 1044 (6th Cir. 1987); Aston v. United States, 625 F.2d 1210, 1211 (5th Cir. 1980).

"By providing Section 4126 as the exclusive remedy for inmates who suffer work-related injuries, Congress has signaled its lack of consent to be sued under the FTCA for such injuries." Wooten, 825 F.2d at 1045. When an inmate fails first to seek worker's compensation under the Federal Prison Industries Fund, there is no subject matter jurisdiction to entertain an FTCA claim. See id.; United States v. Cole, 376 F.2d 848, 848 (5th Cir. 1967); Luttrell v. United States, No. 93-5226, 1994 WL 605746, at *2 (N.D. Ill. Nov. 3, 1994); Moore v. United States, No. 85-1151, 1988 WL 70025, at *5 (N.D.N.Y. June 30, 1988); Jewell v. United States, 274 F. Supp. 381, 382 (N.D. Ga. 1967).

There is no indication of any congressional purpose to make the compensation statute in 18 U.S.C. § 4126 non-exclusive. It was enacted in 1934, and provided for injured federal prisoners the only chance they had to recover damages of any kind. Its enactment was 12 years prior to the 1946 Federal Tort Claims Act. There is nothing in the legislative history of this latter Act which pointed to any purpose to add tort claim recovery for federal prisoners after they had already been protected by 18 U.S.C. § 4126.

United States v. Demko, 385 U.S. 149, 152 (1966). The FTCA

permits suit only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Pennsylvania tort claimants eligible to receive worker's compensation have no common law tort remedy; the FTCA does not permit this suit.

Lack of subject matter jurisdiction is not cured by a party's waiver or failure to raise the issue in a timely manner. See Fed. R. Civ. P. 12(h)(3); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 16-19 (1951); Spectacor Management Group v. Brown, 131 F.3d 120, 127 (3d Cir. 1997), cert. filed, No. 97-1530 (Mar. 16, 1998); Reich v. Local 30, IBT, 6 F.3d 978, 982 n. 5 (3d Cir. 1993). "Subject matter jurisdiction can never be created by estoppel." Rubin v. Buckman, 727 F.2d 71, 72 (3d Cir. 1984); see Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). Guttknecht concedes § 4126 affects the court's jurisdiction and can be raised "at this time." Pltff.'s Brief at 1.

Guttknecht was a federal inmate when she was selected to participate in the work-release program at the Naval Office. Guttknecht remained in secured custody at a half-way house until released on house arrest to live with her mother in October, 1994; she was not released from federal custody until February, 1995. As part of the federal work-release program, Guttknecht performed services at the Naval Office and was paid 75¢ per hour

for her work. (Edward Hughes Decl. ¶ 5; Interagency Agreement § 4(g)).

The Federal Prison Industries Act covers "approved work assignments for other federal entities." 28 C.F.R. § 301.101. The Naval Office participated in the work-release program by inter-agency agreement with the Federal Bureau of Prisons. (Interagency Agreement). All requirements of § 4126 were met and Guttknecht was obliged to proceed with administrative remedies prior to seeking judicial review. It is unfortunate that the government's failure to raise this issue earlier caused an unnecessary year of pre-trial proceedings and a three-day non-jury trial. The court cannot overlook a jurisdictional deficiency merely because the government was dilatory in raising the issue, but it may be that the government is estopped from raising a procedural bar to Guttknecht's assertion of an administrative claim.

III. Conclusions of Law

1. Guttknecht must proceed with an administrative claim under the Prison Industries Act, 18 U.S.C. § 4126, and the accompanying regulations, 28 C.F.R. § 301.101, et seq., before judicial review; this court lacks subject matter jurisdiction.

2. Guttknecht's claim under the FTCA will be dismissed without prejudice for failure to exhaust administrative remedies.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of April, 1998, following a non-jury trial conducted between March 9 through 11, 1998 and closing statements and oral arguments on April 17, 1998, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The government's motion under Federal Rule of Civil Procedure Rule 52(c) for judgment as a matter of law is **DENIED AS MOOT**.

2. Plaintiff's action is **DISMISSED** without prejudice for lack of jurisdiction for failure to exhaust administrative remedies.

Norma L. Shapiro, J.