

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

VINCENT GRAHAM : CIVIL ACTION  
 :  
 v. :  
 :  
 UNITED STATES OF AMERICA : NO. 97-1590

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

February 5th, 2002

Plaintiff Vincent Graham ("Graham") is a former inmate of the federal correctional facility at Allenwood, Pennsylvania. Alleging negligence, Graham filed this action against the United States and the Federal Bureau of Prisons<sup>1</sup> under the Federal Tort Claims Act, 28 U.S.C. §1346(b)(1) ("FTCA"). Pending is defendant's motion to dismiss with prejudice or in the alternative, for summary judgment; the motion to dismiss will be granted.

BACKGROUND

On November 24, 1995, while a prisoner<sup>2</sup> at the Federal Correctional Facility in Allenwood, Pennsylvania ("Allenwood"), Graham was attacked with a sharp object by another prisoner, Robert J. Brown ("Brown"), while they were watching a horror

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<sup>1</sup>By Order dated June 13, 1997, the United States of America was substituted for the Federal Bureau of Prisons as the sole defendant.

<sup>2</sup>The action was stayed while Graham was incarcerated.

movie, "The Howling," in a common area of the prison. As a result of the attack, Graham required 32 stitches in his head, 13 stitches in his face and 4 stitches in his hand.

It is disputed whether: (1) prison officials knew Brown was violent/psychotic and undergoing psychiatric treatment; (2) there was more than one corrections officer on duty to oversee 120 inmates at the time of the attack; and (3) from September, 1995, through the date of the attack on Graham in November, there had been a series of stabbings and attacks with sharp objects in the prison, including the murder of an inmate in a unit adjoining Graham's. It is not in dispute that prisoners were permitted to purchase canned foods and can openers (items which can easily be converted into sharp weapons) and the prison regularly dispensed razors and razor blades to inmates.

Graham contends the United States breached its duty of care to him by negligently: (1) allowing prisoners access to items easily converted to weapons; (2) failing properly to screen and segregate inmates known to have acted violently in the past; (3) allowing inmates to watch violent movies; and (4) failing to provide sufficient staff at the unit where he was housed. After answering the complaint, the United States moved to dismiss under Fed. R. 12(b)(1) or (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment.

## DISCUSSION

### **A. Standard of Review**

The defense of lack of subject matter jurisdiction should be raised by a Fed. R. Civ. P. 12(b)(1) motion filed prior to service of a responsive pleading. CHARLES ALAN WRIGHT ET AL., 5A FEDERAL PRACTICE AND PROCEDURE § 1350, at 209 (West 1990). However, an untimely motion filed after the answer has been served, as here, "will be treated as a suggestion that the court lacks jurisdiction." See id. When a Rule 12 motion raises more than one affirmative defense and lack of subject matter jurisdiction is among them, it should be considered without reaching the merits of an action if there is no jurisdiction. See id. at 210. See also Bell v. Hood, 327 U.S. 678, 682 (1946)(reversing district court's sua sponte dismissal for lack of subject matter jurisdiction).

In deciding a Rule 12(b)(1) motion, a district court may consider evidence outside the pleadings. See Makarova v. United States, 201 F.3d 110, 113 (3d Cir. 2000)(affirming district court's grant of 12(b)(1) motion to dismiss FTCA claim because plaintiff was employee whose exclusive remedy was workers' compensation). The burden of proof is on plaintiff to establish subject matter jurisdiction by the preponderance of the evidence. Id.

### **B. The FTCA**

The FTCA confers on district courts subject matter jurisdiction over negligence actions against the United States; it provides in relevant part:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury . . . or personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b)(1) (West 1993 & Supp. 2000). The FTCA applies to federal inmates' claims alleging personal injuries sustained while incarcerated because of negligence of government employees. See United States v. Muniz, 374 U.S. 150 (1963). The applicability of the FTCA to such actions is limited by two exceptions: (1) the intentional tort exception, 29 U.S.C.A. §2680(h); and (2) the discretionary function exception, 28 U.S.C.A. §2680(a). See Muniz, 374 U.S. at 163 (affirming decisions overturning the grant of motions to dismiss in two actions without deciding whether either exception applied).

**1. The Intentional Tort by Investigative or Law Enforcement Officer Exception<sup>3</sup>**

Title 28 U.S.C. § 2680(h) provides that the government

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<sup>3</sup>At the October 31, 2000 hearing, the court sua sponte considered the applicability of this exception and permitted the submission of post-argument briefs on the issue. Plaintiff's counsel declined to submit a brief; defendant timely and persuasively briefed the issue.

waiver of immunity does not apply to intentional torts (assault, battery, false imprisonment, etc.) except that

with regard to acts or omissions of . . . law enforcement officers of the United States Government, the provision of . . . section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault [or] battery. . . . For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C.A. §2680(h)(West 1994 & Supp. 2000).

This subsection precluding an FTCA claim for assault or battery unless by an investigative or law enforcement officer does not preclude a cause of action for negligently or intentionally failing to prevent an assault or battery by another individual. See Sheridan v. United States, 487 U.S. 392, 400 (1988)(government employees' negligent failure to prevent intoxicated off-duty serviceman from firing into a car is actionable under the FTCA). A plaintiff must allege that the federal employee is an investigative or law enforcement officer to withstand summary judgment based on the intentional tort exclusion. See id.; Maurello v. United States, 111 F. Supp. 2d 475 (D.N.J. 2000)(summary judgment granted under § 2860(h) on former inmate's false imprisonment FTCA claim because plaintiff did not sufficiently allege defendants were investigative or law enforcement officers); Barber v. Grow, 929 F. Supp. 820 (E.D. Pa. 1996)(inmate's FTCA claim dismissed without prejudice because plaintiff did not allege the federal employee who

assaulted/battered him was an investigative or law enforcement officer).

Graham was assaulted by a fellow inmate and not an investigative or law enforcement officer; Section 2860(h) neither confers nor precludes jurisdiction over this action.

## **2. The Discretionary Function Exception**

Defendant claims the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), deprives this court of subject matter jurisdiction. See, e.g., Cohen v. United States, 151 F.3d 1338, 1340 (11th Cir. 1998)(reversing judgment in favor of prisoner who brought an action under the FTCA for injuries he sustained as a result of an attack by another prisoner).

Title 28 U.S.C. §2680(a) provides:

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused [is not actionable under 28 U.S.C. § 1346(b)].

28 U.S.C.A. § 2680(a) (West 1994 & Supp. 2000)(emphasis added).

"The discretionary function exception . . . marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984)(discretionary function

exception barred airline action against the government for negligent aircraft inspection). See also Berkovitz v. United States, 486 U.S. 531, 536 (1988)(discretionary function exception did not bar plaintiffs' FTCA action against the United States Food and Drug Administration for negligent approval of public release of polio vaccine).

A district court considering whether the discretionary function exception bars an FTCA claim must determine whether: (1) the action taken involves choice by the acting government employee; and (2) the choice is "of a kind that the discretionary function exception was designed to shield." Berkovitz, 486 U.S. at 536. See also United States v. Gaubert, 499 U.S. 315, 328 (1991)(discretionary function exception bars FTCA suit against federal bank regulators for negligent supervision).

**a. The Actions At Issue Involved Choice by Government Employees**

An action is discretionary only if it involves an element of choice or judgment. See Berkovitz, 486 U.S. at 536; Gaubert, 499 U.S. at 325. "[I]t is the nature of the conduct rather than the status of the actor that governs whether the exception applies." Id. at 323 (quoting Varig Airlines, 467 U.S. at 813) (internal quotations omitted). The policy decisions to: (1) allow inmates access to items easily converted to weapons; (2) evaluate and house inmates with or without regard to propensity for violence; (3) allow inmates to watch violent movies; and (4) staff Graham's

unit with a certain number of guards, were not dictated by statute. They resulted from discretionary decisions by Bureau of Prisons officials.

**b. The Prison Officials' Discretion as Exercised in This Case is Protected by the Discretionary Function Exception**

The governmental action involved must be based on "considerations of public policy" to qualify for the exception. Berkovitz, 486 U.S. at 537. See also Gaubert, 499 U.S. at 324-25. Graham's claim is premised on choices of government officials, perhaps foolish choices, under a statute which requires precisely the sort of discretion protected by the exception.

Graham bases his claim on 18 U.S.C. § 4042, which provides:

The Bureau of Prisons, under the direction of the attorney general, shall . . . provide . . . for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States . . . [and] provide for the protection . . . of all persons charged with or convicted of offenses against the United States.

18 U.S.C.A. § 4042(a)(2) and (3)(West 2000). The mandatory duty of care set out in § 4042 does not dictate the manner in which the duty must be fulfilled. See Cohen, 151 F.3d at 1343 (section 4042 neither prescribes nor proscribes particular conduct in fulfilling the duty to protect); Calderon v. United States, 123 F.3d 947, 950 (7th Cir. 1997)("[w]hile it is true that [§ 4042] sets forth a mandatory duty of care, it does not . . . direct the manner by which the BOP must fulfill this duty."). The statute

imposes a duty of care with BOP discretion in its implementation.

"[E]ven if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception." Cohen, 151 F.3d at 1342. See also Barrett v. United States, 845 F. Supp. 774, 782 (D. Kan. 1994)("decisions made as to how best to fulfill th[e] duty [to protect] are protected by the discretionary function exception.").

The duty also involves public policy considerations because the need for protection must be balanced with other needs such as providing inmates with the right to circulate within the prison. See Calderon, 123 F.3d at 951.

**c. Graham's Claim is Barred by the Discretionary Function Exception**

The Supreme Court has not directly addressed the discretionary function exception's application to federal prisoners' FTCA claims for injuries by fellow inmates.<sup>4</sup> The federal circuits that have reviewed such claims have uniformly held they are barred by the discretionary function exception. See, e.g., Cohen, 151 F.3d 1338 (11th Cir. 1998); Dykstra v.

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<sup>4</sup>In Muniz, 374 U.S. 150, the Supreme Court held prisoners may bring claims under the FTCA, but expressly declined to address the discretionary function exception's applicability to prisoners' claims the BOP has negligently violated a duty of care. Id. at 158, 163.

United States Bureau of Prisons, 140 F.3d 791 (8<sup>th</sup> Cir. 1998)  
(discretionary function exception applied to prison officials' failure to warn plaintiff his youthful appearance might make him vulnerable to attack and failure to place him in protective custody upon complaint that fellow inmate was staring at him); Calderon v. United States, 123 F.3d 947 (7th Cir. 1997)  
(discretionary function exception applied to prisoner's FTCA claim for government's negligent failure to prevent an attack on him by his cellmate); Buchanan v. United States, 915 F.2d 969 (5th Cir. 1990) (discretionary function exception applied to prisoners' FTCA claim for damages sustained while prisoners were held hostage by Cuban detainees during a prison uprising); see also Scrima v. Hastly, No. 97-8433, 2998 WL 661478 (S.D.N.Y. 1998)(discretionary function exception applied to prisoner's claim of officials' alleged negligence for allowing another inmate to exercise outside plaintiff's cell when the other inmate entered plaintiff's cell and assaulted him); Green v. U.S., Civ. A. No. 94-5706, 1995 WL 574495 (E.D. Pa. 1995)(Pollak, J.)(prisoner's FTCA claim based on sexual assault by cellmate with a history of sexual violence dismissed); Barrett, 845 F. Supp. 774 (D. Kan. 1994)(FTCA claim based on BOP's failure to investigate a series of incidents allegedly leading to inmate's death dismissed for lack of subject matter jurisdiction).

It may be tragically unwise for Allenwood prison officials to allow inmates access to razor blades or foolish for them to

allow inmates to view violent films. But these choices are within the discretion that Congress has committed solely to prison officials. Graham's FTCA claim is barred by the discretionary function exception.

Federal prisoners with claims such as Mr. Graham's are not without any recourse to the federal courts. Though Mr. Graham filed only an FTCA action, he may have had a remedy under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Eighth Amendment to the U.S. Constitution.<sup>5</sup> Under the Eighth Amendment, prison officials are liable for inmate on inmate violence when they act with deliberate indifference to excessive risk to an inmate's health or safety. See, e.g., Farmer v. Brennan, 511 U.S. 825 (1990) (a prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety if and only if he knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it).<sup>6</sup>

#### **CONCLUSION**

The acts that Graham claim constitute negligence by prison officials all fall within the discretionary function exception to

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<sup>5</sup>For a prisoner in state custody, a remedy would lie under 42 U.S.C. § 1983.

<sup>6</sup>The deliberate indifference standard of Farmer is difficult, though not impossible, to meet. See, e.g., Comment: Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence, 63 U. Chi. L. Rev. 693 (1996).

the FTCA, and the intentional tort by investigative or law enforcement officer exception does not apply; there is no subject matter jurisdiction over this claim against the United States. Accordingly, this action must be dismissed and the court need not decide the alternative motions under Rule 12(b)(6) or Rule 56. An appropriate order follows.

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ORDER

AND NOW, this day of February, 2002, for the foregoing reasons, defendant's motion to dismiss with prejudice, or in the alternative, for summary judgment [Docket #20], is **GRANTED IN PART AND DENIED IN PART**. This action is **DISMISSED**. The motion for summary judgment is **DENIED AS MOOT**.

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Norma L. Shapiro, S.J.