

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

BARBARA ELMAN	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 97-5825
	:	
UNITED STATES OF AMERICA, et al.	:	
Defendants.	:	

**MEMORANDUM-ORDER**

**GREEN, S.J.**

**February 27, 1998**

Presently before the court is Defendant United States of America's Motion for Summary Judgment and Plaintiff Barbara Elman's Response thereto. The Defendant moves for summary judgment on the basis that Plaintiff's receipt of worker's compensation benefits under the Federal Employees' Compensation Act ("FECA") deprives this court of subject matter jurisdiction over her claims under the Federal Tort Claims Act ("FTCA"). Plaintiff contends that under the dual capacity doctrine, Plaintiff's claim under the FTCA is not barred by her receipt of benefits under the FECA. For the following reasons, Defendant's Motion for Summary Judgment is granted.

**FACTS**

Plaintiff is an employee of the Equal Opportunity Commission ("EEOC"). On November 20, 1996 Plaintiff and a co-worker were walking from the office of the EEOC to the federal employees' health benefits fair which was being held at the Federal Building at 600 Arch Street in Philadelphia. On the way to the fair at about 10:00 a.m., Plaintiff fell while walking on the sidewalk near the Liberty Bell, on the south side of Market Street between 5th and 6th Streets.

Plaintiff alleges that her fall was the result of a defective condition in the sidewalk. The sidewalk where Plaintiff fell is owned by the Commonwealth of Pennsylvania, however, the National Park Service is responsible for the care and maintenance of Independence National Historic Park, where the accident occurred.

As a result of her fall, Plaintiff suffered injuries to her left knee and facial area. Plaintiff applied for and received federal worker's compensation benefits, as provided by the FECA, for medical expenses and lost wages she alleges to have incurred as a result of this incident. Plaintiff also filed the present action against the United States under the FTCA seeking compensation for her pain and suffering.

#### **DISCUSSION**

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In general, an employee who collects benefits from her employer under the FECA is barred from bringing a subsequent cause of action under the FTCA. See 5 U.S.C. § 8116(c); Lockheed

Aircraft Corp., v. United States, 460 U.S. 190 (1983). The Sixth Circuit has adopted the "dual capacity doctrine" as an exception to federal workmen's compensation laws. See Wright v. United States, 717 F.2d 254 (6th Cir. 1983). The dual capacity doctrine "treats the employer as a third party outside the protections of the workmen's compensation statute under certain conditions." Id. at 259. According to the Sixth Circuit, "An employer may become a third person, vulnerable to tort suit by an employee, if -- and only if -- he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." Id. (quoting 2A Larson, Workmen's Compensation Law 14-229, Section 72.81 (1982)).

The Third Circuit has not formally rejected or adopted the dual capacity doctrine, however, it has found the doctrine to be inapplicable in a case similar to the instant matter. See Schmid v. United States, 826 F.2d 227 (3d Cir. 1987). Schmid involved a federal employee who, during a softball game sponsored by his employer, was alleged to have been injured as a result of the government's negligent maintenance of the field. Id. at 228. The Third Circuit affirmed the lower court's holding that the employee's FTCA suit was barred by the fact that the employee's claim was covered under the FECA. Id. at 230.

The Third Circuit expressed criticism about the dual capacity doctrine by stating its concern that

the question at the center of the doctrine -- whether

at the time of injury the employer was acting as employer or as a third party vis-a-vis the employee -- is virtually identical to the question the agency must ask in determining whether the employee is eligible for FECA benefits -- i.e. whether or not the injury was sustained 'in the performance of his duty.'

Id. at 229. The court went on to caution that a court applying the doctrine "may come perilously close to second guessing the agency's decision about whether the employee is entitled to FECA benefits, something that [5 U.S.C.] § 8116 explicitly states the courts must not do." Id.

The Third Circuit ultimately concluded, however, that it did not have to decide the validity of the dual capacity doctrine in Schmid since the doctrine only applied where the employer was acting vis-a-vis the employee in a role entirely unrelated to its role as employer. Id. In Schmid, the injury occurred on land owned by the government, the game was sponsored in part by the government, and the government encouraged its employees to participate in such activities. Id. Thus, the court found that the plaintiff's injuries were sustained in the course of an activity sufficiently related to his employment that the government's role as team sponsor and field owner was related to its role as employer, and the doctrine was inapplicable. Id.

In the present case, Plaintiff was walking to a health benefits fair being held for federal employees and sponsored by the United States government. Plaintiff was going to the health fair in the middle of the workday at 10:00 a.m., and Plaintiff was injured on federally managed property while en route to the

fair. Plaintiff also applied for and received compensation under the FECA which means that her injury was determined by the Department of Labor to be work-related.

Based on the facts of this case, Plaintiff's injuries were sustained in the course of activity sufficiently related to her employment that the government's role as sponsor of the fair and manager of the property was related to its role as employer, and the doctrine of dual capacity is inapplicable. Were this court to apply the doctrine of dual capacity in this case, it would be doing exactly what the Third Circuit cautioned against in Schmid, that is, second guessing the Department of Labor's determination that Plaintiff's injuries were sustained in the course of her duty as a federal employee. This court lacks jurisdiction to review such a determination and refuses to do so in the present matter under the guise of the dual capacity doctrine.

This court also notes that it was Plaintiff herself who chose to apply for benefits under the FECA, thereby demonstrating Plaintiff's belief that the injury was work-related. Plaintiff's present attempt to re-characterize the injury under the dual capacity doctrine as having a character wholly unrelated to her employment really appears to be an attempt to secure an additional recovery for an injury which has already been compensated for under the FECA. Thus, this court concludes that the action against the Defendant under the FTCA is barred by the fact that her claim was covered under the FECA. Defendant's Motion for Summary Judgment is granted.

An appropriate Order follows.

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

BARBARA ELMAN	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 97-5825
	:	
UNITED STATES OF AMERICA, et al.	:	
Defendants.	:	

**ORDER**

AND NOW, this 27th day of February, 1998 upon consideration of Defendant United States of America's Motion for Summary Judgment and Plaintiff's Response thereto, IT IS HEREBY ORDERED that Defendant's Motion is GRANTED.

BY THE COURT:

---

CLIFFORD SCOTT GREEN, S.J.