IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOHN DAVID GARCIA,

Plaintiff,

vs. CIV 08-00295 JB/WDS

THE UNITED STATES OF AMERICA and
BEN GARCIA,

Defendants.

DEFENDANT UNITED STATES OF AMERICA'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS (Doc. No. 18)

Defendant United States of America ("Defendant") submits this Reply to Plaintiff's Response In Opposition To United States Motion to Dismiss ("Response"). It is Defendant's position that Plaintiff has failed to rebut the legal and factual arguments contained in the Defendant's Motion and Memorandum (Doc. Nos. 15, 16) and Defendant's Motion should be granted and the United States dismissed from this case.

I. WHETHER TO APPLY STANDARDS OF FED. R. CIV. P. 12(b) OR FED. R. CIV. P. 56 FOR DETERMINATION OF DEFENDANT'S MOTION

Defendant has challenged this Court's jurisdiction pursuant to Rule 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff asserts in his Response (Doc. No. 18) that summary judgment is the proper vehicle by which to consider Defendant's Motion. Specifically, Plaintiff claims that, because the United States has submitted affidavits and other evidentiary material in its jurisdictional motion, the motion must be one for summary judgment. However, when making a rule 12(b)(1) motion, a party may challenge the underlying facts upon which jurisdiction depends and rely on affidavits

and other proper evidence to do so. New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995); Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995).[1] A court properly uses its broad discretion in considering such affidavits and evidence to resolve jurisdictional facts under Rule 12(b)(1) and such consideration does not convert the motion to one for summary judgment. Holt, 46 F.3d at 1003.

Assuming, as Plaintiff urges, that summary judgment is the appropriate application for determining Defendant's Motion, summary judgment is proper where the movant demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Thrasher v. B&B Chemical Co., 2 F.3d 995, 996 (10th Cir. 1993). While the movant bears the initial burden of showing that there is an absence of evidence to support the nonmoving party's case, once that burden has been met, Rule 56(e) requires the nonmoving party to designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Bacchus Inds., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991).

To overcome a motion for summary judgment, Plaintiff "may not rest upon mere allegations and denials in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial." Whitaker v. San Jon Schools, Civ. No. 04-1237, 2006

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[1] If jurisdictional issues raised in a Rule 12(b)(1) motion are *truly* intertwined with the merits of a case, a motion should be resolved under either Fed. R. Civ. P. 12(b)(6) or Rule 56. See. e.g., Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1129 (10th Cir.) (the applicability of the FTCA's discretionary function exception is a jurisdictional question that is intertwined with the merits of the case) (citations omitted), cert. denied, 528 U. S. 964 (1999); Tippet v. United States, 108 F.3d 1194, 1196 (10th Cir. 1997).

WL 1308234, at *6 (D.N.M. April 19, 2006), citing Anderson, 477 U.S. at 248. Plaintiff's speculation and unsupported conclusions as to factual disputes are not enough to survive summary judgment. Branson v. Price River Coal Co., 853 F.2d 768, 771-72 (10th Cir. 1988). Only admissible evidence may be considered when ruling on summary judgment and the court must disregard statements of mere belief. World of Sleep, Inc. v. La-Z-Boy Chair, Co., 756 F.2d 1467, 1474 (10th Cir. 1985); Serrano v. Veneman, 410 F. Supp. 2d 1049 (D.N.M. 2005). While it is Defendant's position that its Rule 12(b) Motion is well taken, an application of summary judgment standards also confirms that the Court lacks jurisdiction over the pending matter.

II. ARGUMENT

A. PLAINTIFF HAS NOT CONTROVERTED MATERIAL FACTS

Both Plaintiff and Defendant agree that the incident in question occurred at the St. Augustine Church in the Pueblo of Isleta. Plaintiff, however, disputes Defendant's Uncontroverted Facts No. 2 and 3, and contends that Defendant Garcia was in "plainclothes" and allegedly functioning in his capacity as a tribal police officer at the time of the incident. Plaintiff argues that there were other principals, not members of Defendant Garcia's family, attending the wedding "with whom he interacted during the critical episode . . . and [he] felt he had to act as a police officer for all these people."[2] Response at 4. The "plainclothes" he had on were a Polo shirt and blue jeans. Deposition of Ben Garcia, at 46-47, Exhibit E attached hereto. Observing a verbal

[2] It is indisputable that Defendant Garcia was at the St. Augustine Church on December 9, 2006 to attend his brother's wedding, and was with his girlfriend and his son. Whether there were others attending the wedding who were not members of Defendant Garcia's family, Response at 4, is irrelevant.

argument, he interceded to separate his brother's wife, mother and sister from the Plaintiff. *Id.* Defendant Garcia stated that he was not acting as a tribal officer at the time, nor was he on duty during the time that he was attending the wedding. *Id.* at 47, 48.

Plaintiff challenges Defendant's second statement of uncontroverted fact (Doc. No. 16, at 3) that Defendant Garcia was not on duty with the Isleta Tribal Police Department at the time of the incident. Plaintiff contends that the FBI and BIA investigative reports which are attached as Exhibits A and B to Doc. No. 16 "sound like standard law enforcement reports" and thus constitute an admission by Defendant that Defendant Garcia was acting as a tribal police officer at the time of the incident. Response at 5 - 7; Plaintiff's Exhibit 1. The reports clearly demonstrate that they are in no way "admissions" that officer Garcia was acting as a tribal police officer; to the contrary, they determine that he was "off duty" at the time of the incident.

Obviously, the reports sound like law enforcement reports because they are law enforcement investigations. As noted on the cover page of Plaintiff's Exhibit 1, the investigation is regarding "Off Duty Misconduct." Title 25 C.F.R. 12.51 requires that officers acknowledge both on duty and off duty conduct. Allegations of misconduct are investigated by the BIA Professional Responsibility Unit (Internal Affairs). 25 C.F.R. 12.53. Officer Robert Esquerra was performing an investigation of alleged off duty misconduct and the results of his investigation were provided to George Jojola, the Chief of Police for the Isleta Police Department. Plaintiff's Exhibit 1. Moreover, allegations of alleged civil rights violations must be reported to the Department of Justice (FBI) for separate investigation. 25 C.F.R. 12.54. Plaintiff's conclusion in his

Response at 5 and 7, that the existence of these reports which "sound like standard law enforcement reports" establishes "as an evidentiary matter that Officer Garcia was acting as a police officer in this case" is simply not supported by the documentation.[3]

In another self-serving statement, Plaintiff asserts that, because Agent Esquerra asked Defendant questions about the incident, those questions are deemed admissions by Defendant that Defendant Garcia was acting as a police officer. To the contrary, an officer's questions during an investigation are not admissions nor do the nature of the questions indicate that Defendant Garcia was acting within the scope of his employment as a tribal police officer. In fact, the conclusion reached in both reports was that Defendant Garcia was not on duty at the time of the altercation. George B. Jojola, as Defendant Garcia's supervisor, on behalf of the Isleta Police Department, determined that Defendant Garcia was off duty at the time of the incident and not engaged in activities furthering his employment.[4] There is absolutely no evidence or any indication that the BIA "admits as an evidentiary matter that Officer Garcia was acting as a police officer in this case." Response at 7.

In his Response at 8, Plaintiff argues that Defendant Garcia approached Plaintiff "because people at the wedding expected him, as a police officer, to do something." Thus, Plaintiff concludes that Defendant Garcia did not have a "personal motive" and

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[3] Plaintiff's Response at 6 contains the unsupported and self-serving assertion that "plaintiff and members of his wedding party, and the priest, dispute these typical and standard 'police account versions' of events, and will testify" so at trial. This statement is hearsay, not supported by any admissible evidence and should not be considered. Likewise, Plaintiff concludes, without any admissible evidence to support his assertion, that "under any set of facts, the Officer was acting as a Federally trained and funded police officer." *Id*. This statement should not be considered.

[4] George B. Jojola had no personal involvement in the investigation because 25 C.F.R. 12.53 requires that BIA perform the investigation.

"he believed he was acting pursuant to his authority and responsibilities as an Isleta police officer." *Id.* However, Defendant Garcia stated under oath in his deposition that he went over to separate his brother's wife, mother and sister and the plaintiff from a verbal argument, that he was not acting as a tribal officer at the time of the incident, that he was not arresting the plaintiff, that he did not call the Isleta Police Department to report what had happened, that he did not file a police report, that he was not enforcing tribal law at the time, and that he was not enforcing federal law. Exhibit E, at 47-52. The admissible evidence supports the conclusion that Defendant Garcia was attending a wedding and intervened in an argument between guests and Plaintiff. The fact that attendees at the wedding looked at him and expected him to intervene because they knew he was a police officer, Response at 11, does not establish that the actions he took were on behalf of his employer or in his capacity as a police officer. There was no motive, other than his personal motive, to assist in separating people having an argument.

B. PLAINTIFF FAILS TO ESTABLISH THAT DEFENDANT GARCIA WAS WITHIN THE SCOPE OF HIS EMPLOYMENT

Plaintiff argues that the various reports filed in this matter and the deposition testimony of Defendant Garcia demonstrate that he was acting as a police officer when he injured Plaintiff. In fact, the FBI and BIA reports, the conclusion of Defendant Garcia's supervisor, and Defendant Garcia's own deposition testimony all state that Defendant Garcia was not on duty as an Isleta Police Officer at the time of the incident.

Defendant's Exhibit A, B, D, and Exhibit E, at 47.[5] In the written statement made by Defendant Garcia contemporaneous with the incident, he stated that he noticed an altercation and saw the man place his hand on one of the females involved in the verbal altercation and the female told the male not to touch her. Exhibit B at 15; Exhibit E at 52 - 53. Plaintiff makes the bold assertion that the "inappropriate touching" constitutes a crime under 18 U.S.C. § 2244(b) and Defendant Garcia was responding to the commission of that crime. Response, at 12. However, "sexual contact" is specifically defined as:

> . . . the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person.

18 U.S.C. § 2246(3). Presumably, Plaintiff is not admitting to such an act. The touching on a shoulder or back as described by Defendant Garcia does not constitute a federal crime. Furthermore, there is no evidence that Defendant Garcia ever considered that he was assaulted;[6] he never filed a report to that effect and never sought charges against Plaintiff. Plaintiff distorts the testimony by Defendant Garcia concerning his

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[5] Plaintiff asserts that a BIA Special agent made statements to Defendant Garcia during the June 2007 Interview that demonstrate that the BIA agent "thought that Officer Garcia had an obligation to act as a law enforcement officer, and arrest Plaintiff if he believed that an unlawful physical assault had occurred." Response, at 8. The BIA investigative officer's questions are not determinative of whether or not Defendant Garcia was acting within the scope of his employment at the time of the incident.

[6] In his deposition, when asked if he though Plaintiff was committing a crime, Defendant Garcia stated that "[the only thing I could think of was to – assault . . . on [the woman], the way he was touching her, and she was unclothed on the back, from the neck down, and he just kept touching her." Exhibit E at 52 -53. Plaintiff's reliance on 18 U.S.C. § 113(a)(5) is misplaced; it pertains to assaults within the maritime and territorial jurisdiction of the United States - not Indian country. Title 18 U.S.C. § 111 pertains to an assault on an officer when that person is engaged in or on account of the performance of official duties. It can only be presumed that Plaintiff does not truly believe that Defendant Garcia thought Plaintiff was assaulting him. If so, Plaintiff should have been arrested and prosecuted.

general arrest authority in the deposition testimony at page 8. There is absolutely no indication that Defendant Garcia said he had the authority to arrest or detain Plaintiff under the circumstances or that he had any intention of doing so.

The reason for Defendant Garcia's presence at the church and whether or not he was acting within the scope of his employment as an Isleta Police Officer when Plaintiff was allegedly assaulted is extremely important to the jurisdictional determination in this case. Whether or not he was on duty is not solely the determinative factor to be considered, but is one of the factors to consider in making a scope of employment determination. Medina v. Fuller, 971 P.2d 851 (N.M. App. 1998). As held in Narney v. Daniels, 846 P.2d 347, 356 (N.M. App. 1992), an employee's action is considered to be in scope if the action:

1) is the kind the employee is employed to perform;
2) occurs during a period reasonably connected to the authorized employment period;
3) occurs in an area reasonably close to the authorized area, and
4) is actuated, at least in part, by a purpose to serve the employer.

Attendance at his brother's wedding was not an action Defendant Garcia was employed to perform. Defendant Garcia's action did not occur during a period reasonably connected to his employment period – he was not on duty and did not report to duty for some hours after the incident. The action was not actuated, in any part, by a purpose to serve the employer - he took the action to separate members of one wedding party from another. If Defendant Garcia had taken the actions in accordance with his employment as an Isleta Police Officer, he would have made an arrest, filed a police report, and followed appropriate police procedures for responding to a crime. Medina, 971 P.2d at 856. He did not do so.

C. PLAINTIFF'S CLAIMS EXCLUDED BY 28 U.S.C. § 2680(h)

Defendant Garcia was not a federal law enforcement officer at the time of the incident and there is nothing in the Self-Determination Act or in relevant case law to suggest that the mere existence of a 638 contract between BIA and a tribe providing for law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments. Platero v. United States, D.N.M., Civ. No 05-398 LH/RHS. Even if Defendant Garcia had been within the scope of his employment, coverage under the FTCA as an employee of the Department of the Interior does not confer federal law enforcement officer status on tribal officers for purposes of 28 U.S.C. § 2680(h). There is no evidence that Defendant Garcia was commissioned by the BIA or issued a special law enforcement officer commission by the BIA. Absent such a commission, he is not authorized by law to enforce federal law, and is not a "federal investigative or law enforcement officer" within the meaning of § 2680(h). Platero, at 7 - 8. See also, Locke v. United States, 215 F. Supp. 2d 1033 (D.S.D. 2002), aff'd, 63 F. App'x 972 (8th Cir. 2003).

Plaintiff relies on Williams v. United States, 327 U.S. 711 (1946), United States v. Young, 85 F.3d 334 (8th Cir. 1996) and Duro v. Reina, 495 U.S. 676, (1990) for his argument that Defendant Garcia must be a federal officer because, as a tribal police officer, he had the power to detain a non-Indian offender and transport him to the proper authorities." Response at 12 - 13, 18. As stated supra, Defendant Garcia was not authorized to enforce federal law and was not enforcing any law at the time of the incident in question.

Plaintiff contends that his Complaint does not allege that Defendant Garcia

committed any intentional tort listed in Section 2680(h). He does not claim an assault and battery. However, Plaintiff claims that he was accosted by several men, one of whom was Defendant Ben Garcia, and he felt a blow to his head which "was delivered by Defendant Ben Garcia." Complaint ¶¶ 11 and 13. This factual assertion sounds suspiciously like a claim of assault and battery. His Second Claim for Relief states that Defendant Garcia "intentionally inflicted emotional distress on Plaintiff." Response at 15, Complaint ¶ 30. While this tort is not specifically enumerated under 28 U.S.C. 2680(h), the United States is not liable for such intentional torts and thus Plaintiff's Second Claim for Relief is barred. Trujillo v United States, 313 F. Supp. 2d 1146, 1152 (D.N.M. 2003). Plaintiff's Third Claim for Relief alleges that Defendant Garcia was negligently certified as a law enforcement officer and was negligently supervised, proximately causing Plaintiff's injuries. Complaint ¶¶ 37, 38. His third claim would not be a claim but for the battery allegedly committed by Defendant Garcia. However, any claim which arises out of an assault and battery is barred by 2680(h). As the Honorable M. Christina Armijo held:

> The majority of the circuits [including the Tenth Circuit] addressing the meaning of the "arising out of " clause have adopted the *Shearer II*-plurality view [United States v. Shearer, 473 U.S. 52 (1985)] that a negligent hiring, supervision, or retention claim necessarily arises out of an underlying intentional tort, precluding government liability under the FTCA.

Vallo v. United States, 298 F. Supp. 2d 1231, 1239 (D.N.M. 2003). Thus, this Court lacks jurisdiction over Plaintiff's claim of negligent certification and supervision.

D. TRIBAL COURT EXHAUSTION

Plaintiff's suggestion that Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)

and Montana v. United States, 450 U.S. 544 (1981), stand for the generalized premise that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" (Doc. No. 18, at 19), with the implication that the tribal court does not have jurisdiction over a negligence action by a non-Indian against an Indian, is not a correct interpretation of those cases.

Montana stands for the premise that an Indian tribe lacks civil authority over the conduct of non-members on non-Indian fee land within a reservation boundary. Atkinson, 532 U.S. at 649-50. Atkinson builds on the decision in Montana, with the Court finding that the basic premise prohibits a tribe from taxing non-member activity occurring on non-Indian fee land. *Id*. at 645-55. Thus, the decisions in Montana and Atkinson both address a tribe's ability to civilly regulate on-reservation conduct (tax) of non-members on non-Indian land, but also note "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." Montana, at 566. Plaintiff's assertion, that Montana and Atkinson, which were decided before Enlow v. Moore, 134 F.3d 993 (10th Cir. 1998), stand for the generalized premise that tribal courts lack jurisdiction to hear cases by non-Indians, is simply not correct. Plaintiff's attempt to analogize the specific facts and holding of the cited cases to the facts at issue before this Court is comparing apples to oranges.

Moreover, Plaintiff's failure to address the holdings of cases such as Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006),cert. denied, 549 U.S. 1167 (2007); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987) and Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, (1985), cases akin to the issue before this court, is significant. Plaintiff apparently does not want to pursue an action against Defendant

Garcia in tribal court. From the relevant case law, however, that is where such action must first be brought.

CONCLUSION

For the reasons stated *supra* and contained in Defendant's Memorandum, (Doc. No. 16), this Court lacks jurisdiction over Plaintiff's Complaint for Damages and causes of action and Defendant United States should be dismissed from the above-captioned case.

Respectfully submitted,

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I HEREBY CERTIFY that on February 23, 2009, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:
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