UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

BONITA BUXTON, by herself and through her natural mother, CARMEN BUXTON,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendants.

CIV 09-5057

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

This memorandum is submitted in opposition to the government's motion to dismiss and for summary judgment.

The principles of summary judgment are well known to this Court and will not be repeated here. The Court must determine whether under the undisputed facts and applicable law the government is entitled to summary judgment.

The facts are set forth in the accompanying statement of undisputed facts and facts which are in dispute.

Basically and really without dispute, Bonita Buxton, now an adult, ran away from home in Rapid City to the Pine Ridge Indian Reservation. She was a status offender and under supervision of the South Dakota Department of Corrections. She had committed no crime on the Pine Ridge Indian Reservation. She was incarcerated in the Tribal Detention Center in Kyle for 6 months before finally being released. No notice was ever given to her or her mother. No hearing was ever held. Bonita was told nothing by anyone. Linda Bias, her probation officer, made continuous efforts to secure her return. Bonita told the Tribal Judge she wanted to voluntarily return to Rapid City.

She had one brief unannounced appearance before the Tribal Court approximately one month after she was arrested and no other appearances or court action for six months.

I. The Oglala Sioux Tribe, As A Contractor, Was Negligent In Operation And Administration Of Its Police Department, Court System, And Juvenile Detention Facility.

Plaintiffs' statement of facts at ¶¶ 1 through 17 and 29 through 69 set out the tragic facts of this case, which substantiate the facts set forth in the above paragraph and more, including the harrowing ride from Pine Ridge to Kyle with Officer Janis, who had a six pack in the front seat sipping on it as he drove 100 miles an hour, the substandard conditions she had to endure in her six months of custody, lack of communication and refusal to allow her to make phone calls until she had been in custody for three months or so, letters for help from Bonita Buxton, the money spent by her mother to secure her release, and the refusal of the officials responsible for her prosecution to communicate either with her mother or her probation officer.

The Oglala Sioux Tribe ran the Detention Facility and Tribal Court under a Self Determination contract with the United States. The Oglala Sioux Tribe was the contractor, not anyone else. The contractor and its employees are both deemed to be employees of the United States while carrying out the obligations under the contract. Under its contract with the government, the Tribe agreed to many things, including but not limited to complying with its own juvenile code, to provide due process, to turn over to the State any offender under State jurisdiction where jurisdiction is accepted by the State, to render fair and impartial justice, to implement the previous recommendations of a tribal court assessment to rectify organizational structure problems, case flow problems, and need for a public defender. These facts are set out in plaintiffs' statement of undisputed facts at ¶¶ 70 through 80.

Under federal law, the Tribe is required to comply with standards and policies of the Bureau of Indian Affairs (BIA) in maintaining a juvenile detention center, including providing constitutional rights and complying with the Juvenile Justice and Delinquency Prevention Act of 1974. These facts are set forth in plaintiffs' statement of undisputed facts at ¶¶ 100-103.

The Bureau of Indian Affairs has promulgated a Juvenile Detention Handbook with policies required to be complied with by any contractor operating a juvenile detention center, like the Oglala Sioux Tribe in this case. Those policies are set forth in plaintiffs' statement of undisputed facts at ¶¶ 81 through 99 and can be reviewed by the Court. These include the prohibition against detention of status offenders like Bonita Buxton, the right of detainees to have access to attorneys or legal representatives and to communicate with persons, to provide detainees with access to court and other governmental authorities like probation officer Linda Bias, and to have their case considered under an intake procedure requiring, among other things, parental notification and prompt hearings.

The expert affidavit and report of expert witness Lisa Cook, a former Oglala Sioux Tribal Court Judge, is submitted to the Court. Her conclusions and opinions are set forth under plaintiffs' statement of undisputed facts at ¶¶ 18 through 28. To put it succinctly, there were multiple violations of the Oglala Sioux Tribe Juvenile Code in this case as well as of the Extradition Code, both of which are attached to her affidavit. Under the Extradition Code, Bonita Buxton had the right to an extradition hearing, the right to be admitted to bail pending extradition, and the right to waive extradition and voluntarily return to Rapid City. She was neither offered or given any such rights.

Finally, on October 12, 2007, a Tribal Court Assessment of the Oglala Sioux Tribal Court was issued by Coochise Consulting, LLC. This was the same year that Bonita Buxton was deprived of every law afforded to juveniles under the Tribal Code and applicable Federal regulations. This Assessment is set out in plaintiffs' statement of facts at 211-244. At page 25 of the Assessment (Bates stamp 236) it is stated:

> We imagine there are huge caseload numbers for the limited number of staff and budget. Judging from previous numbers, and the amount of arraignments, these numbers have not gone down. People are so busy doing their jobs; they don't have time to document what they are doing. Staff is overwhelmed. Some have stopped trying to keep up and are just doing what they can. Some have given up. This must stop.

It was also critical of Tribal Council influence on the judiciary for good reason. Assessment at 15-16 (Bates stamp 226-227). In this case, the Tribal Judge indicated that he would not make any decision without concurrence of the Tribal President. The Tribe's contract with the Secretary in this case at C-7 (Bates stamp 167) required the Tribe to implement changes to rectify problems in certain areas of the Tribal Court including in part: (1) Absence of clear organizational structure, (2) Serious case flow problems, and (3) Need for public defender. Bonita Buxton was a clear victim of the Tribe's negligence, well documented, in the operation of its Tribal Court and Detention Center in this case.

II. Plaintiffs' Claims Are Not Barred By 28 U.S.C. 2680 (h).

The government in this case argues that Janis, Reddest, Grass, and Miller cannot be sued because they are not federal law enforcement officers. However, the Oglala Sioux Tribe was the contractor in the present case and the Oglala Sioux Tribe was required to carry out the Self-Determination contract pursuant to the agreement

with the United States. The United States is responsible for the negligence of the Oglala Sioux Tribe. In FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233-1234 (8th Cir. 1995), the court held that the United States was liable for the negligence of a tribal organization operating under a Self Determination contract if it is shown that there is a Self Determination contract in place and an Indian contractor, both of which are present in this case. The Oglala Sioux Tribe has entered into a Self Determination contract to operate the Juvenile Detention Facility and the Tribal Court. See Mentz v. United States, 359 F. Supp. 2d 856, 859 (D.N.D. 2005) (P.L. 101-512 imposes liability upon the United States for acts of tribal organizations). The Oglala Sioux Tribe was negligent in the operation of both the Detention Center and the Court System, for the reasons set forth above, and therefore the United States is subject to liability in this case. Had Oglala Sioux Tribe followed its own Juvenile Code, Bureau of Indian Affairs Juvenile Detention policies, Juvenile Justice and Delinquency Act of 1974, Indian Civil Rights Act, and Extradition Code, all of which it was required to do under the terms of its agreement and Federal law, Bonita Buxton would not have been in custody for 6 months and/or endured the conditions that she did.

The government argues that Janis, Reddest, Grass, and Miller are not federal law enforcement officers and therefore their actions are not covered under the Federal Tort Claims Act. Plaintiffs show hereafter that they are federal law enforcement officers, but even if they are not, the Oglala Sioux Tribe as the contractor in this case was negligent as shown both above and hereafter.

The United States does not state, nor could it agree, that the tribal officers in question are not deemed federal employees under the provisions of FTCA. See Val-U

Construction v. United States, 905 F. Supp. 728 (D.S.D. 2995) (FTCA should be liberally construed to implement its broad intent).

The law enforcement functions of the Tribe are funded pursuant to a 638 contract with the BIA under the Indian Self-Determination Education Assistant Act ("ISDEAA") as authorized by 25 U.S.C. 450f. The ISDEAA promotes a long-standing federal policy of encouraging Indian self-determination, giving Indian tribes control over administration of federal programs benefitting Indians. Under the Self-Determination contract, the federal government supplies funding to a tribal organization, allowing the tribal organization to plan, conduct and administer a program or service that the federal government otherwise would have provided directly. A November 5, 1990 amendment to that Act provides:

> With respect to claims resulting from the performance of functions...under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act...an Indian tribe, tribal organization, or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract or agreement and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract or agreement: Provided, that after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be considered to be an action against the United States and will be defended by the Attorney General and be afforded full protection and coverage of the Federal Tort Claims Act...

Pub. L. No. 101-512, Title III, 315, 104 Stat. 1915, 1959 (codified at 25 U.S.C. 450f notes). The government implicitly agrees that, under the ISDEAA, the officers in this case were employees of the Tribe under the 638 contract and were therefore BIA employees at the time of the acts which form the basis of plaintiff's complaint.

It is clear that, under the circumstances, the actions of the tribal employees in this case may subject the United States to FTCA liability. "The [FTCA] is a limited waiver of sovereign immunity, making the federal government liable to the same extent as a private party for certain torts of federal employees working within the scope of their employment." United States v. Orleans, 425 U.S. 807, 813, 96 S. Ct. 1971 (1976). Under the FTCA, the United States may be sued for damages arising from the negligent or wrongful acts or omission of "an employee of the government." 28 U.S.C. 1346(b)(1).

In the context of the present case, however, which involves some allegations of intentional torts, the government argues that the tribal officers named in the complaint were not "law enforcement officers" under the FTCA. The law enforcement provision of the FTCA states at 29 U.S.C. 2680(h) as follows:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; provided, that with regard to such acts or omissions of investigative or law enforcement officers of the United States Government, the provision of this chapter [28 U.S.C. 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of this enactment of this proviso (enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subjection, "investigative or law enforcement officer" means any officer of the United States who is empowered to execute searches, to seize evidence, or to make arrests, for violations of Federal law.

The argument of the government is erroneous. First, the November 5, 1990, amendment to the ISDEAA codified at 25 U.S.C. 450f notes, set out above, provides that "after September 30, 1990, any civil action or proceeding involving such claims (resulting from the performance of functions) brought hereafter against any tribe...or

tribal employee covered by this provision shall deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act... ." Clearly it was the legislative intent to provide that any claim for any negligent or intentional act of a tribal employee hired and paid under an ISDEAA contract, as exists in this case, would be "afforded the full protection and coverage of the Federal Tort Claims Act." As to tribal employees working under an ISDEAA contract, as in this case, regardless of whether they are police officers or not, the legislative intention and clear language of the amendment was to afford their actions "the full protection and coverage" of the FTCA without any restrictions or exceptions. If restrictions or exceptions to the coverage were intended, Congress would have clearly stated so in the 1990 amendment. It did not. The action and the conduct of the tribal employees in this case are covered by the FTCA.

Second, the government relies an the argument that again turns the 1990 amendment on its head. See Allender v. Scott, 379 F. Supp. 2d 1206, 1217-1218 (D.N.M. 2005). Its argument is as follows. Under 2680(h), reference is made to omissions of investigative or law enforcement officers of the United States government as being covered by the FTCA even though the conduct involves the intentional torts set out there, some of which are alleged in the complaint in the present case. Because tribal officers are not "investigative or law enforcement officers of the United States government," the government seems to argue that coverage does not exist and there is no coverage for the specified intentional torts. This argument is disingenuous. By the very clear language and intent of the 1990 amendments to the ISDEAA contract, tribal employees are deemed to be employees of the Bureau of Indian Affairs. If the tribal employees are working under an ISDEAA contract, as the tribal police officers were in

the present case, they are deemed by the 1990 amendment to be federal investigative or law enforcement officers of the United States government. Under the government's interpretation and argument, if the tribal police officers are not deemed to be federal law enforcement officers, one of the largest and oldest groups of employees employed under ISDEAA, i.e., tribal police officers, would be deprived of the "full protection and coverage of the Federal Tort Claims Act", something that is contrary to and was never intended under the 1990 amendments. A tribal police officer employed under an ISDEAA contract is covered as a federal police officer. There is nothing in the legislative history or face of the amendment to support any argument that a tribal police officer employed under an ISDEAA contract would be covered only as a civilian but not as a police officer.

Third, the government's next argument goes further and somewhat related to its second argument above, maintains that tribal police employees are not "investigative or law enforcement officer(s)" because they are not officer(s) of the United States who are empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law. As indicated in response to the second argument above, the 1990 amendments to the ISDEAA made tribal police officers working under an ISDEAA grant, as in the present case, federal law enforcement officers. And there can be no doubt that tribal police officers are empowered by law to execute searches, to seize evidence and to make arrests for violation of federal law. The requirement that an officer have power to execute searches or seize evidence makes no reference and is not qualified by the term "federal". In other words, tribal searches and tribal seizure of evidence satisfies the requirement so that the conduct of the tribal deemed federal officers under the 1990 amendment is covered under 2680(h). The government's

argument that it has prohibited tribal police officers from enforcing federal law only applies to the provision that an officer have authority to make arrests for violation of federal law. If a tribal deemed federal officer has authority to either execute searches under tribal law or seize evidence under tribal law, one or the other, regardless of the ability to make an arrest for violation of federal law, the requirement of 680(h) is satisfied and the officer's conduct is covered by the FTCA even if intentional.

Fourth, the government argues that no commissions under 25 C.F.R. 12.12(b) were issued to any of the officers involved in this case making them federal officers. First, tribal officers are deemed federal officers under the 1990 amendments. The existence of a commission is irrelevant to coverage under the 1990 amendment. There is nothing in the 1990 amendments requiring any commission. Second, even if a commission were required, it would only be relevant to the ability to make arrests for violation of federal law, the only instance in 2680(h) that mentions federal law. The lack of a commission would not prohibit a tribal deemed federal officer from executing tribal searches or seizing tribal evidence as set out in this memorandum. Third, a commission requirement belies the government's argument that tribal deemed federal officers have no authority to make arrest for violation of federal law. They clearly do, but under the government's argument only when they have been christened to do such. The power exists. See Section 14 of the Oglala Sioux Tribal Code (any member of tribal police has authority to arrest for any offense defined by federal law).

The government cites Locke v. United States, 215 F. Supp. 2d 1033 (SD 2002), Lavellie v. United States, 396 F. Supp. 2d 1082 (DND 2005), and Mizner v. United States, U.S. Dist. Lexus 2662 (D.S.D., December 4, 2003). Each of these cases were subsequent to Locke and relied upon Locke rationale. The holding in Locke in the

issues before this Court can be distilled into two sentences: "Plaintiff has failed to cite any specific provision of law or set forth any non-conclusory facts in connection with her claim that [names] were federal law enforcement officers at the time of the alleged incidents. See Dry v. United States, 235 F.3d 1249, 1257 (10th Cir. 2000). The affidavit of [name] is unchallenged to the effect that he has not received the necessary certification, enforces only tribal laws or ordinances, and is not a federal law enforcement officer." Locke is not supported by any persuasive authority and with all due respect is wrong for the reasons stated in this memorandum. The rationale of Locke comes solely from the Court's erroneous interpretation of the 1990 amendment and its oversight and misconception as to the requirements of 2680(h). It does not appear that the arguments made in this memorandum were ever made in Locke or Dry. This memorandum establishes that tribal officers are deemed federal officers and certification is unnecessary to federal jurisdiction. Tribal officers at Pine Ridge in this case enforce both federal and tribal law.

Fifth, a number of negligent claims in this case, discussed above and below, challenge the conditions of Bonita Buxton's confinement and refusal to comply with rudimentary rights while she was incarcerated. Judge Emery, Alberta Miller, Raquel Reddest, Tammy Grass, and the Tribal President all had a part in failing to comply with rights that Bonita Buxton had but of which she was deprived. These negligent acts and conduct are not barred because they did not have certifications as federal law enforcement.

III. The Complaint States Claims Upon Which Relief Can Be Granted.

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. The complaint undergoing analysis is to be

construed liberally in plaintiff's favor, all well pleaded allegations are deemed to be true, all doubts and inferences are to be resolved in plaintiff's favor, and the complaint to be viewed in the light most favorable to plaintiff. E.g., Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 792 (2009). Pleaders must show that their allegations "possess enough heft" to establish an entitlement to relief. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007). Courts generally allow plaintiff an opportunity to amend the complaint to correct any deficiencies unless an amendment would be futile. Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 989 (9th Cir. 2009).

First, as was established above, tribal officers are covered under the FTCA including being liable for false arrest, false imprisonment, and malicious prosecution.

Second, it is not at all clear, and there clearly is a dispute of fact, as to whether there was any reason to arrest Bonita Buxton or that Gary Janis or the detention facility staff knew for what she was being arrested. Janis refused to tell Bonita Buxton for what she arrested and the detention facility staff could not tell her either. There is also an issue whether the arrest warrant was issued before or after she had been arrested and detained.

Third, even if Bonita Buxton was properly arrested, once she was arrested and detained she was deprived of a plethora of rights as a juvenile. These include but are not limited to the right as a status offender not to be detained, right to a hearing, right to notice of what she was being charged, the right to have her parents advised of what she was being charged with and her rights to a hearing, right to voluntarily be returned to Rapid City which had been sought by her state probation office, right to bail, and the other rights set forth in plaintiffs' statement of facts submitted in this case. The negligent deprivation of these rights are compensable.

If one aspect of the government's conduct causes injury and, when viewed by itself, would be actionable as a separate wrong, the fact that other aspects of the government's conduct constitutes one of the excluded torts will not bar recovery for the distinct and separate wrong. E.g., Block v. Neal, 460 U.S. 289 (1983); Cross Bros. Meat Packers, Inc. v. United States, 705 F.2d 682 (3rd Cir. 1983); Jimenez-Nieves v. United States, 682 F.2d 1, 4 (1st Cir. 1982); Melton v. United States, 488 F. Supp. 1066 (D.D.C. 1980); and Pate v. United States, 328 F. Supp. 2d 62, 74-75 (D.D.C. 2004) (Parole Commission failed to file own rules on timely hearings).

Fourth, the government's contention that Bonita Buxton was not prosecuted by the United States is frivolous. Tribal officers are covered under the FTCA just as federal officers would be covered. The complaint makes this allegation.

IV. False Arrest Is Only One Act Of Many Negligent Acts Committed In This Case.

The complaint in this case asserts many claims other than false arrest and false imprisonment including, for example, the failure to comply with the Tribe's own juvenile code by, among other things, failing to provide notice to either Bonita or her mother of the fact of incarceration, scheduled court hearings, or notice of the charges, complaint, ¶ 22, 36; incarceration in unhealthy, unsanitary, and unsafe conditions, Id. ¶ 23; infliction of emotional distress by dissuading her to have any contact with her adoptive family and not allowing her to speak to her mother until three months after she had been incarcerated, informing her that she could be kept incarcerated as long as they wanted, Id. ¶¶ 24, 29, 36; failure to have any hearings whatsoever for six months once she was incarcerated, Id. ¶¶ 25, 32, 33, 35; conditioning her release upon agreement by the Tribal President, Id. ¶ 27; ignoring numerous and repeated requests by her

probation officer, Id. 38; ignoring requests by Bonita Buxton as to what was going to happen to her, Id. ¶ 38; and refusal to make inquiries or contacts with South Dakota, Id. ¶38. See also generally, Id. ¶ 39 (incarcerated in unkempt and unsanitary conditions; prohibited from continuing her education and going to school; and infliction of physical, psychological, and emotional injury).

Bonita Buxton was clearly damaged by the negligence in this case, including the intentional and negligent infliction of emotional harm. Santiago-Ramirez v. Secretary of Department of Defense, 984 F.2d 16 (1st Cir. 1993), and Gross v. United States, 508 F. Supp 1085 (D.S.D. 1981), 723 F.2d 609 (8th Cir. 1983), following remand. See also Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003) (violation of right to privacy).

In short, Bonita Buxton is claiming that she was unlawfully incarcerated, but she is claiming much more. She is also claiming numerous negligent acts based on the conditions and treatment that she received while being unlawfully incarcerated, as set forth above, which are part and parcel different from a challenge to the very fact or duration of physical imprisonment. See, e.g., Preiser v. Rodriguez, 411 U.S. 375, 499 (1973); Wilkinson v. Dotson, 455 U.S. 74, 82 (2005) (challenge to parole proceedings); Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (challenge to failure to provide required hearings); and Hanks v. Prachar, 457 F.3d 774, 776 (8th Cir. 2006) (challenge to conditions of confinement). Incarcerated persons retain the right of access to courts, Johnson v. Avery, 393 U.S. 483, 485 (1969) (prisoner's right of access to courts cannot be restricted), and freedom of speech and association with family, e.g., Powers v. Snyder, 484 F.3d 929, 933 (7th Cir. 2007), both of which Bonita Buxton was negligently deprived of in the present case and if afforded could have resulted in her quick release from custody.

V. Constitutional Torts Are Not Cognizable Under The FTCA Unless The Contract With The United States Makes Them Applicable.

_____The 638 contract in this case requires the Tribe, as the grantor, to operate its court system in a manner that provides due process. The Oglala Sioux Tribe, as contractor, is required to follow its own laws and policies. See agreement between Secretary and Oglala Sioux Tribe, ¶ 3 (A) (Bates stamp 157). Due process is to be provided with respect to all services and functions under the contract. Id., ¶ 13 (Bates stamp 158). Contractor is required to provide services in a fair and uniform manner and provide access to a judicial body to resolve disputes. Id., © (5) (Bates stamp 159). Judges are required to render fair and impartial judgment in accordance with the law. Id., © (8) (Bates stamp 164). Policies and standards are required of all tribal entities receiving Federal funding to ensure support of constitutional rights. 25 C.F.R. § 10.1. The Oglala Sioux Tribe as a contractor and as a condition precedent to receiving federal funds was required to comply with due process and constitutional rights. 25 C.F.R. § 10.1. The claim of the government under Part III of its memorandum is without basis in fact or law.

VI. ICRA Claims Are Covered Under The FTCA If The Oglala Sioux Tribe Is Required To Comply With ICRA As Part Of Their Contract With The United States.

_____This argument is addressed under IV above. See agreement between the Secretary and Oglala Sioux Tribe, ¶ 11 (1) (Bates stamp 160) ("For purposes of FTCA coverage, the contractor and its employees... are deemed to be employees of the Federal government while performing work under this contract").

CONCLUSION

For all the above reasons, the Motion to Dismiss and Motion For Summary Judgment should be denied.

Respectfully submitted this 23rd day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2010, I served the above and foregoing Memorandum in Opposition to Defendant's Motion to Dismiss and for Summary Judgment on the individual next designated herein, by electronic transmission with copy via First Class mail, to wit:

Cheryl Schrempp DuPris
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/s/ *Terry L. Pechota*
Terry L. Pechota

* This document was filed electronically.