The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHERRI BLACK, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	No. C13-5415-RBL UNITED STATES' REPLY

I. None of the Officers Involved in this Incident Were Federal Law Enforcement Officers Under the FTCA Because None of Them Had SLECs at The Time of The Incident.

Plaintiff concedes that any intentional tort claims arising out of Detective Greg Graves conduct are barred by the intentional tort exception to the Federal Tort Claims Act ("FTCA") because, without a Special Law Enforcement Commission ("SLEC"), Detective Graves does not qualify as a "federal law enforcement officer" under 28 U.S.C. § 2680(h). *See* Dkt. No. 27, at pg. 2. Plaintiff argues that Detective Graves should be the only officer excused under the intentional tort exception because "it is not yet determined whether there were other tribal police officials involved who may hold a SLEC and who's [sic] actions may be deemed as intentional under this cause of action." *Id.* at pg. 2-3. But none of the officers involved in this incident had an SLEC. *See* Second Declaration of Thomas Woolworth filed concurrently herewith. Special Agent in Charge Woolworth confirms that on December 8, 2011, no member of the Port Gamble Tribal Police Department and no member of the Suquamish Tribal Police Department had an SLEC. *Id.* at ¶5. Thus, any and all claims arising out of assault, battery,

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false imprisonment, or false arrest, based on the conduct of any tribal officer involved in the December 8, 2011 incident, should be dismissed against the United States because none of the officers involved in the incident had SLECs. As such, none of them qualify as "federal law enforcement officers" under the FTCA and the intentional tort exception bars any claims.

II. Neither the ISDEA Nor a 638 Contract Can Transform a Tribal Officer Into a "Federal Law Enforcement Officer" Under the FTCA.

Although Plaintiff concedes that tribal officers are not "federal law enforcement officers" under the FTCA without an SLEC (Dkt. No. 27), and the Port Gamble Tribe did not make any arguments to the contrary (Dkt. No. 23), the Suquamish Tribe argues that all tribal officers acting under a 638 contract are automatically transformed into "federal law enforcement officers" under the FTCA. The Suquamish Tribe argues that when a tribe enters into a 638 contract with the Bureau of Indian Affairs ("BIA"), the only law enforcement activity that can be contracted for is federal law enforcement, and as such, all tribal officers should qualify as "federal law enforcement officers" under the FTCA. *See* Dkt. No. 25, pg. 3-6. The Suquamish Tribe is incorrect. The fact that the Secretary of the BIA may have authorized a tribe to enforce federal law does not mean that that authority immediately or inherently passed to every tribal law enforcement officer in that tribe.

Under the Indian Law Enforcement Reform Act ("ILERA"), the Secretary may authorize employees of the BIA to enforce laws of the United States or an Indian tribe if authorized by the tribe. The Office of Justice Services ("OJS") has the responsibility of enforcing federal law and tribal law, with the consent of the tribe. 25 U.S.C. § 2802(c)(1). The fact that the BIA and OJS have the authority to enforce federal law, does not mean that every employee of the BIA or the OJS have the authority to enforce federal law. Similarly, just because the authority to enforce federal law may have been contracted to a tribe, not every member of that tribe's public safety department has the authority to enforce federal law. Only those individuals who possess an SLEC have the authority to enforce federal law. There is a difference between the general authority granted to tribes and the specific authority granted to individual tribal officers. Even though a tribe may have the general authority to enforce federal law, not every tribal law enforcement officer is "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," to qualify as a federal law enforcement officer under the FTCA. *See* 28 USC 2680(h).

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Numerous courts have addressed and rejected the exact argument the Suquamish Tribe is raising. In *LaVallie*, the court stated:

> Plaintiff refers to the 638 contract which obligates the Tribe to "[p]rovide enforcement of all Federal, State, Tribal, and local Government laws . . . in accordance with the Contractor's area of jurisdiction . . ." This language does not, in and of itself, transform [the officer] into a federal law enforcement officer any more than it would transform him into a state law enforcement officer.

LaVallie v. United States, 396 F.Supp.2d 1082, at 1084-85; *see also Dupris v. McDonald*, 2012 WL 210722, *13 (D.Ariz. Jan. 24, 2012) (the fact that a 638 contract between the tribe and the BIA existed for the provision of law enforcement services does not automatically confer federal law enforcement authority upon the officers in tribal police departments.); *Trujillo v. United States*, 313 F.Supp.2d 1146, 1150 (D.N.M. Nov. 14, 2003) (nothing in the ISDEA, or in relevant case law, suggests that the mere existence of a 638 contract automatically confers federal law enforcement authority upon the officers in tribal police departments.); *Locke v. United States*, 215 F.Supp.2d 1033, 1038-39 (same).

The *Buxton* court specifically analyzed the ISDEA and found that it does state that any tribal employee acting pursuant to a 638 contract is deemed an employee of the BIA, but it "says nothing about transforming BIA employees into federal law enforcement officers." *Buxton v. United States*, 2011 WL 4528337, *8 (D.S.D. April 1, 2011). The court further found that the fact that a separate process exists, provided by regulation for conferring federal law enforcement status on tribal police, belies the argument that the ISDEA or a 638 contract in and of itself confers federal law enforcement status. *Id.* (*citing* 25 C.F.R. § 12.21). The court stated, "[i]f all tribal police were automatically rendered federal law enforcement officers by virtue of [the ISDEA], there would be no need for a separate process to confer such status." *Id.*

Similarly, the *Henderson* court held that federal regulations make clear that tribal law enforcement officers operating under a BIA contract are not automatically commissioned as federal officers; however, they may be commissioned on a case-by-case-basis. *Henderson v. United States*, 2012 WL 4498871, *3 (D.N.M. Sept. 19, 2012) (*citing* 25 C.F.R. § 12.21(b)). The court held that, although the BIA is authorized to delegate the responsibility of enforcing federal law on Indian lands to tribal police, to do so, the BIA must approve and issue SLECs to individual tribal officers determined to be qualified on a case-by-case basis. *Id.*

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Notably, the Suquamish Tribe fails to address the material facts in this case. It is undisputed that at the time of the alleged assault the tribal officers involved were enforcing tribal law, serving a tribal arrest warrant, that was issued from a tribal court, on a tribal member, and the subject of the warrant was ultimately arrested and charged with a variety of tribal offenses. *See* Dkt. No. 24, Ex. A.

Thus, the overwhelming weight of evidence presented establishes that the tribal police officers involved in this incident were tribal police officers. First, they were attempting to enforce tribal law when their encounter with Mr. Black took place. Second, neither the ISDEA nor a 638 contract automatically transforms a tribal police officer into a federal law enforcement officer under the FTCA. And third, none of the officers involved in this incident had an SLEC at the time. Therefore, none of the tribal officers involved qualify as "federal law enforcement officers" for purposes of the FTCA and as such, the United States is not liable for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" based on the conduct of any tribal officer involved in the December 8, 2011 incident.

III. Plaintiff's Claim for Failure to Render Medical Aid is Barred by the Intentional Tort Exception to the FTCA Because it Arises Out of the Alleged Assault and Battery.

The United States agrees that tribal officers who are acting pursuant to a 638 contract may subject the United States to liability under the FTCA under certain circumstances for state court negligence claims. But the only negligence claim Plaintiff has asserted is the failure to render medical aid. And this claim arises out the alleged intentional tort of assault and battery. Without the alleged assault and battery, there would be no claim for failure to render medical aid. As such, this claim is also barred by Section 2680(h). [1]

[1] Plaintiff's claim for failure to render medical aid under these circumstances, where an individual was injured while being apprehended by police, is properly brought under Section 1983 as a claim for unreasonable delay of medical treatment. The Due Process Clause of the Fourteenth Amendment requires police departments "to provide medical care to persons . . . who have been injured while being apprehended by police." *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *see also John v. Berry*, 469 F.Supp.2d 922, 938 (W.D.Wash. Dec. 18, 2006). Due process requires that police officers seek the necessary medical attention for a detainee when he or she has been injured while being apprehended by either promptly summoning the necessary medical help or by taking the injured detainee to a hospital. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986) (*citing Revere*, 463 U.S. at 245). A

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The FTCA specifies that the Act's general waiver of sovereign immunity shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...." 28 U.S.C. § 2680(h). Several courts have emphasized the significance of the language used. Congress could have barred only claims for assault, but instead barred all claims arising out of assault. *See*, e.g., *Collins v. United States*, 259 F.Supp. 363, 364 (E.D.Pa. 1966).

In determining whether a claim "arises out of" one of the enumerated torts, courts look beyond a plaintiff's classification of the cause of action to examine whether the conduct upon which the claim is based constitutes one of the torts listed in Section 2680(h). *See Sabow v. United States*, 93 F.3d 1445, 1456 (9th Cir. 1996) (*citing Mt. Homes, Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990) ("[W]e look beyond [the complaint's] characterization [of the cause of action] to the conduct on which the claim is based."); *Thomas–Lazear v. Federal Bureau of Investigation*, 851 F.2d 1202, 1207 (9th Cir. 1988) ("This circuit looks beyond the labels used to determine whether a proposed claim is barred [by the intentional torts exception]")). Courts focus the Section 2680(h) inquiry on whether conduct that constitutes an enumerated tort is "essential" to a plaintiff's claim. *Id.* If the gravamen of a plaintiff's complaint is a claim for a tort excluded under Section 2680(h)'s intentional tort-exception, then the claim is barred. *See Snow–Erlin v. United States*, 470 F.3d 804, 808 (9th Cir. 2006).

Notably, the district court of South Dakota analyzed the same issue before this Court: whether a claim for failure to render medical aid arises out of a claim for assault. The Court found that it did and that both claims were barred by the intentional tort exception to the FTCA. *See Johnson v. United States*, 2007 WL 2688556, *3 (D.S.D. Sept. 11, 2007). In *Johnson*, the plaintiff alleged that a corrections officer beat him while trying to arrest him and that a Standing Rock Sioux Tribe police officer witnessed the beating but did not attempt to intervene on plaintiff's behalf. *Id.* at *1. The plaintiff raised several claims including assault and battery

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Section 1983 claim against officers is viable if the officers' affirmative acts place the individual in mortal danger. *See Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997); *see also Keller v. City of Portland*, 1998 WL 1060222, *11-12 (D.Or. Nov. 13, 1998) (police officers called to the scene had a duty under the Due Process Clause to summon medical assistance once the suspect of their pursuit had been shot); *Maxwell v. County of San Diego*, 708 F.3d 1075, 1082 (9th Cir. 2013) (individuals injured by a third party have a cause of action under Section 1983 if police impede access to medical care leaving the victim in a more dangerous situation).

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and failure to secure timely medical care. *Id.* First, the court found that the corrections officer was not an investigative or law enforcement officer under the FTCA and the United States was not liable as a matter of law for his intentional torts. *Id.* at *3. Then, the court cited the Ninth Circuit's decision in *Thomas–Lazear* and found that a cause of action which is distinct from one of those excepted under Section 2680(h) will nevertheless be deemed to arise out of an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is essential to the plaintiff's claim. *Id.* The court held,

> Since [the correctional officer's] alleged assault of [plaintiff] is essential to the claim for failure to secure timely medical care, the claim "arises out" of assault and is subject to the provisions of § 2680(h). Therefore, this court does not have jurisdiction over claims arising out of his intentional torts and the plaintiff's claim for failure to secure timely care should be barred.

Id.

The same is true here. Plaintiff's allegation of failure to render medical aid necessarily arises out of the alleged assault and battery. For without the alleged assault and battery, there would be no claim for failure to render medical aid. That Plaintiff styled her claim as a negligence claim is of no moment; a claimant cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligence. "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery." *United States v. Shearer*, 473 U.S. 52, 55 (1985) (emphasis in original). Therefore, Plaintiff's claim for failure to render medical aid arises out of the alleged assault and battery and is also barred by Section 2680(h).

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CONCLUSION

WHEREFORE for the reasons set forth above, and in the United States' Motion to Dismiss, the United States respectfully requests that the Court issue an Order dismissing all claims against the DOI and the BIA as well as all claims against the United States.

Dated this 13th day of September, 2013.

Respectfully submitted,

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s/ Kristin B. Johnson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on September 13, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on September 13, 2013, I mailed by United States Postal Service the foregoing document to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

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Dated this 13th day of September, 2013.

s/ Tiffany Gallegos

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