The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAJU A.T. DAHLSTROM, Plaintiff, v. UNITED STATES, *et al.*, Defendants.	CASE NO. 2:16-cv-01874-RSL UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) Re-Noted for: November 3, 2017

The sole issue before the Court is whether the United States has waived sovereign immunity for the employment actions of the Sauk-Suiattle Indian Tribe (the "Tribe"), as well as the enforcement actions of the Tribe's Chief of Police. This Court has already denied, in part, the United States' Motion to Dismiss on the ground that the Tribe's employment decisions are not encompassed by a federal contract or agreement under the ISDEAA. Dkt. 46. Therefore, the remaining questions for the Court are: whether Plaintiff's claims are barred by the discretionary function exception to the Federal Tort Claims Act ("FTCA"); and, whether Plaintiff's intentional tort claims are barred by 28 U.S.C. § 2680(h) of the FTCA and/or not cognizable under Washington law.

Plaintiff bears the burden of pleading claims that fall within the FTCA's limited waiver of sovereign immunity. *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992).

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However, "a plaintiff may not invoke federal jurisdiction by pleading matters that clearly fall within the exceptions of § 2680." *Id.*, *quoting Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982). "Only after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by § 2680 does the burden fall on the government to prove the applicability of a specific provision of § 2680." *Id.*[1] Plaintiff states that he is asserting "claims under the FTCA for negligent supervision and training, false arrest, wrongful imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress." Dkt. 48, at p. 16. All of these claims are clearly barred by § 2680 of the FTCA and, therefore, Plaintiff has not successfully invoked federal jurisdiction.

A. Plaintiff's Intentional Tort Claims are Facially Insufficient to Invoke Federal Jurisdiction

Section 2680(h) expressly provides that the FTCA 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). Plaintiff does not attempt to explain in his response how the United States has waived sovereign immunity for his intentional tort claims despite the exceptions in § 2680(h). Nor does he address his intentional tort claims against the Tribe's Chief of Police, or explain how the United States has waived sovereign immunity for false arrest, false imprisonment, or negligent infliction of emotional distress, which arises from his intentional tort claims.

Plaintiff does not allege that the Tribe's Chief of Police, Richard McDonnell, was a federal officer or was carrying out federal law at the time of his enforcement actions, so he has not plead facts sufficient to invoke the "exception to the exception" in § 2680(h). Furthermore, the United States has provided proof that Mr. McDonnell did not possess a Special Law Enforcement Commission, which is required before he can be deemed a federal law enforcement officer for purposes of the exception to the exception found in § 2680(h).

[1] The Ninth Circuit has adopted the rule set forth by the Sixth Circuit in *Carlyle. Prescott*, 973 F.2d at 702.

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See Dkt. 38-2, at ¶ 11Thus, Plaintiff's intentional tort claims against the United States should be dismissed.

Similarly, because his negligent infliction of emotional distress claim "arises" from Mr. McDonnell's law enforcement actions, that claim should be dismissed, as well.[2] *Sheehan v. United States*, 896 F.2d 1168, 1171 (9th Cir. 1990), *amended by Sheehan v. United States*, 917 F.2d 424 (9th Cir. 1990)(Section 2680(h) bars claims based upon conduct which constitutes one of the excepted torts). Indeed, such a claim is not cognizable under Washington law when the claim is premised upon intentional conduct. *See e.g. Lawson v. City of Seattle*, 2014 WL 1593350, at *13 (W.D. Wash. Apr. 21, 2014) (granting summary judgment on a negligent infliction of emotional distress claim predicated on the intentional acts underlying the plaintiff's false arrest claim); *Willard v. City of Everett*, 2013 WL 4759064, at *2 (W.D. Wash. Sept. 4, 2013) ("A plaintiff may not base a claim of negligence on an intentional act, like the use of excessive force."). Therefore, all of Plaintiff's intentional tort claims and those arising from the same conduct, should be dismissed.

B. Plaintiff's Remaining Claims are Barred by the Discretionary Function Exception

Plaintiff has failed to plead facts sufficient to invoke jurisdiction for his remaining claims, including negligent supervision and training, wrongful discharge in violation of public policy and intentional infliction of emotional distress or outrage. Courts have repeatedly held that employment decisions, including hiring, retaining, supervision and training fall squarely within the discretionary function exception. *See e.g. Nurse v. United States*, 226 F.3d 996, 1001-02 (9th Cir. 2000)*; Gager v. United States*, 149 F.3d 918, 921-22 (9th Cir. 1998); *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207 (D.C. Cir. 1997). Hiring, training and supervision choices made by federal agencies are subject to the agency's judgment and are based upon a wide range of policy factors, including budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity,

[2] It is not clear from his response whether Plaintiff has abandoned this claims, so it is addressed here as a precaution.

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experience and employer intuition. *Sydnes v. United States*, 523 F.3d 1179, 1185-86 (10th Cir. 2008), *quoting Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C.Cir. 1997); *and citing Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995).

Plaintiff has not identified in his pleadings any federal law or policy that specifically prescribes guidelines for the hiring, training or supervision of the Tribe's employees and the United States is not aware of any such law or policy. On the other hand, Plaintiff has admitted, and the Tribe's *Employee Handbook* demonstrates, that his employment with the Tribe was at-will. *See* Dkt. 38-1, at pp. 8-9. The Tribe retains the authority to change, cancel or suspend all other employment policies and benefits. *Id.* Thus, the Tribe's hiring, training and supervision choices involve an element of judgment or choice, not prescribed by any federal statute, regulation or policy. The first prong of the *Berkovitz* analysis is met. As to the second prong, pursuant to the cases set forth above, it is well-established that day-to-day management decisions, such as appropriate levels of training and supervision to provide to employees is susceptible to policy analysis. *See also United States v. Gaubert*, 499 U.S. 315, 325 (1991). Additionally, the stated purpose of the Indian Self-Determination and Education Assistance Act is to allow the tribes to operate their own federal programs directly, which correlates to the federal government's goal of promoting tribal self-governance. *See* 25 U.S.C. § 4501(a); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). This includes the right to regulate the activities of non-members, such as Plaintiff, who enter consensual relationships with the tribe. *N.L.R.B. v. Pueblo*, 276 F.3d 1186, 1192-93 10th Cir. 2002). Thus, Plaintiff's negligent supervision and training claims against the United States are subject to the discretionary function exception and must be dismissed.

Similarly, Plaintiff's common law tort claim of wrongful discharge in violation of public policy must be dismissed for the reasons set forth in *Sydnes*, 523 F.3d at 1184-85. States cannot waive the federal government's immunity and state tort law cannot serve to limit a federal employee's discretion. *Id.* The only way Plaintiff can succeed in bringing a state law wrongful discharge tort claim against the United States is to point to a federal

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policy that incorporates the state tort law as a limit on the discretion of federal employees. *Id.* Plaintiff has not done so.

Plaintiff does attempt to obfuscate the issue by providing vague reference to a myriad of regulatory statutes and provisions, but without any analysis as to how those regulations apply to the discretionary function exception. Instead, he leaves it to the Court and the United States to discern his argument. This is insufficient to overcome the discretionary function exception. "[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' " *Webb v. Smart Document Sols., LLC*, 499 F.3d 1078, 1083 (9th Cir. 2007)(*citing Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 817 (1986) (*quoting* 28 U.S.C. § 1331)).

Indeed, many of the federal statutes or regulations that Plaintiff cites have an administrative process for addressing retaliation claims. For example, the Affordable Care Act's ("ACA"), implementing regulation, 29 C.F.R. Part 1984, provides a specific administrative remedy for employees who believe they have been retaliated against for reporting a violation of the ACA. *See* 29 C.F.R. 1984.103. Employees must file a complaint with the Occupational Safety and Health Administration ("OSHA") office where the employee resides or is employed, which will then conduct an investigation, issue findings and provide an opportunity for a hearing before an Administrative Law Judge for the Department of Labor. *See* 29 C.F.R. 1984.105. Retaliation is a violation of the Fair Labor Standards Act, which Plaintiff has not alleged in this case, nor does he allege that he has exhausted his administrative remedies under this regulation. Retaliation claims for violations of the Safe Drinking Water Act are handled in a similar manner by OSHA. *See* 29 C.F.R. Part 24, Subpart A.

Similarly, a Sarbanes-Oxley Act whistleblower cannot go straight to court. Rather, the individual must first file an administrative complaint with the Secretary of Labor within 90 days of the violation. *See* 18 U.S.C. § 1514A(b)(1); 49 U.S.C. § 42121(b)(1*), Jones v.*

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Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 668–69 (4th Cir. 2015). The whistleblower must wait 180 days for OSHA to investigate the allegation and issue a decision before bringing suit in the district court. *See* 18 U.S.C. § 1514A(b)(1)(B). Plaintiff has not demonstrated that he has exhausted his administrative remedies under the Sarbanes-Oxley Act and, therefore cannot maintain a retaliation claim based upon a violation of the Act. Along the same lines, HIPAA does not provide a private cause of action for an individual claiming a violation of the Act. *Webb*, 499 F.3d at 1081.

Plaintiff does not explain how the remainder of the federal statutes he cites apply to this case or prescribe the Tribe's discretion under the discretionary function exception, but it is clear that Plaintiff has not asserted a viable cause of action under any of these statutes in his Amended Complaint. He describes his claims in his response as: negligent supervision and training, false arrest, wrongful imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress." Dkt. 48, at p. 16.

Plaintiff's claims for intentional infliction of emotional distress and outrage both arise from the underlying conduct of the Tribe and the Tribe's Chief of Police are therefore are not actionable because the underlying conduct is subject to the discretionary function and/or intentional tort exceptions. *See Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994). Additionally, Plaintiff has not plead sufficient facts to assert either claim as a matter of law. In Washington, claims of intentional infliction of emotional distress and outrage require proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195 (2003). The requirement of outrageousness is a high bar. *Christian v. Tohmeh*, 191 Wn. App. 709, 736 (Div. III, 2015). Washington law requires that the claim be predicated on behavior "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Kloepfel*, 149 Wn.2d at 196 (*quoting Grimsby v. Samson*, 85 Wn.2d 52, 59 (1975)). It also requires proof that the conduct in question was intentional or reckless, and actually resulted in severe emotional distress. *Id.* Plaintiff has not

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alleged sufficient facts to meet the requirements of Washington law and his claims fail as a matter of law, even if not barred by the discretionary function exception. /

C. Conclusion

All of Plaintiff's claims are clearly barred by § 2680 of the FTCA and/or not cognizable under Washington law. As such, Plaintiff's Amended Complaint should be dismissed in its entirety as to the United States.

DATED this 3rd day of November, 2017.

Respectfully submitted,

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United States Attorney

s/ *Tricia Boerger*

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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 November 3, 2017, I electronically filed said pleading 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):

Richard L. Pope, Jr.	rp98007@gmail.com
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I further certify that on November 3, 2017, I mailed by United States Postal Service said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

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Dated this 3rd day of November, 2017.

/Julene Delo

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