

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES JOSEPH BROWN,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-408-S

UNITED STATES OF AMERICA,

Defendant.

Plaintiff was allowed to proceed on his claim under the Federal Tort Claims Act. 28 U.S.C. § 2671 et. seq. He alleges that he was injured by another inmate due to the wrongful acts of employees of the Bureau of Prisons and the United States Marshal Service.

Defendant filed a motion to dismiss plaintiff's complaint on November 8, 2006. This motion has been fully briefed and is ready for decision.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery

under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

FACTS

For purposes of deciding defendant's motion to dismiss the facts as alleged in plaintiff's complaint are taken as true.

Plaintiff is currently an inmate at the Federal Correctional Institution, Jesup, Georgia. In February 2005 he was being transferred from Minnesota to Miami, Florida and was housed overnight at FCI-Oxford. He was assaulted in his cell by another inmate.

MEMORANDUM

Plaintiff claims he was injured by another inmate due to the wrongful acts of employees of the Bureau of Prisons and the United States Marshal Service.

The Federal Tort Claims Act (FTCA) authorizes civil actions against the United States for certain negligent or wrongful conduct by government employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). However the FTCA does not authorize:

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). Where this "discretionary function exception" applies, courts lack subject matter jurisdiction over the action. 28 U.S.C. § 1346(b)(1).

The discretionary function exception applies to (1) discretionary acts (2) that are based on considerations of public policy. Grammatico v. U.S., 109 F.3d 1198, 1200-01 (7th Cir. 1997). An act is discretionary if it involves "an element of judgment or choice." Id. at 1200, quoting United States v. Gaubert, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991). It is not discretionary if "a federal statute, regulation, or policy specifically prescribes [the] course of action for the employee to follow." Id.

In Calderon v. United Staes, 122 F. 3d 947, 950 (7th Cir, 1997), an inmate sued the United States under the FTCA claiming that prison staff had negligently permitted him to be assaulted by another inmate after he told prison officials that the inmate had threatened him. The plaintiff alleged that the United States had violated the duty of care set forth in 18 U.S.C. § 4042. The United States Court of Appeals for the Seventh Circuit held that the statute does not set forth any particular conduct that BOP staff should engage in or avoid while attempting to fulfill their duty to protect inmates. Id.

The Court further held that plaintiff's claim that prison staff had failed to protect him from another inmate involved

discretionary conduct. Specifically, the Court states, "It is clear that balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison involves considerations based upon public policy." The Court concluded that Calderon's action was barred by the discretionary function exception of the FTCA.

Plaintiff claims, like Calderon, that federal employees failed to prevent him from the assault by another inmate. As in Calerdon, the Court finds that the actions of the federal employees were discretionary conduct. Plaintiff's claim is barred under the discretionary conduct exception of the FTCA. Accordingly, defendant's motion to dismiss plaintiff's claim will be granted because the Court lacks jurisdiction of this FTCA claim.

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint is GRANTED.

IT IS FURTHER ORDERED that judgment is entered DISMISSING plaintiff's complaint and all claims contained therein for lack of subject matter jurisdiction.

Entered this 11th day of December, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge