No. 18-7392

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

SCOTT TYREE,
Appellant.

On Appeal from the United States District Court for the Eastern District of North Carolina

RESPONSE BRIEF OF THE UNITED STATES

ROBERT J. HIGDON, JR.
United States Attorney

BY: Joshua B. Royster
Assistant United States Attorney
Michael Bredenberg
Special Assistant United States Attorney
Hayley Milczakowski
Qualified Third Year Law Student
150 Fayetteville Street, Suite 2100
Raleigh, North Carolina 27601
Telephone: (919) 856-4530

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUE 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA BARS PLAINTIFF'S CLAIM THAT SHU OFFICERS FAILED TO RESPOND TO THE DISTRESS ALARM IN A TIME FRAME MANDATED BY BOP POLICY 14

A. Standard of Review 14

B. Discussion 14

1. Applicable Law 14

2. The District Court Properly Applied the Discretionary Function Analysis to the Conduct at Issue 18

a. The First Prong of the Discretionary Function Exception is Met Because There are No Statutes, Regulations, or Policies That Mandate a Particular Response Time to the Activation of a Distress Alarm 20

b. The Second Prong of the Discretionary Function Exception is Met, as the Officers' Actions are Susceptible to Policy Analysis 28

3. Plaintiff Fails to Allege any Facts Suggesting that the Officers Acted in a Negligent Manner 32

CONCLUSION.. 35

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

937 F.3d 316 (4th Cir. 2019) 31, 32

Andrews v. Daw,
201 F.3d 521 (4th Cir. 2000) 19

Baum v. United States,
986 F.2d 716 (4th Cir. 1993) 17, 30

Berkenfeld v. Lenet,
921 F.3d 148 (4th Cir. 2019) 19, 34

Berkovitz v. United States,
486 U.S. 531 (1988) 16, 21

Calderon v. United States,
123 F.3d 947 (7th Cir. 1997) 21

Cohen v. United States,
151 F.3d 1338 (11th Cir. 1998) 21

Coulthurst v. United States,
214 F.3d 106 (2d Cir. 2000) 33

Evans v. B.F. Perkins Co.,
166 F.3d 642 (4th Cir. 1999) 14, 16

Garza v. United States,
161 F. App'x 341 (5th Cir. 2005) 25

Hibble v. United States,
133 F.3d 915 (4th Cir. 1998) 24

Holbrook v. United States,

673 F.3d 341 (4th Cir. 2012) 17, 30

Indemnity Ins. Co. of North America v. United States,

569 F.3d 175 (4th Cir. 2009) 15

Jones v. United States,

No. 2:11-CV-94, 2014 WL 4495110 (N.D.W. Va. Apr. 7, 2014) 23

Keller v. United States,

771 F.3d 1021 (7th Cir. 2014) 33

Lane v. Pena,

518 U.S. 187 (1996) 15

Montez ex rel. Estate of Hearlson v. United States,

359 F.3d 392 (6th Cir. 2004) 21

Nabe v. United States,

No. 10-CV-3232, 2014 WL 4678249 (E.D.N.Y. Sept. 19, 2014) 20

Palay v. United States,

349 F.3d 418 (7th Cir. 2003) 33

Parrott v. United States,

536 F.3d 629 (7th Cir. 2008) 26

Pornomo v. United States,

814 F.3d 681 (4th Cir 2016) 14, 15

Rhodes v. Chapman,

452 U.S. 337 (1981) 29

Rich v. United States,

811 F.3d 140 (4th Cir. 2015).. 16, 21, 22, 33

Richmond, Fredericksburg & Potomac R. Co.,

945 F.2d 765 (4th Cir. 1991)..16

Rivera v. United States,

No. 3:12-CV-1339, 2013 WL 5492483 (M.D. Pa. Oct. 2, 2013) 23

Santana-Rosa v. United States,

335 F.3d 39 (1st Cir. 2003) 29

Seaside Farm, Inc. v. United States,

842 F.3d 853 (4th Cir. 2016)... 15, 17, 30

Smith v. Washington Metro, Area Transit Authority,

290 F.3d 201 (4th Cir. 2002)... 17, 30

Suter v. United States,

441 F.3d 306 (4th Cir. 2006)..30

Treistman v. BOP,

470 F.3d 471 (2d Cir. 2006) 33

United States v. Gaubert,

499 U.S. 315 (1991)... 16, 17, 21, 30

Welch v. United States,

409 F.3d 646 (4th Cir. 2005)... 14, 15

Williams v. United States,

50 F.3d 299 (4th Cir. 1995)... 15, 16

Statutes

18 U.S.C. § 4042 .... passim

18 U.S.C. § 4042(a)(3).. 21

28 U.S.C. § 1291 1

28 U.S.C. § 1346(b)(1).. 1, 14

28 U.S.C. § 2672 .... passim

28 U.S.C. § 2680(a) 14

Rules

Fed. R. Civ. P. 5(d)(1)(A) 7

Fed. R. Civ. P. 12(b)(1) 14

Other Authorities

BOP Program Statement 3420.09(10) 12, 22, 23

BOP Program Statement 3420.11.. 22

BOP Program Statement 6031.04.. 27

STATEMENT OF JURISDICTION

Appellant Scott Tyree appeals from a judgment entered by the United States District Court for the Eastern District of North Carolina, dismissing his Federal Tort Claims Act complaint for lack of subject matter jurisdiction. Jurisdiction to the district court was established by 28 U.S.C. § 1346(b)(1).

Jurisdiction to this Court is provided by 28 U.S.C. § 1291. The district court judgment was entered on August 17, 2017. Appellant filed several post-judgment motions with the district court. On September 11, 2018, the district court issued a final order disposing of all issues in the case. Appellant filed a timely notice of appeal on November 15, 2018.

STATEMENT OF ISSUE

Whether the district court correctly held the discretionary function exception bars Plaintiff's Federal Tort Claims Act claim alleging Bureau of Prisons employees failed to timely respond to a distress alarm in a time frame mandated by BOP following an attack by his cellmate.

STATEMENT OF FACTS

Plaintiff's Allegations

At all relevant times to the issues alleged in this case, Appellant Scott Tyree ("Plaintiff") was an inmate in the custody of the Federal Bureau of Prisons ("BOP") and designated to the Low Security Correctional Institution in Butner, North Carolina ("LSCI Butner"). (J.A. 12–13). On June 16, 2014, Plaintiff filed a complaint against the United States of America under the Federal Torts Claim Act, 28 U.S.C. § 2672, et seq. ("FTCA"), alleging BOP employees were negligent when they failed to timely respond to a distress alarm in a time frame mandated by BOP following an attack by his cellmate. (J.A. 17, 112).

According to Plaintiff, on July 19, 2012, while Plaintiff was housed in the Special Housing Unit ("SHU") at LSCI Butner, his cellmate disconnected Plaintiff's continuous positive airway pressure ("CPAP") medical device and began assaulting him. (J.A. 13). Plaintiff alleged that throughout the assault he repeatedly called for help because he was unable to reach the "distress button" at the other end of his cell. (J.A. 13). After an estimated five minutes, his cellmate ended the assault, pressed the "distress button" and repeatedly yelled "CO." (J.A. 13). Approximately two minutes later, Plaintiff alleges his cellmate resumed the assault with the CPAP device for an additional five minutes. (J.A. 14). Thereafter, Plaintiff's cellmate dragged him to the front of the cell and

assaulted Plaintiff with his fists. (J.A. 14). When the officers responded, they found Plaintiff and his cellmate in the front of the cell. (J.A. 14).

Plaintiff stated that he was examined by the institution's health services department and subsequently transferred by ambulance to the WakeMed emergency room for treatment. (J.A. 14). Plaintiff alleged that the assault inflicted "numerous contusions, cuts, and scrapes" as well as a laceration above his eye which required nine stiches. (J.A. 14). Plaintiff also stated that he underwent a CT-scan to check for skull fractures, but did not provide details about the results of that scan. (J.A. 14). On two dates in July 2013, a year after the assault, Plaintiff alleged he experienced a grand mal seizure. (J.A. 14). Plaintiff stated that he had never suffered head trauma or been diagnosed with a seizure disorder prior to the assault. (J.A. 14). In his complaint, Plaintiff specifically claims that:

> [h]ad the SHU officers responded to the "distress" alarm in the time-frame mandated by internal FBOP policy and procedures, that [Plaintiff's] injuries would not have been as extensive, or serious, as they were and that he would not have developed the seizure disorder that he now suffers from. Staff failed to respond to the "distress" alarm in excess of ten (10) minutes. [Plaintiff] will now require the services of a specialist, Neurologist, as well as taking anti-seizure medication for the foreseeable future.

(J.A. 17).

During the course of the ensuing litigation, the two correctional officers on duty in the SHU at the time of the incident each signed declarations stating

they were involved in conducting their assigned duties and responded "immediately" upon observation of the distress button indication light. (J.A. 24, 27). More specifically, Officer Stephen Seaman stated he was conducting rounds on the B Range when he saw the light outside of Plaintiff's cell, which indicated that the distress button had been activated. (J.A. 23–24). Prior to seeing this light, Officer Seaman stated that he was not aware of any emergency occurring inside the cell. (J.A. 24). Upon seeing the light, Officer Seaman immediately responded. (J.A. 24). Officer Thomas Ashley indicated that he was in the SHU office taking care of paperwork and other duties when he saw a light go off on the switchboard, which meant that a distress button had been pushed in Plaintiff's cell. (J.A. 26–27). He, too, stated he responded immediately by going to the range[1] and alerting Officer Seaman. (J.A. 27).

Procedural History

In response to Plaintiff's complaint, the United States filed a motion to dismiss or in the alternative for summary judgment and supporting memorandum on January 9, 2015. (E.C.F. 16–17). Included in the

---

[1] A prison range is essentially a long corridor off of which numerous individual prison cells stem from. Special Housing Units generally consist of multiple ranges separated from each other with gates or sallyports which restrict entry and movement. Due to the secure nature of a SHU, only one officer is permitted to be on the range at a time.

Government's filing were the declarations of the two SHU officers on duty during the incident. (E.C.F. 17-1, 17-2). Each officer stated he responded as soon as he became aware of the distress light. (J.A. 23–27). On August 28, 2015, the district court granted summary judgment in favor of the Government. (J.A. 33). In its order the district court found that the officers did not breach their duty of care to Plaintiff, as the officers responded to the alarm immediately upon viewing the distress light. (J.A. 33). The district court also found that Plaintiff's assertion that officers should have responded quicker to the alarm was "merely speculative." (J.A. 33).

Plaintiff timely appealed. (E.C.F. 36). On March 23, 2016, this Court vacated and remanded the district court's order, holding that Plaintiff had not been given an opportunity to conduct discovery that may have created a genuine issue of material fact sufficient to defeat summary judgment. Tyree v. United States, No. 15-7528 (4th Cir. Feb. 19, 2016) ("Tyree I").

On remand, the district court vacated its August 28, 2015 order, and referred the matter to a United States Magistrate Judge to enter a scheduling order and allow the parties to conduct a period of discovery. (E.C.F. 43). This scheduling order was entered on April 18, 2016. (E.C.F. 44). Discovery and dispositive motions deadlines were extended multiple times to accommodate ongoing discovery issues. (E.C.F. 63, 69, 82, 90). In October 2016, the

magistrate judge ordered that discovery be completed by November 11, 2016. (E.C.F. 69). On November 21, 2016, the Government filed a second motion to dismiss for lack of subject matter jurisdiction, asserting the discretionary function exception to the FTCA. (J.A. 46–60). The district court did not immediately rule on this motion, as discovery was subsequently extended to April 18, 2017, for the purpose of allowing Plaintiff to seek discovery related to the jurisdictional issue. (J.A. 83).

During the extended discovery period, Plaintiff served on the United States numerous requests for admissions, requests for production of documents, and interrogatories, some of which he also filed with the district court.[2] (J.A. 66–73, 110–11). Plaintiff did not seek to depose any BOP staff during the discovery process. The Government responded to Plaintiff's discovery requests, withholding information from him only citing legitimate security concerns. However, the information withheld from Plaintiff, including the SHU post orders, was provided to the district court for an in camera review. (E.C.F. 92) (sealed docket entry).

---

[2] Ordinarily, discovery requests and responses are not to be filed in the district court. Fed. R. Civ. P. 5(d)(1)(A). However, in this case, Plaintiff contested many of the Government's responses and therefore filed many of his discovery requests and the Government's responses with the district court.

District Court's Order

After the protracted discovery period ended, the district court issued an order granting the Government's second motion to dismiss, holding the discretionary function exception barred Plaintiff's FTCA claims. (J.A. 119–22). The district court correctly construed Plaintiff's claim "solely as one asserting that SHU officers failed to respond to the distress alarm in a time frame mandated by BOP policy." (J.A. 113). The district court concluded the SHU officers' conduct was discretionary, finding there were no mandatory directives requiring that officers respond to the activation of a distress button within a specific timeframe. (J.A. 119–21). In making that determination, the district court recognized that 18 U.S.C. § 4042 requires BOP to provide for the "protection" and "safekeeping" of inmates but does not require BOP to take a particular course of action to ensure inmate safety. (J.A. 119). Instead, § 4042 leaves the implementation of duty providing for the protection and safety of the inmates to the BOP. (J.A. 119).

The district court also considered several BOP program statements that Plaintiff contended established a mandatory directive for correctional officers to respond to a distress alarm within a specified amount of time. (J.A. 119–21). In analyzing these policies, the district court found that the program statements and guidelines Plaintiff cited concerning response to medical emergencies were

inapplicable to Plaintiff's situation because Plaintiff never alleged that medical staff failed to respond within a given time period. (J.A. 119–20). The district court additionally found that a non-medical emergency response is governed by different BOP program statements and cited numerous cases that support the district court's finding that the guidance in those policies allowed for individual officer discretion in their implementation. (J.A. 120–21).

The district court also found that the Government action involved in this case was based on public policy considerations and therefore was of the type of action that the discretionary function exception was designed to shield. (J.A. 122). The district court considered relevant case law and found correctional officers' decisions regarding the supervision of inmates are inherently grounded in policy considerations. (J.A. 122). Furthermore, the district court found in the absence of a mandatory directive concerning intervention in inmate assaults, officers were "permitted the discretion to determine the appropriate time to intervene in consideration of inmate and staff safety, the size of the correctional facility, and any other incidents or events occurring at the facility." (J.A. 122).

As a result of these findings, the district court properly concluded that the discretionary function exception to the FTCA bars Plaintiff's claims. (J.A. 122–24). Plaintiff filed several post-judgment motions with the district court, including a Rule 59(e) motion to alter or amend judgment. (E.C.F. 108). The

district court denied Plaintiff's Rule 59 motion on September 11, 2018. (E.C.F. 113). On November 15, 2018, Plaintiff filed a timely notice of appeal. (J.A. 125).

SUMMARY OF ARGUMENT

The district court properly dismissed Plaintiff's complaint for lack of subject matter jurisdiction because his claim is barred by the discretionary function exception to the Federal Tort Claims Act.

A two-part test is used to determine whether the discretionary function exception applies. First, the challenged conduct must involve an element of judgment or choice. Second, the challenged conduct must also be the type of conduct the discretionary function exception was designed to shield. Where both parts are met, the discretionary function exception bars Plaintiff's FTCA claim.

Here, Plaintiff claimed that SHU officers failed to respond to the distress alarm in a time frame mandated by BOP policy. However, the district court properly determined the decision on when and how to respond to a distress alarm involves elements of judgment or choice. Indeed, there are no federal statutes, regulations, directives, orders, or policies that dictate precisely when or how officers must respond to the activation of a distress alarm.

While federal law requires BOP to provide for the "safekeeping, care and subsistence" of inmates, pursuant to 18 U.S.C. § 4042, this statute does not dictate how the duty must be fulfilled. Consequently, the implementation of this general duty is left to the discretion of the BOP. Further, BOP program

statements do not contain mandatory directives which deprive correctional officers of discretion in their response time. While the Standards of Employee Conduct Program Statement, P.S. 3420.09(10), requires an "immediate, effective and appropriate response to all emergency situations" this program statement does not prescribe a specific course of conduct for staff responding to emergencies. More specifically, the program statement does not define "immediate," "effective," or "appropriate," nor does it provide guidance on what such a response necessarily entails. As such, the program statement implicitly reserves discretion in its implementation, and the policy is squarely within the discretionary function exception.

Additionally, the SHU post orders do not mandate a specific response time to either the activation of a distress button or any generic emergency situation and do not prescribe a specific course of conduct for the SHU officers. Instead, the SHU post orders are a mere guideline for officers. The fact that these secure procedures were not disclosed to Plaintiff in discovery is of no consequence. They were submitted to the court in camera.

Moreover, the American Correctional Association ("ACA") guidelines apply only to health care professionals responding to a life-or-limb threatening medical emergency – not to correctional officers responding to distress alarm to which they would have no idea whether there was a medical emergency or not.

Accordingly, the district court properly determined these guidelines are inapplicable to the conduct at issue here.

The district court also properly found that the SHU officers' conduct was the type of conduct the discretionary function exception was designed to protect because the nature of the decision on when and how to respond to a distress alarm is susceptible to policy analysis. Indeed, decisions concerning response times to inmate distress alarms necessarily contemplate the maintenance of order and security within correctional facilities, and the balance of safety goals with finite agency resources.

Although raised for the first time on appeal and not presented to the district court, Plaintiff's argument that the "negligent guard theory" defeats the application of the discretionary function exception is meritless. Even under a liberal interpretation, Plaintiff's complaint does not plausibly assert the negligent guard theory of liability because it cannot be read to allege that his injuries resulted from a particular officer's laziness or inattentiveness.

As a result, the district court properly determined Plaintiff's claim is barred by the discretionary function exception to the FTCA, and its dismissal for lack of subject matter jurisdiction must therefore be affirmed.

ARGUMENT

I. The Discretionary Function Exception to the FTCA Bars Plaintiff's Claim that SHU Officers Failed to Respond to the Distress Alarm in a Time Frame Mandated by BOP policy.

A. Standard of Review.

This Court reviews de novo a district court's decision dismissing a FTCA case for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Welch v. United States, 409 F.3d 646, 650 (4th Cir. 2005) (citing Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999)).

B. Discussion.

1. Applicable Law.

As a sovereign, the United States is immune from all suits against it absent a waiver of its immunity. Pornomo v. United States, 814 F.3d 681, 687 (4th Cir 2016). The FTCA creates a limited waiver of the United States' sovereign immunity for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ." 28 U.S.C. § 1346(b)(1). This waiver of sovereign immunity, however, is subject to several exceptions, one of which is the discretionary function exception. 28 U.S.C. § 2680(a).

The discretionary function exception provides that the United States is not liable for "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 is abused." Id. The discretionary function exception represents the boundary between Congress' willingness to impose tort liability on the United States and its desire to protect certain governmental activities from exposure to suit by private individuals. It was meant to protect the Government from liability that would seriously handicap efficient Government operations. See Seaside Farm, Inc. v. United States, 842 F.3d 853, 858 (4th Cir. 2016) (internal quotations and citations omitted).

Because the discretionary function exception involves the Government's waiver of sovereign immunity, it must be strictly construed in the United States' favor. Lane v. Pena, 518 U.S. 187, 192 (1996). As such, if subject matter jurisdiction is challenged, the plaintiff bears the burden of proving that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. Indemnity Ins. Co. of North America v. United States, 569 F.3d 175, 180 (4th Cir. 2009); Welch v. United States, 409 F.3d 646, 650 (4th Cir. 2005); Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995). Plaintiff seeks to have this Court alter its long-standing precedent that he, as plaintiff, has the burden to show that the discretionary

function exception does not apply to this case. (Brief at 34). The Court should reject his invitation to do so.

When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the court must regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. Williams, 50 F.3d 299 at 304. The district court should grant the Rule 12(b)(1) motion to dismiss if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. Evans, 166 F.3d at 647; Richmond, Fredericksburg & Potomac R. Co., 945 F.2d 765, 768 (4th Cir. 1991). Where, as here, the Government raises a facial challenge to the district court's subject matter jurisdiction, the court considers the facts as alleged by plaintiff to be true. Rich v. United States, 811 F.3d 140, 144–45 (4th Cir. 2015).

The Supreme Court of the United States has promulgated a two-prong test for determining whether the discretionary function applies to a certain action. See United States v. Gaubert, 499 U.S. 315 (1991); Berkovitz v. United States, 486 U.S. 531 (1988). First, a court must determine whether the governmental conduct being challenged involves an element of judgment or choice, or whether a "federal statute, regulation, or policy specifically prescribes the course of action for an employee to follow." Gaubert, 499 U.S. at 322–23; Berkovitz, 486

U.S. at 536. If there is a statute, regulation, or policy prescribing a specific course of action, then there is no discretion, and the exception will not apply. Gaubert, 499 U.S. at 322.

If the court finds the alleged conduct does involve an element of judgment or choice, the court then moves to the second prong of the test, which examines whether the discretion involved is susceptible to policy analysis. Id. at 325. In making this determination, the court is to consider whether the decision "'in an objective, or general sense … is one which we would expect inherently to be grounded in considerations of policy.'" Seaside Farm, 842 F.3d at 858 (quoting Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993)). Thus, the court does not evaluate "'whether policy considerations were actually contemplated in making [the] decision.'" Id. (quoting Smith v. Washington Metro, Area Transit Authority, 290 F.3d 201, 208 (4th Cir. 2002)) (emphasis in original). Furthermore, if discretion is permitted by the statute, regulation, or policy at issue "it must be presumed that [decisions] are grounded in policy when exercising that discretion." Id. at 858 (citing Holbrook v. United States, 673 F.3d 341, 345 (4th Cir. 2012) (internal citations omitted)). Notably, if an action is discretionary within the meaning of the exception, the exception applies "whether or not the discretion involved be abused." Gaubert, 499 U.S. at 323.

Here, Plaintiff claims the SHU officers failed to respond to a distress alarm in a time frame mandated by BOP policy. (J.A. 113). For the reasons below, the district court properly determined the discretionary function exception bars Plaintiff's FTCA claim, and the district court's dismissal for subject matter jurisdiction must therefore be affirmed.

2. The District Court Properly Applied the Discretionary Function Analysis to the Conduct at Issue.

The conduct at issue for review in this case, which the district court properly identified in the case below, is whether the "SHU officers failed to respond to the distress alarm in a time frame mandated by BOP policy." (J.A. 113). However, Plaintiff appears to criticize the district court for citing discretionary function cases involving BOP decisions other than those concerning BOP officers responding to emergencies; and as such, he accuses the district court of mischaracterizing the issue in this case. (Brief at 13–16). To the contrary, considering the dearth of case law on the particular fact pattern in this case, it is clear the district court's discussion of BOP's § 4042 general duties was proper. In fact, a review of the case law in this area indicates that there are no identifiable cases where correctional officers made a decision to respond as soon as they became aware of a distress alarm, rather than the more ordinary situation where they made a decision not to respond. The district court's citations simply identify examples of the countless situations in which courts have found the

BOP's implementation of § 4042 general duties of protection and safekeeping of inmates to be entirely discretionary. (J.A. 119).

Nevertheless, even assuming arguendo that the district court misidentified the issue, this Court may affirm the dismissal by the district court on the basis of any ground supported by the record, even if it is not the basis relied upon by the district court. Berkenfeld v. Lenet, 921 F.3d 148 (4th Cir. 2019), (quoting Andrews v. Daw, 201 F.3d 521, 526 n.3 (4th Cir. 2000). Consequently, for all of the reasons set forth herein, this Court should affirm the district court's dismissal for lack of jurisdiction.

Plaintiff contends this case is different than the cases cited by the district court that involved a discretionary decision to wait for the right moment to intervene in an assault and a discretionary decision that potentially exposes an inmate to danger because, unlike those cases, this case involves "delays in responding to an uninvestigated emergency." (Brief at 14). According to Plaintiff, the first prong cannot be met because, he surmises, the SHU Officers did not know why the alarm had been triggered to begin with and therefore could not have acted with any discretion. (Brief at 20). He further speculates that the only explanation for their failure to respond is because they were "inattentive, careless, or lazy." (Brief at 20).

Plaintiff's argument misses the mark for at least three reasons. First, there are no statutes, regulations, or policies that mandate a particular response time to the activation of a distress alarm. Second, Fourth Circuit precedent applying the discretionary function exception does not require that the officers actually make a policy-based decision. Instead, the focus of the inquiry is not on the officers' subjective intent in exercising the discretion conferred by the statute or regulation, but on the nature of the actions taken and on whether those actions are susceptible to policy analysis. Third, Plaintiff's unsupported, self-serving statements that the SHU officers failed to immediately respond or his speculation that they did not respond because they were because they were possibly "inattentive, careless, or lazy" is not sufficient to meet his burden of proof that the discretionary function does not apply. (Brief at 20). Indeed, even after an extended period of discovery, Plaintiff can point to no evidence that the officers were inattentive or otherwise dilatory in their duties. His failure to do so is fatal to his claim. See, e.g., Nabe v. United States, No. 10-CV-3232, 2014 WL 4678249 (E.D.N.Y. Sept. 19, 2014).

a. The First Prong of the Discretionary Function Exception is Met Because There are No Statutes, Regulations, or Policies That Mandate a Particular Response Time to the Activation of a Distress Alarm.

A plaintiff may defeat an assertion of the discretionary function exception by identifying a "federal statute, regulation, or policy [that] specifically

prescribes a course of action for an employee to follow." Gaubert, 499 U.S. at 322–23; Berkovitz, 486 U.S. at 536. In this case, Plaintiff did not identify any federal statutes or regulations that mandate a specific response time or manner in which correctional officers must respond to the activation of a distress alarm.

Notwithstanding that failure, Title 18 U.S.C. § 4042(a)(3) charges the BOP with the general duty to "provide for the safekeeping, care … protection, instruction, and discipline of all persons charged with, or convicted of, offenses against the United States." 18 U.S.C. § 4042(a)(3). This Court has previously held that § 4042 is a broad statute through which the BOP maintains discretion regarding the implementation of those duties. Rich, 811 F.3d at 145.

Similarly, at least three other circuits have held that § 4042 does not specifically prescribe a course of action for BOP to follow when protecting inmates. See, e.g., Cohen v. United States, 151 F.3d 1338, 1343 (11th Cir. 1998) (explaining that § 4042 does not "mandate a specific, non-discretionary course of conduct" that precludes the exercise of discretion, instead, the BOP must exercise discretion to choose the policies and procedures it believes necessary to meet its general duty); Calderon v. United States, 123 F.3d 947 (7th Cir. 1997) (finding that although 18 U.S.C. § 4042(a)(3) vests the BOP with the general duty of care to federal inmates, the statute fails to direct the manner by which the BOP must fulfill this duty); Montez ex rel. Estate of Hearlson v. United

States, 359 F.3d 392, 396 (6th Cir. 2004) (same). As a result, when analyzing § 4042, the agency is given broad discretion in the implementation of this general duty, and therefore, does not preclude the discretionary function exception. Rich, 811 F.3d at 145.

Plaintiff does identify a specific BOP policy which he contends mandates that staff immediately respond to emergencies. Specifically, the BOP program statement which governs BOP employee conduct provides that: "[b]ecause failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employees respond immediately, effectively, and appropriately during all emergency situations." Program Statement 3420.09(10), Standards of Employee Conduct, at p. 9 (Feb. 5, 1999).[3] (J.A. 120). The program statement also requires that ". . . employees are required to remain fully alert and attentive during duty hours." Id. This program statement requires an immediate, effective, and appropriate response

---

[3] This program statement was in place at the time of the incident at issue in this case, but it was subsequently amended on December 6, 2013, and is now identified as P.S. 3420.11, Standards of Employee Conduct (Dec. 6, 2013). The Government represents that there is no substantive change to the responsiveness language between the two program statements, and agrees with Appellant that it would be appropriate for this Court to take judicial notice of the citations to the prior program statement.

to emergency situations; however, it does not define these elements or provide guidance on how staff are to provide such a response.

Because the program statement prescribes no specific course of action on how to respond, discretion is implicitly retained in its implementation. Jones v. United States, No. 2:11-CV-94, 2014 WL 4495110, at *18 (N.D.W. Va. Apr. 7, 2014) (comparing BOP Standards of Conduct Program Statement with 18 U.S.C. § 4042). More specifically, the program statement does not define "immediate," "effective," or "appropriate," nor does it provide guidance on what such a response necessarily entails. As such, the program statement implicitly reserves discretion in its implementation, and the policy is squarely within the discretionary function exception. Id.; see also, Rivera v. United States, No. 3:12-CV-1339, 2013 WL 5492483, at *10 (M.D. Pa. Oct. 2, 2013).

Plaintiff also speculates applicable post orders contain a mandatory directive. For example, without any factual support, he suggests "it is more than plausible that the ten-minute delay alleged by Plaintiff violated the post orders giving specific guidance to the officers on duty in this SHU." (Brief at 21). Plaintiff is wrong for multiple reasons.

First, the SHU post orders in question, which are a sealed part of the record in this case, make explicitly clear that they are guidelines to be performed utilizing sound judgment and professionalism, rather than mandatory directives,

and that they are intended as advice for officers, not restrictions upon them. Plaintiff asserts that language purporting to grant discretion in a directive containing otherwise mandatory language should not transform the directive into a discretionary guideline. (Brief at 24–25). The Fourth Circuit, however, has held that an agency may have guidelines which provide a framework for their employees' decision making but which do not preclude the exercise of discretion. See Hibble v. United States, 133 F.3d 915 (4th Cir. 1998), cert. denied, 525 U.S. 827 (1998) (holding the specific Army pamphlet plaintiff relied on, requiring either immediate repair of hazardous condition, or barriers or warnings, was actually a "guide" and not a mandatory directive).

Even assuming, solely for argument's sake, that the explicit discretionary language in the applicable post orders do not, as a general matter, leave ultimate discretion to the correctional officers, no SHU post order prescribes a course of action for the specific conduct at issue here: that is, the required response (or response time) to the activation of a distress button. (See E.C.F. 92) (filed under seal). The applicable post orders do not mention distress alarms, nor do they mandate a response time to any emergency situation. In the absence of a mandatory directive in the post orders specifically prescribing a course of action on this issue, the officers were permitted to use their discretion.

Plaintiff's reliance on Brembry v. United States, et al., 2011 U.S. Dist. LEXIS 105573 (W.D. Va. Sept. 19, 2011), is likewise misplaced. In Brembry, the district court found that the discretionary function exception did not apply with respect to a post order that provided: "[t]he Unit Officer will remain inside the inner door of the Unit during controlled movements." Id. at *4. The court found that the post orders contained an explicit mandate, which deprived the officer of the discretion to step outside the Unit. Id. at *6. Similarly, Plaintiff's reliance on the Fifth Circuit's unpublished decision Garza v. United States, 161 F. App'x 341 (5th Cir. 2005) is also unavailing. In Garza, the Fifth Circuit held that the discretionary function exception was inapplicable with respect to a post order that provided that officers "will patrol the recreation yard." Id. at 344. The Court found that the instruction did not allow an officer the discretion to avoid patrolling the recreation yard. Id.

Here, in contrast with both cases, the post orders contain no specific mandate establishing a response time to distress alarms, or directing when and how officers should respond to an assault or other emergency.[4] In the absence

---

[4] The Government acknowledges that the applicable SHU post orders provide security procedures for how staff are to enter inmate cells and make notifications in the event of a medical or suicide emergency, but they do not mandate when or how staff are to respond to a distress alarm. (ECF 92).

of such mandate, in conjunction with the discretionary language, the officers were required to exercise their judgment in responding to the distress alarm.

Plaintiff contends he should have been allowed to view these post orders, or in the alternative, the district court should have granted Plaintiff's motion for appointment of counsel and allowed appointed counsel to review them. (Brief at 24). In support of this contention Plaintiff cites a case that provides for either in camera review of the documents or the appointment of counsel with attorney-privileged view. See Parrott v. United States, 536 F.3d 629, 638 (7th Cir. 2008). Here, the Government submitted the SHU post orders for in camera review by the district court. Post orders contain sensitive information regarding correctional officer shift times, positions, and other duties. Release of post orders of a federal correctional facility can endanger the security of the institution as well as the safety of staff, inmates, and the general public. Therefore, the Government declined to provide these materials to an incarcerated federal inmate or to individuals outside of the Department of Justice.

Nevertheless, Plaintiff argues that the district court should have explained why an in camera review of the post orders did or did not impact the court's conclusions. (Brief at 24). Yet, there is no dispute that the post orders were part of the record before the district court, and the court had the discretion to weigh

the relevancy and importance of the evidence before it. Nevertheless, any error by the district court in not mentioning the post orders would be harmless, as the record is clear that the applicable post orders are discretionary. Because this Court reviews this case de novo, the sealed docket entry is available for this Court's plenary consideration.

Finally, Plaintiff claims the SHU officers violated BOP Program Statement 6031.04, Patient Care, by asserting BOP officers were required to respond within four minutes to the activation of the distress alarm. (Brief at 20). The program statement provides: "ACA [American Correctional Association] standards require a four-minute response to life-or limb-threatening medical emergencies." (J.A. 91-92). Although the district court below did not analyze whether the ACA Standard was a mandatory directive, it properly found the standard to be inapplicable when activated in response to inmate assaults. (J.A. 120). Additionally, the district court noted that Plaintiff was seeking the response of correctional officers on duty in the SHU, not that of medical professionals. (J.A. 120).

To avoid this outcome, Plaintiff argues that he was experiencing both an assault as well as a life-threatening emergency. As such, he contends the medical response time should have been complied with. (Brief at 21). However, the district court correctly found that Plaintiff was not a patient declaring a medical

emergency at the time the distress button was activated. (J.A. 120). Medical professionals were not conducting rounds in the SHU, and as Plaintiff acknowledges, the assigned SHU correctional officers could not have known whether there was a medical emergency before they responded. (Brief at 21). Before Plaintiff could receive any medical care in response to an alleged medical emergency, it was necessary for the officers to become aware of the distress alarm and determine whether there was an emergency which required medical attention. To be sure, Plaintiff never has alleged that the medical staff response was in violation of the four-minute directive. (J.A. 14, 120).

In sum, the district court properly held the challenged governmental conduct involved an element of judgment or choice, and there was no federal statute, regulation, or policy that prescribed the course of action for an employee to follow.

b. The Second Prong of the Discretionary Function Exception is Met, as the Officers' Actions are Susceptible to Policy Analysis.

The district court also correctly found that the officers' decision as to when and how to respond to the activation of a distress alarm is conduct that is susceptible to policy analysis. (J.A. 122). Indeed, such decisions necessarily implicate correctional oversight and matters of internal prison security. Consequently, the second prong of the discretionary function exception analysis is also met.

The BOP requires discretion and flexibility to respond to situations that may occur in the unpredictable prison environment. See Rhodes v. Chapman, 452 U.S. 337, 349 n.14 (1981) ("[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators."). The BOP exercises this discretion by grounding its decisions in public policy considerations related to internal prison security. Santana-Rosa v. United States, 335 F.3d 39, 44 (1st Cir. 2003) ("The management of large numbers of potentially dangerous individuals … inevitably requires not only the exercise of discretion but decision-making within the context of various difficult policy choices."). Certainly, the specific conduct underlying Plaintiff's claim – the response time to a distress alarm – pertains to matters of internal prison operations and security and the balance of safety goals with finite resources. Here, the district court properly found that the officers are permitted the discretion to determine the appropriate time to intervene in consideration of inmate staff and safety, the size of the facility, and other incidents or events occurring at the facility. (J.A. 122).

Plaintiff contends the discretionary function exception should not apply because the officers did not actually balance the policy-based considerations. (Brief at 27). However, it is immaterial whether the correctional officers actually balanced or considered the various policy considerations, as the relevant

question is whether the nature of the conduct is "susceptible to policy analysis." Gaubert, 499 U.S. at 325.

In Gaubert, the Supreme Court held that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis. Gaubert, 499 U.S. at 325 (emphasis added). This Court, too, has adopted the Gaubert directive in FTCA cases involving the discretionary function exception. See Holbrook v. United States 673 F.3d 341, 350 (4th Cir. 2012); Suter v. United States, 441 F.3d 306, 311 (4th Cir. 2006); Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993).

Thus, the United States need not show that the agency or employees actually weighed policy considerations in carrying out the act in question. See, e.g., Smith, 290 F.3d at 208; Seaside Farm, Inc., 842 F.3d at 858. Rather, "[i]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." Gaubert, 499 U.S. at 324.

Here, even if the officers didn't respond as soon as the distress alarm lit, the nature of their actions is subject to policy analysis. Gaubert at 325. In other words, even if the officers did not make a specific decision to delay responding

to the distress alarm, Plaintiff does not allege any facts (or point to any after discovery) that the officers were doing anything other than their job, and the nature of their job involved the exercise of their discretion to determine which duties take priority over all other duties they were responsible for completing.

Plaintiff cites this Court's opinion in Sanders v. United States, for the proposition that a government official violated a nondiscretionary duty even though she had implicit discretion to diverge from the policy if she made an actual policy decision to do so. 937 F.3d 316, 330–31 (4th Cir. 2019). However, Sanders is inapposite here because in Sanders, a NICS examiner had a mandatory duty to contact another agency for information, and her decision not to do so did not involve a permissible exercise of discretion. Id. Here, there is no evidence to suggest that the SHU Officers elected to do nothing in response to the distress alarm. To the contrary, the officers used their discretion to determine that responding to the distress light was more important than continuing with their other duties, and as such, responded as soon as they saw the light. Consequently, the Sanders decision is not applicable here.

It remains clear that an officer's decision as to the time and manner in which he responds to an inmate-initiated call button is easily susceptible to policy analysis. These policy considerations could reasonably include, among others, finite agency resources, staffing shortages, competing job duties, and the

preservation of order and security of the institution. Because the nature of this conduct is susceptible to policy analysis, the second prong of the discretionary function exception is satisfied. Therefore, the district court's finding that the discretionary function exception applies and its subsequent dismissal for lack of jurisdiction is proper.

In sum, the district court properly concluded that the second prong of the discretionary function test is satisfied, and this Court should affirm the dismissal of Plaintiff's complaint for lack of subject matter jurisdiction.

3. Plaintiff Fails to Allege any Facts Suggesting that the Officers Acted in a Negligent Manner.

Although Plaintiff fails to make specific allegations of officer negligence in his complaint, he seems to suggest that the officers simply did not respond to the distress alarm in the time-frame mandated by policy, and that through some permutation of a res ipsa loquitur-type theory, they must have been inattentive or lazy, and as such, should not be protected by the discretionary function exception. (Brief at 25–30). For the first time, in his appellate brief, Plaintiff now cites to case law in support of what he refers to as a "negligent guard theory." Id. This is the theory that negligent conduct, such as behavior that is "marked by individual carelessness or laziness," is not conduct that exercises discretion, and thus is not shielded by the discretionary function exception. See,

e.g., Rich, 811 F.3d at 147 (citing Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000)).

Plaintiff's complaint does not plausibly assert the negligent guard theory of liability. The cases Plaintiff cites in support of his theory are cases in which the plaintiffs actually alleged facts suggesting that officers were inattentive or dilatory in their duties or otherwise did not arise from discretionary judgments. See, e.g., Rich, 811 F.3d at 146 (allegation that officers improperly conducted security pat-downs); Keller v. United States, 771 F.3d 1021,1022 (7th Cir. 2014) (alleging that officers failed to monitor their assigned yards because they were lazy or inattentive); Treistman v. BOP, 470 F.3d 471, 475–76 (2d Cir. 2006) (alleging that the BOP failed to institute and enforce proper staffing and patrolling of the housing units); Palay v. United States, 349 F.3d 418, 429 (7th Cir. 2003) (alleging that BOP improperly transferred plaintiff to the unit in which he was assaulted); Coulthurst, 214 F.3d at 109 (alleging that employee failed to perform diligent inspection out of laziness, hastiness, or inattentiveness).

Here, even under a liberal interpretation, Plaintiff's complaint cannot be read to allege that his injuries resulted from a particular officer's laziness or inattentiveness. Plaintiff simply never made any plausible allegations at the district court level to suggest that the officers in this case acted for purely personal or non-policy reasons. In fact, he even admits that he "was locked in

a cell and under assault at the time and has no access to the facts concerning what the guards were doing." (Brief at 26). Indeed, even after an extended discovery period, Plaintiff fails to put forth any facts supporting his allegation that the officers were inattentive or dilatory in their duties. Instead he speculates only "negligence or indifference are the most natural explanations." (Brief at 26). However, Plaintiff's mere speculation and invocation of res ipsa loquitur is insufficient to meet his burden that the SHU officers were actually negligent.

Plaintiff did not allege that the officers' response to the activation of the distress alarm was not effective or appropriate under the circumstances, and certainly did not allege facts even suggesting that the officers were not fully alert and attentive during their shift. Moreover, the uncontested declarations of the correctional officers indicate they responded as soon as they became aware of the distress alarm, which may or may not have been the same moment it was pushed. (J.A. 23–27). This Court may consider these facts and affirm the dismissal by the district court on the basis of any ground supported by the record, even if it is not the basis relied upon by the district court. Berkenfeld, 921 F.3d 148. Thus, for this additional reason, Plaintiff failed to meet his burden to establish that the discretionary function exception does not apply.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted, this 26th day of December, 2019.

ROBERT J. HIGDON, JR.
United States Attorney

BY: */s/ Joshua B. Royster*
Joshua B. Royster
Assistant United States Attorney
Michael Bredenberg
Special Assistant United States Attorney
Hayley Milczakowski
Qualified Third Year Law Student
150 Fayetteville Street, Suite 2100
Raleigh, North Carolina 27601
Telephone: 919-856-4530

CERTIFICATE OF COMPLIANCE

1. Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this brief meets the page or type-volume limits of Rule 32(a) because, exclusive of the portions of the document exempted by Rule 32(f), this brief contains:

   ☐ ________ Pages *(may not exceed 30 pages for a principal brief or 15 pages for reply brief, pursuant to Rule 32(a)(7)(A))*; or

   ☒ 7,385 Words *(may not exceed 13,000 words for a principal brief or 6,500 words for reply brief, pursuant to Rule 32(a)(7)(B)).*

2. Further, this document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in Microsoft Word 2016 using fourteen-point *Calisto MT*, a proportional-width typeface.

/s/ Joshua B. Royster
JOSHUA B. ROYSTER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to Appellant's Counsel of Record.

/s/ Joshua B. Royster
JOSHUA B. ROYSTER
Assistant United States Attorney