

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JENNIFER WATSON,)	
)	
Plaintiff)	
)	
v.)	Civil No. 98-137-B
)	
UNITED STATES OF AMERICA,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
TO DISMISS AND PLAINTIFF’S MOTION TO AMEND THE COMPLAINT**

Pending before the Court is Defendant’s motion to dismiss for lack of subject matter jurisdiction or alternatively, because the complaint fails to state a claim for which relief can be granted. Fed. Rule Civ. P. 12 (b)(1) & (6). Also before the Court is Plaintiff’s motion to amend the complaint. This action arose out of alleged instances of sexual harassment and assault by one of Defendant’s employees, a postal worker, against Plaintiff when Plaintiff picked up mail held for her at the post office. Plaintiff alleges that Defendant knew its employee had a history of the type of behavior alleged, but failed in its duty to protect Plaintiff from the employee. For the reasons delineated below, I recommend that the Court GRANT Defendant’s motion to dismiss and DENY Plaintiff’s motion to amend.

I. Background

For the purposes of this motion the Court will accept the facts recited by Plaintiff as true. On December 2, 1994, Plaintiff went to the United States Post Office in Bradley, Maine to pick up her mail. Plaintiff claims that while a postal employee was assisting her in retrieving her mail, the employee sexual harassed and assaulted her. Plaintiff claims the harassment and assault

occurred not only on December 2nd, but also on other occasions up until December 7th. Plaintiff alleges that based on information provided by an unidentified employee at the post office, the employee who assaulted her was known by his superiors to have engaged in inappropriate sexual behavior in the past. Plaintiff claims that Defendant negligently hired and supervised its employee, thereby breaching its duty to protect Plaintiff from the employee.

II. Discussion

The plaintiff has the burden of demonstrating that the Court has subject matter jurisdiction when a defendant moves to dismiss under Fed. R. Civ. P. 12(b)(1). *Lord v. Casco Bay Weekly*, 789 F.Supp. 32, 33 (D. Me. 1992). However, on a motion to dismiss, the Court must accept the allegations in the plaintiff's complaint as true. *Cruz v. Beto*, 405 U.S. 319,322 (1972). Accepting the allegations in Plaintiff's Complaint as true, the Court will now consider whether Plaintiff has met its burden of demonstrating that this Court has subject matter jurisdiction over this matter.

Defendant moves the Court to dismiss because the Court does not have jurisdiction to hear Plaintiff's claim. Fed. Rule Civ. P. 12(b)(1). Generally, Defendant is immune from suit unless it specifically consents to be sued. Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, as a general waiver of immunity from suit. Within the FTCA are exceptions from that general waiver, specifically section 2860 lists those areas in which the United States did not waive its right to sovereign immunity.

In this matter Defendant invokes two exceptions. First, Defendant asserts that pursuant to section 2860(h), often referred to as the "intentional tort exception", Defendant cannot be liable for the sexual assault committed by its employee and therefore the Court must dismiss the

complaint pursuant to Fed. Rule Civ. P. 12 (b)(1). Second, Defendant argues that pursuant to section 2860(a) Defendant cannot be liable for discretionary functions such as who Defendant chooses to hire and how Defendant supervises its employees. We address Defendant's arguments below.

Our analysis of section 2860(h) begins with *United States v. Shearer*, 473 U.S. 52 (1985). In *Shearer*, a serviceman who previously had been convicted of manslaughter, kidnaped and murdered another serviceman. The plaintiff brought suit against the United States for negligent supervision. The United States claimed that under section 2860(h) it was immune from suit. The Court agreed, stating:

Section 2860(h) does not merely bar claims for assault and battery; in sweeping language it excludes any claim arising out of assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a government employee.

Id. at 55. (citing *United States v. Splear*, 338 U.S. 217, 219 (1949)).

Three years later the Supreme Court revisited the application of § 2860(h). *Sheridan v. United States*, 487 U.S. 392 (1988). In *Sheridan*, three naval corpsmen found a drunk off-duty serviceman named Carr in a naval hospital. While taking Carr to the emergency room, the corpsmen noticed Carr had a rifle. The corpsmen then fled and failed to alert authorities about Carr. Later the evening, Carr fired a shot into the plaintiff's car, thereby causing damage to the plaintiff's car and injuring the plaintiff. The Court held that when the employee's tortuous conduct occurs outside the scope of the employee's employment and the conduct occurred because of the negligence of other government employees based on an independent duty to the victim, the government is not immune from suit. *Id.* at 401.

Following *Sheridan*, courts have not found immunity under section 2680(h) when the Government owed a special or independent duty to the plaintiff. See *Malloy v. United States*, 884 F. Supp. 622 (D. Mass. 1995) (Government owed a special duty to protect plaintiff who lived on a military base from a private who had an extensive criminal record when Inspector General failed to conduct proper investigation of private's criminal history.); *Bembensita v. United States*, 866 F.2d 493, 497-498 (D.C. Cir. 1989) (Government owed hospital patient who was blind and in a semicomatose condition an independent duty to protect the patient from sexual assault by hospital employee.); *Harris v. United States*, 797 F. Supp. 91, 94-95 (D.P.R. 1992) (Government owed school children at naval base an independent duty to protect them from teacher who molested them.). Discussing the *Shearer* and *Sheridan* decisions this Court wrote:

Shearer dictates that the Government does not owe a duty to the world to prevent employees from committing foreseeable illegal or violent acts whether they are on or off the job. However, *Sheridan* determined that liability may attach, and hence, jurisdiction may exist, where the Government owes an independent duty to the victim.

Miami North v. U.S. Dep't of Labor Pen. Job Corps Ctr., 939 F. Supp. 53, 56 (D. Me. 1996).

Plaintiff argues that she is suing Defendant based on the negligence of postal employees to stop a foreseeable assault. However, as the cases cited above illustrate, Plaintiff must demonstrate that Defendant owed her an independent duty. Plaintiff argues that Defendant owed her a duty, not only as a member of the general public, but “as a member of the community who needed to pick up mail held for her at the post office. . . .” Plaintiff’s Response at 4. I am satisfied after reviewing the cases cited above that Plaintiff’s need to pick up mail at the post office falls short of establishing that Defendant owed Plaintiff an independent duty. In each of the post-*Sheridan* cases cited above, the Government had a special relationship with the plaintiff.

Such a relationship does not exist here. In fact, Plaintiff's position would effectively extend a general duty on Defendant to protect a person from an intentional tort committed by a Government employee when that person receives a service utilized by a large number of the public. Such an extension is not dictated by existing precedent. Accordingly, I recommend that the Court find that the assault and battery exception in section 2860(h) applies thereby precluding subject matter jurisdiction over this matter.

Plaintiff has filed a motion to amend her complaint provided the Court finds her complaint is insufficient to sustain her claim. After reviewing the motion and Defendant's response I am satisfied that to grant Plaintiff's motion would be futile. *Forman v. Davis*, 371 U.S. 178, 182 (1962). Plaintiff's proposed amended complaint fails to plead sufficient facts to establish that Defendant owed her an independent duty that would preclude the application of section 2860(h).¹ Accordingly, I recommend that Plaintiff's motion be DENIED.

Having found that Defendant is immune from liability pursuant to section 2860(h) the Court need not address whether the discretionary function exception immunizes Defendant from suit in this matter.

III. Conclusion

For the reasons stated above I recommend that Defendant's Motion to Dismiss be GRANTED and Plaintiff's Motion to Amend be DENIED.

¹ In her proposed amended complaint Plaintiff states that, "U.S. Postal Service employees owed a duty to the Plaintiff, as a person who needed to use postal facilities to claim her property, to protect her from the propensities" of the postal employee. This falls short of the duty needed to forestall the application of section 2680(h).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on October 30, 1998