

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TIMOTHY F. READY, JR., et al.,)
)
 Plaintiffs)
)
 v.)
)
 UNITED STATES OF AMERICA, et al.,)
)
 Defendants)

Docket No. 96-371-P-H

**MEMORANDUM DECISION ON DEFENDANTS’ MOTION TO STRIKE
AND RECOMMENDED DECISION ON DEFENDANTS’ MOTION
TO DISMISS OR FOR SUMMARY JUDGMENT**

The defendants, the United States, Lewis A. Felton and William H. Ryzewic,¹ move this court to dismiss the complaint of the plaintiffs, Timothy R. Ready, Jr. (“Ready”), and Linda L. Ready, husband and wife, in its entirety, or, in the alternative, to grant them summary judgment. The defendants also move to strike the Statement of Material Facts filed by the plaintiffs in connection with their opposition to the motion to dismiss or for summary judgment. This case arises out of circumstances surrounding the resignation of Ready from his position as security manager for the Portsmouth Naval Shipyard located in Kittery, Maine. I deny the motion to strike and recommend that

¹ The complaint also lists John Doe I and Jane Doe I as defendants. None of the summary judgment materials submitted by the plaintiffs addresses these two defendants. In light of my recommendation concerning the motion to dismiss or for summary judgment as to the identified defendants, I also recommend that the complaint be dismissed as to the Doe defendants. The plaintiffs have provided nothing beyond the conclusory allegations concerning these individuals that are present in the complaint. Without more, no colorable claims have been raised against these individuals. *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995).

the motion to dismiss or for summary judgment be granted.

I. Applicable Legal Standards

A. Motion to Dismiss

The defendants have moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and (6). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept “bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.” *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); see also *Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the

complaint; the court may not consider factual allegations, arguments and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

B. Summary Judgment

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following facts are undisputed in the summary judgment record.² Ready was employed as security manager at the Portsmouth Naval Shipyard (“PNSY”) in Kittery, Maine from 1986 until he voluntarily resigned effective May 31, 1992. Complaint (Docket No. 1) ¶¶ 1, 15; Answer of United States (Docket No. 2) ¶¶ 1, 15; Answer of Defendants Felton and Ryzewic (Docket No. 3) ¶¶ 1, 15; Defendants’ Statement of Material Facts (Docket No. 9) (“Defendants’ SMF”) ¶ 1; Plaintiffs’ Response to Defendants’ Statement of Material Facts (Docket No. 15) ¶ 1. On September 27, 1991 defendant Felton, then a captain in the Navy and commander of PNSY, issued a Notice of Proposed Removal to Ready. Declaration of Lewis A. Felton (“Felton Dec.”), attached to Defendants’ SMF, ¶ 5 & Encl. 1; Declaration of William H. Ryzewic (“Ryzewic Dec.”), attached to Defendants’ SMF, ¶ 3. Defendant Ryzewic, Felton’s immediate superior and a civilian, was the deciding official with respect to the proposed removal. Ryzewic Dec. ¶ 3. Ready was placed on administrative leave. Felton Dec. ¶ 5.

Ready and his attorney met with Ryzewic in November 1991. Ryzewic Dec. ¶ 5. Ready presented an oral reply to the charges. *Id.* On April 2, 1992 Ryzewicz issued his Decision on Proposed Removal. Encl. 1 to Ryzewic Dec. The decision advised Ready of his right of appeal to the Merit Systems Protection Board; copies of the Board’s regulations and an appeal form were enclosed.

² The defendants have filed a motion to strike the plaintiff’s statement of material facts, Docket No. 16, on the grounds that there is no legal or procedural basis for a statement of material facts to be filed by a party opposing a motion for summary judgment, as distinguished from a response limited to the statement of material facts filed by the moving party. Docket No. 19. The defendants have, in the alternative, filed a response to the plaintiffs’ statement. Contrary to the defendants’ position, Local Rule 56 does not prevent the nonmoving party from filing a statement of material facts beyond those listed by the moving party as to which there may exist a genuine issue to be tried. The rule does contemplate that such a list and any response to the moving party’s statement will be incorporated into a single document. The failure to do so in this case is not fatal. The motion to strike is denied.

Id. at 8. During April 1992 representatives of Ready and the Navy discussed the possibility that Ready would retire in a certain manner and receive an annuity upon retirement. Encl. 3 to Ryzewic Dec. On May 13 and 14, 1992 Ready and Ryzewic executed a Memorandum of Agreement pursuant to which Ready agreed to resign and apply for discontinued service retirement. Encl. 4 to Ryzewic Dec. The Memorandum of Agreement also provides that

Mr. Ready will rescind all existing complaints and requests for relief whatsoever pertaining to his employment with the Shipyard. Mr. Ready hereby agrees to refrain from seeking relief in the future through any means, except as hereinafter provided, concerning his employment with the Shipyard. In tendering his resignation and filing for discontinued service retirement, Mr. Ready does so in settlement of all matters pertaining to his employment with the Shipyard.

Id. ¶ 6. The Memorandum of Agreement also recites that Ready entered into the agreement “without coercion and after having the opportunity to review the agreement with the counsel of his choosing.”

Id. ¶ 9.

In June 1992 Ready’s attorney wrote to the attorney who had represented PNSY during the negotiation of the Memorandum of Agreement concerning the “top secret” clearance Ready held as a member of the United States Naval Reserve, independent of his former position as security manager at PNSY. Declaration of Marie E. Gregory (“Gregory Dec.”), attached to Defendant’s SMF, Encl. 1. The PNSY attorney responded by letter stating that Navy authorities were performing a routine five-year background investigation update of Ready’s security clearance and that the Defense Investigative Service had requested and was provided a copy of the report compiled by the Inspector General concerning the allegations that led to the Notice of Proposed Removal. *Id.* The Defense Investigative Service conducted a review of Ready’s reserve security clearance. Affidavit of Timothy F. Ready, Jr., Exh. A to Plaintiffs’ Objection to Motion to Dismiss or Motion for Summary Judgment (“Plaintiffs’

Objection”) (Docket No. 13), ¶ 24.³ Employees of the Navy are governed by Department of the Navy Instruction 5510.1H which requires that unfavorable information developed about an individual must be reported. Encl. 7 to Gregory Dec.

Ready appealed to the Merit Systems Protection Board by letter dated September 16, 1992 alleging that the Memorandum of Agreement was “void as it was obtained by the fraudulent and bad faith conduct of the Agency and/or mutual mistake by the parties.” Encl. 2 to Gregory Dec. Ready sought reinstatement to his former position, retroactive to the date of his resignation, and full pay and benefits. *Id.* at 3. By decision dated November 30, 1992 the Board’s administrative law judge dismissed Ready’s appeal. Encl. 3 to Gregory Dec. Ready was advised of his right to petition the full Board for review of the decision or to file a petition for review in the United States Court of Appeals for the Federal Circuit. *Id.* at 12. Ready appealed to the full Board, which denied his petition for review and advised him of his right to request review by the United States Court of Appeals for the Federal Circuit. Encl. 4 to Gregory Dec. Ready did not request such review.

By letter dated March 31, 1994 Ready and his wife filed an administrative tort claim with the Navy. Encl. 5 to Gregory Dec. On June 26, 1996 the Navy denied this claim. Encl. 6 to Gregory Dec. The plaintiffs filed this action on December 20, 1996. Docket No. 1.

³ Plaintiff Timothy Ready’s affidavit is made on information and belief, contrary to the requirements of Fed. R. Civ. P. 56(e) that affidavits submitted in connection with a motion for summary judgment be made on personal knowledge. The majority of the paragraphs in this affidavit present hearsay. The defendants have objected to the affidavit on this basis and the court will disregard all hearsay statements in the affidavit. Indeed, I rely only on this single item of information from the affidavit. There is no support in the affidavit or in the Plaintiffs’ Statement of Material Facts for the repeated assertion in Plaintiffs’ Objection that Ready’s security clearance was in fact suspended. The plaintiffs’ reliance in this regard on the allegations in their complaint, if that indeed is the basis for these assertions, is insufficient for purposes of summary judgment. *Astrowsky v. First Portland Mortgage Corp.*, 887 F. Supp. 332, 335 (D. Me. 1995).

III. Analysis

A. Claims Arising From the Resignation

The defendants argue that Count I, which alleges violation of Ready's constitutional rights in the course of the investigation and proposed termination that led to his resignation, is preempted by the Civil Service Reform Act, 5 U.S.C. § 7101 *et seq.* The plaintiffs now concede that the Civil Service Reform Act preempts their claims "[t]o the extent that [they] seek[] to remedy defendants' conduct resulting in his alleged wrongful removal from PNS." Plaintiffs' Objection at 3. However, they contend that Count I raises additional claims, specifically the alleged wrongful release of the Notice of Proposed Removal and the alleged impact of the defendants' conduct on Ready's security clearance and status in the Naval Reserve. Dismissal of all claims raised in Count I or in Count IV against the individual defendants that address the alleged wrongful termination of Ready's employment by PNSY is therefore appropriate. The plaintiffs' remaining asserted claims will be discussed below.

B. Interference with Contractual Rights

In Counts II and V, the plaintiffs allege that the defendants interfered with Ready's "contractual rights to his employment at the Portsmouth Naval Shipyard and in the United States Naval Reserve." Complaint ¶¶ 43, 60. The Federal Tort Claims Act specifically bars recovery for any claim arising out of interference with contract rights. 28 U.S.C. § 2680(h). The plaintiffs attempt in their memorandum in opposition to the motion to dismiss to recast these counts as claims for intentional infliction of emotional distress. That is not what the complaint alleges. Complaint ¶¶ 42-47, 59-65. In addition, the plaintiffs' motion to amend the complaint to add a count alleging intentional infliction of emotional distress against the individual defendants has been denied by this court. Docket No. 14 (endorsement).

Counts II and V must be dismissed. *See also Rollins v. Marsh*, 937 F.2d 134, 139-40 (5th Cir. 1991) (Federal Tort Claims Act claims precluded by Civil Service Reform Act).

C. Negligence

Count III asserts a claim of negligent training and supervision against the United States, based on the alleged actions of its agents and employees. Such a claim is often called a *Bivens* action, after *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Federal Tort Claims Act excludes recovery for claims 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, whether or not the discretion is abused. 28 U.S.C. § 2680(a). Supervision generally is a discretionary function. *Tonelli*, 60 F.3d at 496.

The defendants argue that supervision of the individual defendants was a discretionary function and that the court therefore lacks subject matter jurisdiction over the claim, citing *Irving v. United States*, 909 F.2d 598, 600 (1st Cir. 1990). The plaintiffs respond that the due process clause of the Constitution and the so-called “merit system principles” contained in 5 U.S.C. §§ 2301-02 establish a duty of care that “inherently includes the duty to properly train, manage, supervise, and control [the government’s] employees.” Plaintiffs’ Objection at 17.

However, the remedy for violation of the merit system principles is not a private right of action. *Wright v. Park*, 5 F.3d 586, 591(1st Cir. 1993); *Schrachta v. Curtis*, 752 F.2d 1257, 1260 (7th Cir. 1985). To the extent that this claim arises out of the termination of Ready’s employment, it is preempted by the Civil Service Reform Act, as previously noted. The only remaining subjects for discussion, therefore, are the plaintiffs’ assertions that this claim is based on the wrongful release of

information in violation of the Privacy Act, 5 U.S.C. § 552, and that his security clearance and status in the Naval Reserve were “impacted” by the alleged conduct in violation of his due process rights. Plaintiffs’ Objection at 3. Assuming *arguendo* that the alleged actions of the individual defendants are sufficient to establish a claim of negligent training or supervision, the plaintiffs’ attempt to recast their claims as something other than those that are preempted by the Civil Service Reform Act is unavailing.

The short answer to the plaintiffs’ argument is that the Civil Service Reform Act is intended to reach “the untoward *effects* of a prohibited personnel practice.” *Roth v. United States*, 952 F.2d 611, 616 (1st Cir. 1991) (emphasis added). The complaint’s allegations concerning Ready’s Naval Reserve security clearance and “status” involve the effects of actions of the defendants undertaken during a personnel matter. The plaintiffs are attempting to sue based on the Notice of Proposed Removal “and associated acts which reflected dissatisfaction with [Ready’s] work . . . and which focused upon substantial conflicts anent agency policy and procedures.” *Id.* at 614. Such allegations are preempted by the Civil Service Reform Act. *Id.* Ready’s “position as [a] federal employee[] is central to [his] complaint[], and it is this employment relationship that the Supreme Court emphasized in *Bush* [*v. Lucas*, 462 U.S. 367 (1983),] and its progeny, rather than the nature of the specific violation involved.” *Bolivar v. Director of the FBI*, 846 F. Supp. 163, 169 (D.P.R. 1994). “Where the plaintiff’s claims arose out of their [sic] employment relationship with the federal government and all actions taken by the defendants were related to the plaintiff’s status as a federal employee, the actions constitute personnel decisions under CSRA.” *Hill v. Tennessee Valley Auth.*, 842 F. Supp. 1413, 1417 (N.D. Ala. 1993). The release of information to the Naval Reserve can only be characterized as “related to the plaintiff’s status as a federal employee,” and any claim arising from that action must be deemed

preempted by the Civil Service Reform Act. *See also Berrios v. Department of the Army*, 884 F.2d 28, 32 (1st Cir. 1989) (disputed conduct that occurs in the course of removal proceedings is covered by the Civil Service Reform Act).⁴

To the extent that the claimed release of the Notice to the public may not be fairly characterized as related to Ready's status as a federal employee or within the scope of the individual defendants' employment, two points will suffice. First, the complaint raises no claim under the Privacy Act, which establishes its own cause of action. 5 U.S.C. § 552a(g)(1). Consideration of such a claim would require careful examination of the Notice and the circumstances of its alleged release in order to determine whether the release did in fact violate the Act. That is not the issue here. Dismissal of the charge based on public dissemination of the report in this action is therefore warranted. Even if that were not the case, the plaintiffs have provided nothing of evidentiary quality in the record to suggest that any of the individual defendants so released the document, making summary judgment in favor of the individual defendants appropriate on that claim.

Finally, as to Count III specifically, the Supreme Court has stated: "we refused — again

⁴ In addition, the plaintiffs may not seek court review of the decision of the Naval Reserve to suspend Ready's security clearance. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990); *see also Webster v. Doe*, 486 U.S. 592, 601 (1988) (federal courts lack jurisdiction to review termination of CIA employee for security reasons); *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (Merit Systems Protection Board has no authority to review decision to revoke security clearance). The plaintiffs contend that they do not seek such a review but only seek "damages based on the wrongful suspension of [Ready's] Security Clearance which was a direct and proximate result of the wrongful conduct of the defendants." Plaintiffs' Opposition at 2. However, Ready was only damaged in this regard if the suspension itself was wrongful, a question that this court may not resolve. *But see Chesna v. United States Dep't of Defense*, 822 F. Supp. 90, 96-97 (D. Conn. 1993) (federal court may have jurisdiction over claims of constitutional violation occurring during revocation of security clearance even though it has no jurisdiction to review revocation itself). In addition, the plaintiffs' statement of material facts provides no evidence of any damages caused to them by the suspension of the security clearance, a necessary element of proof.

unanimously — to create a *Bivens* remedy for a . . . violation ‘aris[ing] out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States.’” *Schweiker v. Chilicky*, 487 U.S. 412, 422 (1988). The failure to supervise and train that is alleged in this action clearly arises out of an employment relationship that is governed by the Civil Service Reform Act.

The plaintiffs make the same attempt to avoid the strictures of the Civil Service Reform Act as to Counts I, II, IV and V, and the attempt fails for the same reason.

In addition, the settlement agreement signed by Ready bars these claims. The plaintiffs argue that their claims “clearly go beyond the terms of the Agreement.” Plaintiff’s Objection at 11. Without citation to authority, they contend that the “wrongful suspension of [Ready’s] Security Clearance with regard to his U.S. Naval Reserve employment . . . does not pertain ‘to his employment with the Shipyard,’” *id.* at 11-12, and that Linda Ready’s loss-of-consortium claim cannot be barred by an agreement to which she was not a party, *id.* at 12. In fact, all of the actions of the defendants of which the plaintiffs complain did pertain to Ready’s employment with the shipyard. They occurred only in the process of terminating Ready’s employment and therefore only because he was employed by the shipyard. Ready may not avoid the terms of his settlement agreement by arguing that the acts underlying that agreement had additional consequences which he had not anticipated at the time he entered into it. Ready has provided nothing in the summary judgment materials to suggest that he is not bound by his agreement.

I do not understand the defendants to be arguing that the settlement agreement bars the claim for loss of consortium. I deal with that claim in the next section of this recommended decision.

D. Loss of Consortium

The only remaining claim in the complaint is Linda Ready's claim for loss of consortium, set out in Count VI. Such a claim is barred by Maine law when there is no underlying claim on behalf of the spouse. *Gillchrest v. Brown*, 532 A.2d 692, 693 (Me. 1987) (loss-of-consortium claim derivative of injury to spouse). See *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 252 n.1 (1st Cir. 1996). The parties do not address the issue of which jurisdiction's law applies to this state-law claim which is before this court pursuant to the diversity jurisdiction established by 28 U.S.C. § 1332, but this court applies Maine choice-of-law rules in diversity cases. *City of Old Town v. American Employers Ins. Co.*, 858 F. Supp. 264, 266 (D. Me. 1994). Maine has adopted the "most significant contacts and relationships" test of sections 145 and 146 of the *Restatement (Second) of Conflict of Laws* for personal injury actions. *Collins v. Trius, Inc.*, 663 A.2d 570, 572 (Me. 1995). Therefore, "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties." *Id.* (quoting section 146 of the Restatement; emphasis in original). The same is true for torts other than personal injury. *Restatement (Second) of Conflict of Laws* § 145(1). Here, the complaint makes it clear that the alleged injury occurred in Maine, and there has been no demonstration that any other state has a more significant relationship to the occurrence and the parties.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion be **GRANTED**.

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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after 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.

Dated this 12th day of November, 1997.

*David M. Cohen
United States Magistrate Judge*