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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

J. G.,
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.

Case No. [19-cv-00623-MMC](#)

**ORDER GRANTING MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION;
DISMISSING COMPLAINT**

Re: Dkt. No. 27

Before the Court is defendant United States’ Motion to Dismiss, filed May 22, 2019, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Plaintiff J.G. has filed opposition, to which the United States has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

BACKGROUND

On March 25, 2016, J.G., “an eight-year-old female,” went to a dental clinic operated by La Clinica De La Raza (“La Clinica”) “to obtain dental care and treatment.” (See Compl. ¶¶ 5, 11.) According to J.G., while she was receiving treatment, she was “sexually molested” by Alejandro Saro (“Saro”), a dental assistant employed by La Clinica. (See *id.* ¶ 12.) J.G. alleges that, at some point in time after the above-referenced appointment, she “informed her mother that Saro had sexually abused her during the visit on . . . March 25, 2016,” and that “Saro had previously sexually abused her on at least one earlier occasion” during another dental appointment that took place “between approximately September 2015 and March 25, 2016.” (See *id.* ¶ 13.)

¹ By order filed July 5, 2019, the Court took the motion under submission.

1 U.S.C. § 233(g) (see Decl. of Frances M. Reico, Ex. B); and (2) the United States
2 Attorney has certified La Clinica “was acting within the scope of its deemed employment
3 as an employee of the PHS during the timeframe of events giving rise to the First Claim
4 for Relief in the Complaint” (see Certification ¶ 2). Under such circumstances, to the
5 extent the First Claim for Relief is asserted against La Clinica, said claim is barred by 42
6 U.S.C. §§ 233(a) and (g), and thus is subject to dismissal. See 42 U.S.C. § 233(a)
7 (providing “[t]he remedy against the United States provided by [FTCA]” for injuries
8 resulting from dental functions performed by PHS employees “acting within the scope of
9 their employment, shall be exclusive of any other civil action or proceeding by reason of
10 the same subject-matter against . . . the employee . . . whose act gave rise to the claim”);
11 see also id. § 233(g) (providing § 233(a) applies to entities deemed to be PHS
12 employees).

13 Next, the United States seeks an order dismissing the Complaint, as brought
14 against the United States, for lack of subject matter jurisdiction. In particular, the United
15 States contends the Complaint is subject to dismissal because the sole claim asserted
16 therein “is barred by the discretionary function exception to the FTCA.” (See Mot. at
17 5:19-20.)

18 The FTCA was “enacted to waive the Government’s sovereign immunity” under
19 limited circumstances. See Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-
20 94 (1983). Specifically, under the FTCA, the United States may be sued for claims
21 alleging, inter alia, “personal injury or death caused by the negligent or wrongful act or
22 omission of any employee of the Government while acting within the scope of his office or
23 employment, under circumstances where the United States, if a private person, would be
24 liable to the claimant in accordance with the law of the place where the act or omission
25 occurred.” See 28 U.S.C. § 1346(b)(1); see also United States v. Orleans, 425 U.S. 807,
26 813 (1976) (referring to FTCA as “a limited waiver of sovereign immunity”).

27 The waiver set forth in the FTCA is, however, subject to exceptions, one of which
28 being the “discretionary function exception.” See Berkovitz v. United States, 486 U.S.

1 531, 535-36 (1988). Under such exception, the FTCA does not apply to claims “based
2 upon the exercise or performance or the failure to exercise or perform a discretionary
3 function or duty on the part of a federal agency or employee of the Government, whether
4 or not the discretion involved be abused.” See 28 U.S.C. § 2680(a).

5 Where a claim falls within the discretionary function exception, “federal courts lack
6 subject matter jurisdiction to hear [the] claim,” see Nurse v. United States, 226 F.3d 996,
7 1000 (9th Cir. 2000), and, in determining whether the discretionary function exception
8 bars a claim, courts apply a “two-part test,” see Gonzalez v. United States, 814 F.3d
9 1022, 1027 (9th Cir. 2016).

10 First, “a court must . . . consider whether the [challenged] action is a matter of
11 choice for the acting employee.” See Berkovitz, 486 U.S. at 536. “This inquiry is
12 mandated by the language of the exception; conduct cannot be discretionary unless it
13 involves an element of judgment or choice.” Id. Thus, where a “federal statute,
14 regulation, or policy specifically prescribes a course of action for an employee to follow,
15 . . . there is no discretion in the conduct for the discretionary function exception to
16 protect,” as “the employee has no rightful option but to adhere to the directive.” See id.

17 Second, “assuming the challenged conduct involves an element of judgment, a
18 court must determine whether that judgment is of the kind that the discretionary function
19 exception was designed to shield.” See id. “The focus of [the second step] is not on the
20 agent’s subjective intent in exercising [his or her] discretion . . . , but on the nature of the
21 actions taken and whether they are susceptible to policy analysis.” See United States v.
22 Gaubert, 499 U.S. 315, 325 (1991).

23 Although the United States bears the “ultimate burden of proving” the discretionary
24 function exception applies, “a plaintiff must advance a claim that is facially outside the
25 discretionary function exception in order to survive a motion to dismiss.” See Prescott v.
26 United States, 973 F.2d 696, 702 n. 4 (9th Cir. 1992).

27 Here, the United States contends J.G. has failed to “make out a claim that is
28 facially outside the discretionary function exception.” (See Mot. at 7:11-15 (internal

1 quotation and citation omitted).) For the reasons set forth below, the Court agrees.

2 At the outset, the Court finds the allegations in the Complaint do not support J.G.’s
3 contention that “La Clinica did not have discretionary decision [sic] in how they trained
4 and supervised Saro” (see Opp. at 7:2-4). Specifically, as the United States points out,
5 J.G.’s allegations do not support a finding that, due to any federal statute, regulation, or
6 policy, La Clinica is required to follow a “specifically prescribe[d] course of action” in
7 making decisions with respect to the hiring, supervision, or retention of its employees.
8 See Berkovitz, 486 U.S. at 536; see also Lu v. Powell, 621 F.3d 944, 950 (9th Cir. 2010)
9 (affirming dismissal of negligent supervision claim based on supervisor’s failure to
10 discipline defendant for violating regulation, where “plaintiffs ha[d] not identified any
11 mandatory duty to discipline”). To the extent J.G. contends La Clinica lacked discretion
12 in making such decisions because “[t]he duties of a dental assistant are outlined in
13 California Business and Profession[s] Code, Section 1750.1” (see Opp. at 4:17-18), such
14 argument fails, as “[s]tate law cannot override the FTCA’s grant of immunity for
15 discretionary conduct.” See Carroll v. United States, 661 F.3d 87, 101 (1st Cir. 2011);
16 see also Sydnes v. United States, 523 F.3d 1179, 1184 (10th Cir. 2008) (holding “[t]o
17 overcome the discretionary function exception . . . , plaintiffs must show that the federal
18 employee’s discretion was limited by a federal statute, regulation, or policy,” as “states
19 can’t waive the federal government’s immunity” (emphasis in original) (internal quotation
20 and citation omitted)).

21 Next, the Court finds J.G.’s claim is predicated on employment decisions that are
22 “of the kind that the discretionary function exception was designed to shield,” see
23 Berkovitz, 486 U.S. at 536, as the Ninth Circuit “ha[s] held the hiring, supervision, and
24 training of employees to be discretionary acts” that involve “the type of discretionary
25 judgments [the discretionary function exception] was designed to protect,” see Doe v.
26 Holy See, 557 F.3d 1066, 1084 (9th Cir. 2009); see also Vickers v. United States, 228
27 F.3d 944, 950 (9th Cir. 2000) (noting Ninth Circuit “ha[s] held that decisions relating to the
28 hiring, training, and supervision of employees usually involve policy judgments of the type

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Congress intended the discretionary function exception to shield”).


Accordingly, the sole claim asserted in the Complaint is subject to dismissal for lack of subject matter jurisdiction, as said claim falls within the discretionary function exception to the FTCA. Further, because “the bar of sovereign immunity is absolute,” and plaintiff has not explained in her Opposition how she would be able to “redraft [her] claims to avoid the [discretionary function] exception[] to the FTCA,” see Frigard v. United States, 862 F. 2d 201, 204 (9th Cir. 1988), the Court finds leave to amend would be futile.

CONCLUSION

For the reasons stated above, the United States’ Motion to Dismiss is hereby GRANTED and the Complaint is hereby DISMISSED.

IT IS SO ORDERED.

Dated: August 5, 2019


MAXINE M. CHESNEY
United States District Judge