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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 MARK ROSENBAUM,

11 Plaintiff,

12 v.

13 TIMOTHY A. BURGESS, DEBORAH M.  
14 SMITH, STEVE SKROCKI, TIM  
15 BLEICHER, and JOHN DOE I,

16 Defendants.

Case No. C06-00144RJB

ORDER ON PLAINTIFF'S  
MOTION TO PERMIT  
LIMITED DISCOVERY

17 This matter comes before the court on plaintiff's Motion to Permit Limited Discovery (Dkt. 12).  
18 The court has considered the pleadings filed by the parties and the remainder of the file herein.

19 PROCEDURAL HISTORY

20 On May 11, 2006, plaintiff filed a civil action in the Superior Court for the State of Alaska, Third  
21 Judicial District at Anchorage. Dkt. 1-2. On June 13, 2006, the United States filed a Notice of Removal,  
22 and included in the notice as Exhibit B, the Certification of Phyllis J. Pyles, which stated as follows:

23 I, Phyllis J. Pyles, Director, Torts Branch, Civil Division, United States Department of Justice,  
24 acting pursuant to the provisions of 28 U.S.C. § 2679(d)(2), and by virtue of the authority vested in  
25 me by the Appendix to 28 C.F.R. § 15.3 (Civil Directive No. 90-79) hereby certify that I have  
26 reviewed the Complaint in the lawsuit filed by Plaintiff Mark Rosenbaum against Defendants in the  
Superior Court of the State of Alaska, captioned as Mark A. Rosenbaum v. Timothy A. Burgess, et  
al., Case No. 3-AN-06-7069 Civil.

27 On the basis of the information now available to me with respect to the allegations in Plaintiff's  
28 Complaint, I certify that all of the Defendants including former U.S. Attorney Timothy M. Burgess,  
Former First Assistant U.S. Attorney Deborah M. Smith, Assistant U.S. Attorney Steve Skrocki,  
and Federal Protective Service officers Tim Bleicher and John Doe I, were acting within the scope

1 of their respective employment as employees of the United States at the time of the conduct alleged  
2 in Plaintiff's Complaint.

3 Dkt. 1-3.

4 The Notice of Removal stated that the case was removed pursuant to 28 U.S.C. § 1442 and 28  
5 U.S.C. § 2679(d)(2), which provides that, upon certification by the Attorney General that the defendant  
6 employee was acting within the scope of his federal employment at the time of the incident out of which  
7 the claim arose, any civil action or proceeding commenced upon such claim in a state court shall be  
8 removed at any time before trial to the district court of the United States for the district in which the action  
9 is pending. Dkt. 1-1, at 1-2.

10 Concurrent with the Notice of Removal, the United States filed a Notice of Substitution, under 28  
11 U.S.C. § 2679(d)(2), and moved to amend the caption of the case to substitute and name the United States  
12 as the party defendant in place of the individual defendant. Dkt. 4-1. Plaintiff opposes the motion to  
13 amend the caption and substitute and name the United States as a proper defendant, and requests that the  
14 court remand the case to state court. Dkt. 13. Prior to ruling on this motion, however, plaintiff requests a  
15 continuance (Dkt. 14) to permit him to challenge the Westfall Certification by engaging in limited  
16 discovery (Dkt. 12) and by presenting evidence at an evidentiary hearing (Dkt. 13).

17 In order for the case to proceed in an orderly manner, the court should address plaintiff's Motion to  
18 Permit Limited Discovery (Dkt. 12) before ruling on the other pending motions. The parties have fully  
19 briefed the issue presented in this motion.

20 ALLEGATIONS IN THE COMPLAINT

21 The complaint alleges that, on May 12, 2004, shortly before he was asked to leave his work station,  
22 plaintiff was summoned to the U.S. Attorney's conference room; that defendants Burgess and Smith were  
23 in the conference room; and that defendant Skrocki appeared in the conference room along with  
24 defendants Bleicher and John Doe I, who were known to be armed. Dkt. 1-2, at 3. The complaint alleges  
25 that Mr. Burgess and Ms. Smith ordered plaintiff to accompany Mr. Skrocki along with Mr. Bleicher and  
26 Mr. Doe; that plaintiff, knowing that Mr. Bleicher and/or Mr. Doe were armed, and fearing that they would  
27 use whatever force was necessary to effect the objective, did as he was ordered. *Id.* The complaint further  
28 alleges that plaintiff was escorted by Mr. Skrocki, Mr. Bleicher, and Mr. Doe to plaintiff's office, where  
these defendants provided him with a cardboard box, ordered him not to leave, and gave him ten minutes

1 to pack the box, while the defendants guarded him and prevented him from leaving the room. *Id.* Plaintiff  
2 alleges that Mr. Skrocki, Mr. Bleicher and Mr. Doe continued to confine him, and intending in fact to do  
3 so, directed him to the elevator, closed the door, and escorted him to his vehicle, where he was ordered  
4 immediately to enter his vehicle and leave the premises, without returning to the parking structure. The  
5 complaint alleges that, under the continuing dominion and control of defendants, including their apparent  
6 willingness to use all such force as they felt necessary, plaintiff entered his vehicle and left, as ordered. *Id.*  
7 at 3-4. Plaintiff alleges that, as he drove away, the enormity of the outrageous conduct of the defendants  
8 emotionally overwhelmed him and he broke down crying; that he was required to seek counseling; and that  
9 to this day, continues to suffer severe mental pain and suffering as a result of defendants' conduct. *Id.* at 4.  
10 Plaintiff claims that he was falsely imprisoned by defendants. *Id.* at 4.

#### 11 DISCUSSION

12 *Westfall Certification.* The Federal Employees Liability Reform and Tort Compensation Act  
13 (FELTRCA), also known as the Westfall Act, immunizes United States employees for their negligent or  
14 wrongful acts or omissions while acting within the scope of their office or employment. See 28 U.S.C.  
15 §2679(b); *Green v. Hall*, 8 F.3d 695, 698 (9<sup>th</sup> Cir. 1993). In cases in which a suit is instituted against an  
16 employee of the United States, and upon certification by the United States Attorney or delegee, that the  
17 United States employee was acting within the scope of his or her employment at the time of the event  
18 giving rise to the civil claim (Westfall Certification), such actions are deemed to be actions brought against  
19 the United States, and the United States must be substituted as the defendant. See 28 U.S.C. § 2679(d);  
20 *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 431-32 (1995). When such actions have been initiated  
21 in state court, they are removed to the district court of the United States, embracing the place in which the  
22 action or proceeding is pending. See 28 U.S.C. § 2679(d)(1).

23 A plaintiff may challenge the Attorney General's scope of employment certification in the district  
24 court. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); *Meridian Int'l Logistics, Inc. v.*  
25 *United States*, 939 F.2d 740, 745 (9<sup>th</sup> Cir. 1991). The Attorney General's decision regarding the scope of  
26 employment certification is subject to *de novo* review by the district court. See *Green v. Hall*, 8 F.3d 695,  
27 698 (9<sup>th</sup> Cir. 1993); *Meridian Int'l Logistics*, 939 F.2d at 745. In determining whether a United States  
28 employee acted within the scope of his or her office, the court applies the *respondeat superior* principles of

1 the state in which the tort occurred. *Green v. Hall*, 8 F.3d at 698-99.

2 The party seeking review of the Westfall certification bears the burden of presenting evidence and  
3 disproving the Attorney General’s decision to grant the scope of employment certification by a  
4 preponderance of the evidence. *See Green*, 8 F.3d at 698. The Attorney General’s certification is *prima*  
5 *facie* evidence that the federal employee was acting within the scope of his employment, and the plaintiff  
6 seeking to challenge the Attorney General’s certification “bears the burden of presenting evidence and  
7 disproving the Attorney General’s certification by a preponderance of the evidence.” *See Billings v.*  
8 *United States*, 57 F.3d 797, 800 (9th Cir. 1995).

9 *Scope of Employment.* Alaska follows the Restatement (Second) of Agency’s provision regarding  
10 scope of employment, found in Section 228, which provides as follows:

11 (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is the kind he is  
12 employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is  
13 actuated, at least in part, by purpose to serve the master; and (d) if force is intentionally used by the  
14 servant against another, the use of force is not unexpected by the master.

15 *Taranto v. North Shore Slope Borough*, 909 F.2d 354, 358 (Alaska 1996)(quoting Restatement (Second)  
16 of Agency § 228). In determining whether an employee acted within the scope of employment, these  
17 Restatement factors are relevant considerations, although not prerequisites, to determine whether an  
18 employer should be held responsible for an employee’s acts. *Laidlaw Transit, Inc. v. Crouse ex rel.*  
19 *Crouse*, 53 P.3d 1093, 1098-99 (Alaska 2002).

20 Plaintiff requests that the court permit him to engage in limited discovery in order to determine  
21 whether there was a legal basis for Mr. Burgess, as United States Attorney, to order an Assistant U.S.  
22 Attorney “to be held under guard without explanation, based upon innuendo and outside any established  
23 policy.” Dkt. 12, at 4. Plaintiff further contends as follows:

24 Because the Government works under policies and procedures, there is some basis for believing  
25 that the information sought actually exists, and such information would include memoranda and  
26 recorded conversations between the participants to the events that occurred and are the subject of  
27 the State Court complaint prior to, as well as after those events occurred. Mr. Rosenbaum believes  
28 that such communications would include admissions that the parties undertaking the wrongful and  
false imprisonment acknowledge their animus, devoid of a business motive, that underlay the false  
imprisonment.” Dkt. 12, at 4-5.

It appears that plaintiff is requesting that he be permitted discovery focused on two issues: (1)  
whether defendants possessed the authority to engage in the conduct alleged in ¶¶ 4-9 of the complaint  
(Dkt. 1-2); and (2) whether defendants’ actions were motivated by personal animus. Plaintiff should be

1 permitted to inquire into the first issue regarding the authority of defendants to do what they allegedly did.  
2 Plaintiff should be able to develop the facts related to defendants' authority through written interrogatories  
3 and requests for production.

4         The motivation of the defendants to engage in this alleged conduct is another matter. The court  
5 first notes that no decision can be made at this point whether anything nefarious occurred at all during the  
6 incident at issue in this case. For purposes of this motion for limited discovery, however, the court must  
7 assume that defendants' "personal animus" toward plaintiff played a part in their actions. *See* Dkt. 12,  
8 Affidavit of Mark A. Rosenbaum, at 3. However, plaintiff's reasoning that, because defendants' actions  
9 were motivated by personal animus, their conduct fell outside the scope of their employment, is flawed.  
10 The issue regarding scope of employment is whether the *conduct* at issue fell within the scope of the duties  
11 and authority of defendants' positions as employees of the United States, not *why* they performed those  
12 acts. Defendants' motivations regarding that conduct may, or may not, be relevant to the underlying legal  
13 claim, but are not relevant to the scope of employment inquiry.

14         The cases plaintiff cites in support of his argument that defendants were not acting within the scope  
15 of their employment because their actions were motivated by ill will or bad faith are not on point. In fact,  
16 the focus in those cases was on whether the conduct was within the scope of employment, not solely what  
17 motivated conduct that would otherwise have been within an employee's scope of employment. *See*  
18 *Haddom v. United States*, 68 F.3d 1420 (D.C. Cir. 1995)(electrician *threatened* to beat up chef acted  
19 outside scope of employment); *Nadler v. Mann*, 951 F.2d 301 (11<sup>th</sup> Cir. 1992)(AUSA who *leaked*  
20 defamatory material to news media acted outside scope of conduct); *Quick v. United States*, 254 F.Supp.  
21 2d 706 (S.D. Ohio 2002)(employee who *made* false and defamatory *statements* to co-worker acted outside  
22 scope of employment). Plaintiff has cited no authority that would support his position that bad motive  
23 itself would remove conduct from an employee's scope of employment.

24         Moreover, if plaintiff's claim that improper motivation in performing duties, which government  
25 employees were otherwise authorized to perform, could remove the conduct from a United States  
26 employee's scope of employment, the purposes of the Federal Tort Claims Act (FTCA) would be  
27 eviscerated. Although plaintiff filed this case in state court, alleging a state law claim for false  
28 imprisonment, if defendants were acting within the scope of their employment as employees of the United

1 States, plaintiff's claim would be governed by the FTCA. The FTCA waives sovereign immunity of the  
2 United States for certain tortious actions. *See* 28 U.S.C. § 1346(b). The FTCA requires that the United  
3 States be substituted for an employee acting within the scope of his or her employment. 28 U.S.C. §  
4 2679(d)(2). The FTCA therefore provides broad protection for a United States employee from personal  
5 liability for acts done within the scope of employment, even if the employee had an improper motive. If the  
6 court were to accept plaintiff's reasoning that animus or bad faith removes conduct from a government  
7 employee's scope of employment, these government employees would be denied the broad protection  
8 afforded them by the FTCA.

9 Because the motivation or intent of defendants are not at issue in whether defendants acted within  
10 the scope of employment, the court should not permit plaintiff to conduct discovery on these issues in the  
11 context of the accuracy of the Westfall certification.

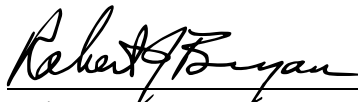
12 Therefore, it is hereby

13 **ORDERED** that plaintiff's Motion to Permit Limited Discovery (Dkt. 12) is **GRANTED IN**  
14 **PART AND DENIED IN PART**, as follows: (1) plaintiff may inquire, through written interrogatories and  
15 requests for production only, into issues regarding the authority of defendants to engage in the conduct  
16 alleged in ¶¶ 4-9 of the complaint; (2) plaintiff may not inquire into motivation of defendants to engage in  
17 the conduct at issue, including issues relating to defendants' animus toward plaintiff.

18 Not later than September 28, 2006, the parties are **ORDERED** to (1) file a discovery plan,  
19 including dates for completing that discovery; and (2) set a proposed noting date and briefing schedule for  
20 the other pending motions.

21 Service of this order will be in accord with the court's ECF system.

22 DATED this 18<sup>th</sup> day of September, 2006.

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25 Robert J. Bryan  
26 United States District Judge  
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