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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Margaret Suisala-Tavita,

10 Plaintiff,

11 v.

12 JR Rodriguez, et al.,

13 Defendants.
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No. CV-17-03266-PHX-DGC

ORDER

15 While driving to work on March 12, 2015, J.R. Rodriguez, a U.S. Border Patrol
16 Agent, struck and killed a pedestrian in Pinal County, Arizona. Doc. 23 at 2. The
17 pedestrian’s mother, Plaintiff Margaret Suisala-Tavita, has filed a complaint against the
18 United States, alleging that it is liable for Rodriguez’s negligence under the Federal Tort
19 Claims Act (“FTCA”). Doc. 10 at 2-3 ¶¶ 8-10. The United States has filed a motion to
20 dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure
21 12(b)(1). Doc. 23. The motion is fully briefed, and no party requests oral argument. The
22 Court will grant the motion to dismiss.

23 **I. Legal Standard.**

24 A motion to dismiss under Rule 12(b)(1) can be either a facial or factual attack on
25 jurisdiction. *Thornhill Publ’g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.
26 1979). A facial attack asserts that the allegations in the complaint are “insufficient on
27 their face to invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,
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1 1039 (9th Cir. 2004). A factual attack “disputes the truth of the allegations that, by
2 themselves, would otherwise invoke federal jurisdiction.” *Id.*

3 In a facial attack, the complaint’s allegations are taken as true and construed in
4 favor of the non-moving party. *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 930 (N.D. Cal.
5 2009) (citing *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207
6 (9th Cir. 1996)). In a factual attack, the plaintiff’s allegations are not entitled to a
7 presumption of truthfulness, the court may look beyond the pleadings to resolve factual
8 disputes, and the plaintiff has the burden of proving jurisdiction exists. *Safe Air for*
9 *Everyone*, 373 F.3d at 1039. The plaintiff must “present affidavits or any other evidence
10 necessary to satisfy its burden[.]” *St. Clair v. City of Chino*, 880 F.2d 199, 201 (9th Cir.
11 1989).

12 **II. Analysis.**

13 Plaintiff argues that the Court must accept all allegations in the complaint as true
14 and construe them in her favor pursuant to Rule 12(b)(6). Doc. 27 at 3-4. But the United
15 States moves to dismiss under Rule 12(b)(1), not 12(b)(6), and the dismissal standards
16 under these rules “differ greatly” when a 12(b)(1) motion makes a factual attack.
17 *Thornhill Publ’g Co.*, 594 F.2d at 733 (citing *Mortensen v. First Fed. Sav. & Loan*
18 *Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)). The government’s Rule 12(b)(1) motion makes
19 a factual attack – it challenges the truth of the facts alleged in the complaint. Doc. 23 at
20 5-8. As a result, the Court will not presume the allegations to be true, and Plaintiff bears
21 the burden of proving jurisdiction exists.

22 To assert a claim against the United States, Plaintiff must prove that it has waived
23 its sovereign immunity. “It is well settled that the United States is a sovereign, and, as
24 such, is immune from suit unless it has expressly waived such immunity and consented to
25 be sued.” *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007)
26 (citation omitted). The FTCA provides a limited waiver of sovereign immunity for torts
27 committed by federal employees acting within the scope of their employment. 28 U.S.C.
28 § 1346(b)(1); *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). “FTCA scope

1 of employment determinations are made ‘according to the principles of *respondeat*
2 *superior* of the state in which the alleged tort occurred.’” *Wilson v. Drake*, 87 F.3d 1073,
3 1076 (9th Cir. 1996) (citation omitted). Because the accident at issue in this case
4 occurred in Arizona, Arizona law applies. Doc. 23 at 4; Doc. 27 at 2-4. To show a
5 waiver of sovereign immunity under the FTCA, Plaintiff therefore must show that
6 Rodriguez was acting within the scope of his employment under Arizona law.

7 In Arizona, “[a]n employee’s tortious conduct falls outside the scope of
8 employment when the employee engages in an independent course of action that does not
9 further the employer’s purposes and is not within the control or right of control of the
10 employer.” *Engler v. Gulf Interstate Eng’g, Inc.*, 280 P.3d 599, 602 (Ariz. 2012)
11 (adopting the Restatement (Third) of Agency § 7.07). Whether an employer exercised
12 any control over its employee is determined at the time of the accident. *Id.*

13 Generally, an employee going to or returning from his or her place of employment
14 is not within the scope of employment “unless the employee is rendering a service
15 growing out of or incidental to the employment.” *State v. Superior Court (Rousseau)*,
16 524 P.2d 951, 954 (Ariz. 1974); *see also Engler*, 280 P.3d at 602. In *Rousseau*, an
17 Arizona National Guardsman was involved in a car accident at 5:20 a.m. while traveling
18 to a 6:30 a.m. work training session. 524 P.2d at 953. The Arizona Supreme Court found
19 that the guardsman’s training did not require that he drive his own car or run errands for
20 the Arizona National Guard prior to the training session. *Id.* at 954. Although the
21 National Guard granted travel reimbursements, it “had no right to dictate the manner of
22 travel, the route to be taken, [the] speed, or that [the guardsman] use his car to go and
23 come from [the training session] as compared to other modes of travel.” *Id.* Based on
24 these circumstances, *Rousseau* held that the State of Arizona was not vicariously liable
25 because “the travel itself . . . was not intrinsically involved with the scope of the
26 employment service, nor involved with collateral duties[.]” *Id.*

27 Plaintiff’s complaint alleges that Rodriguez was an employee with the United
28 States Border Patrol (“USBP”) at the time of the accident and “was under the control or

1 subject to the control of the USBP and the United States government.” Doc. 10 at 2-3
2 ¶¶ 8-9. The United States disputes this allegation. Doc. 23 at 6.

3 Rodriguez has executed a declaration stating that his scheduled shift on
4 March 12, 2015, was from 6:00 a.m. to 2:00 p.m., that the “accident occurred at
5 approximately 5:49 a.m.,” and that he was driving his “personally owned vehicle” at the
6 time. Doc. 23-1 at 3-4 ¶¶ 4, 8-9. He declares that he was off-duty when the accident
7 occurred because “Border Patrol Agents are ‘on-duty’ when their scheduled shift begins,
8 or when they check-in to the station or duty location, whichever is later.” *Id.* at 3 ¶ 3.
9 Rodriguez attests that he planned to arrive at his duty station “just before 7:00 a.m., and
10 to begin [his] shift at 7:00 a.m.” *Id.* at ¶ 5.¹ He further avows that he was “not on an
11 errand for the USBP, had made no stops for the USBP, was not going to make any stops
12 for the USBP, and other than [his] service-issued uniform and gear, [] had no USBP
13 property in [his] vehicle.” *Id.* at 4 ¶ 14. He also states that “USBP does not have rules
14 governing how I get to work, what route I take to work, or whether I can make any stops
15 on my way to work.” *Id.* at ¶ 15.

16 Rodriguez’s supervisor, Jack T. Jeffreys, confirms these facts. Jeffreys declares
17 that on March 12, 2015, “Rodriguez’s scheduled shift was from 6:00 a.m. to 2:00 p.m.”;
18 that “Border Patrol Agents are ‘on-duty’ when their scheduled shift begins, or when they
19 check-in to the station or duty location, whichever is later”; and that “Border Patrol
20 Agents are not ‘on-duty’ when they are commuting to work.” *Id.* at 8 ¶¶ 4-6. He also
21 asserts that Border Patrol agents are not assigned government vehicles for their work
22 commutes and that “Rodriguez was not assigned a government vehicle to commute from
23 home to work and vice versa” on March 12, 2015. *Id.* at ¶¶ 9-10. The United States also
24 cites a federal regulation providing that “[a] Border Patrol agent’s travel time to and from
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27 ¹ Rodriguez does not explain why he intended to start his shift at 7:00 a.m.
28 (Doc. 23-1 at 3 ¶ 5) if it was scheduled for 6:00 a.m. (*id.* at ¶ 4), but the Court does not
find this potential inconsistency significant because both start times were after the 5:49
a.m. accident (*id.* at 4 ¶ 8).

1 home and the agent's regular duty station . . . may not be considered hours of work under
2 any provision of law." 5 C.F.R. § 550.1637; *see also* Doc. 23 at 7.

3 Plaintiff does not dispute that the accident occurred at 5:49 a.m. while Rodriguez
4 was driving to work, nor does she suggest that Rodriguez was performing some service
5 for the USBP at the time. Plaintiff's sole argument is based on her quotation of the
6 following statement from the Pinal County Sherriff's Office:

7 **DRIVER STATEMENT:**

8 I conducted a roadside interview with JR Rodriguez immediately following the
9 collision. I also conducted a telephonic interview with JR Rodriguez on 03-13-15
10 at approximately 1300 hours. According to JR Rodriguez, Rodriguez was
11 traveling to work in Casa Grande, Arizona. Rodriguez was dressed in a green
BDU and was found to be an on duty U.S. Border Patrol Agent.

12 Doc. 27 at 3.

13 Plaintiff does not produce the document containing this statement or identify its
14 author. But even assuming the quotation's veracity, it attributes to Rodriguez only the
15 statement that he "was traveling to work," consistent with his declaration. The statement
16 that Rodriguez was "found to be an on duty U.S. Border Patrol Agent" does not explain
17 who made the finding or by applying what legal standard. In Arizona, when facts are
18 undisputed, as they appear to be here, the determination of whether an employee is acting
19 within the scope of his employment is a question of law. *Smith v. Am. Express Travel*
20 *Related Servs. Co.*, 876 P.2d 1166, 1171 (Ariz. Ct. App. 1994). The Court need not
21 accept as true a legal conclusion contained in an undisclosed accident report that provides
22 no explanation of the basis for the conclusion.

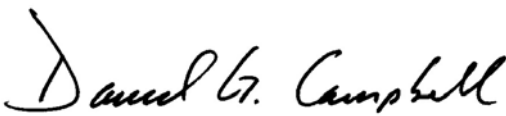
23 This case is akin to *Rousseau*. The accident occurred while Rodriguez was driving
24 to work, in his own vehicle, before the start of his shift. Nothing in the record suggests
25 that he was performing any service for the USBP or that the USBP had the right to dictate
26 where, when, or how he traveled to work. Given these facts, the Court concludes that
27 Rodriguez was not within the scope of his employment under Arizona law at the time of
28 the accident. Plaintiff has not carried her burden of showing that sovereign immunity has

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been waived under the FTCA. The Court will dismiss this case for lack of subject matter jurisdiction under Rule 12(b)(1).

IT IS ORDERED that Defendant's motion to dismiss for want of jurisdiction (Doc. 23) is **granted**.

Dated this 6th day of March, 2018.



David G. Campbell
United States District Judge