

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ZACHARY BARIAN,  
Plaintiff,  
v.  
UNITED STATES OF AMERICA,  
Defendant.

No. 2:14-cv-1102 CKD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Plaintiff is a federal prisoner proceeding pro se and in forma pauperis under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. § 1346. Plaintiff alleges that he suffered personal injury as a result of negligence when he was incarcerated at Federal Correctional Institution-Herlong. Before the court is defendant’s motion to dismiss the negligence claim due to a lack of subject matter jurisdiction. (ECF No. 12.) The motion has been fully briefed, including a sur-reply accepted in light of plaintiff’s pro se status. (ECF Nos. 15, 19 & 23.)

For the reasons set forth below, the court will recommend that defendant’s motion be granted.

I. Background

In the complaint, plaintiff alleges that on November 26, 2012, while in the prison yard at FCI-Herlong, he was exposed to gas fumes that burned his eyes, nose, and lungs; made him lightheaded; and caused him and other inmates on the yard to cough and choke. (ECF No. 1 at 1-2.) A correctional officer later informed plaintiff that another officer had conducted a “training

1 operation” involving chemical agents in the parking lot adjacent to the prison yard, separated by a  
2 chain-link fence. This officer “forgot to check his wind flaps,” which resulted in the prison yard  
3 being “gassed” with chemical agents. (*Id.* at 4.) Plaintiff asserts that prison officials failed to  
4 discharge “their duties placed upon them by way of special relationship under Federal and  
5 California State Law to provide for the ‘care and safety’ of [plaintiff and other inmates] by  
6 negligently allowing [plaintiff] to be battered by said chemical agents[.]” (*Id.* at 17.)

7 Plaintiff filed the complaint in the instant action on May 5, 2014. (ECF No. 1.)

8 In its July 1, 2014 screening order, the undersigned concluded that plaintiff stated a claim  
9 for negligence under the FTCA, but did not state cognizable claims for battery or retaliation.  
10 (ECF No. 6.)

## 11 II. Legal Standards

### 12 A. Federal Tort Claims Act

13 The FTCA provides for recovery of money damages against the United States for  
14 cognizable state or common law torts committed by federal officials while acting within the scope  
15 of their employment. 28 U.S.C. §§ 1346(b), 2674. The FTCA provides that the United States  
16 shall be liable in tort suits “in the same manner and to the same extent as a private individual  
17 under like circumstances.” 28 U.S.C. § 2674. It is the exclusive waiver of sovereign immunity  
18 for suits against the United States sounding in tort. 28 U.S.C. § 1346(b).

19 The FTCA can extend tort liability to the U.S. government if the facts show that the  
20 actions taken amount to negligence under state law. Under California law, negligence is  
21 established if the plaintiff can show that his injury is a result of the defendant’s breach of a duty  
22 of care. Nally v. Grace Cmty. Church, 47 Cal. 3d 278, 294 (1988).

23 However, the FTCA waiver of immunity is inapplicable to a claim based on the exercise  
24 of a discretionary function on the part of a federal agency or employee. Childers v. United States,  
25 40 F.3d 973, 974 (9th Cir. 1995) (citing 28 U.S.C. § 2680(a)). This is true “whether or not the  
26 discretion is abused.” Miller v. United States, 163 F.3d 591, 593 (9th Cir. 1998). In creating the  
27 discretionary function exception (DFE), Congress “wished to prevent judicial ‘second-guessing’  
28 of legislative and administrative decisions grounded in social, economic, and political policy

1 through the medium of an action in tort.” U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense,  
2 467 U.S. 797, 814 (1984).

3 Because Congress expressly reserved the sovereign immunity of the United States as to  
4 such claims, federal courts lack jurisdiction over any claim to which the DFE applies. Alfrey v.  
5 United States, 276 F.3d 557, 561 (9th Cir. 2002). Although the plaintiff bears the initial burden  
6 of proving subject matter jurisdiction under the FTCA, the government bears the burden of  
7 establishing that the DFE applies. Sabow v. United States, 93 F.3d 1445, 1451 (9th Cir. 1996);  
8 Miller, 163 F.3d at 594.

9 **B. Rule 12(b)(1) Motion**

10 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject  
11 matter jurisdiction of the court. Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039-40  
12 (9th Cir. 2003). A Rule 12(b)(1) motion will be granted if the complaint, when considered in its  
13 entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction. Id. at  
14 1039, n.2; Thornhill Publ’g Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.  
15 1979). On a motion for lack of jurisdiction under Rule 12(b)(1), no presumptive truthfulness  
16 attaches to the plaintiff’s allegations, as it does on a motion to dismiss under Rule 12(b)(6) or a  
17 motion for summary judgment under Rule 56. Id.

18 Challenges to jurisdiction under Rule 12(b)(1) may be facial (i.e., on the pleadings) or  
19 factual, permitting the court to look beyond the complaint. Savage v. Glendale Union High  
20 School, Dist. No. 205, 343 F.3d 1036, 1039-40, n.2 (9th Cir. 2003); see also White v. Lee, 227  
21 F.3d 1214, 1242 (9th Cir. 2000). In a factual challenge, “the district court is not restricted to the  
22 face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve  
23 factual disputes concerning the existence of jurisdiction.” McCarthy v. Unites States, 850 F.2d  
24 558, 560 (9th Cir. 1988). See also Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th  
25 Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion  
26 into one for summary judgment).

27 ///

28 ///

1 III. Facts

2 Unless otherwise noted, the following facts are undisputed:

3 On November 26, 2012, Lieutenant Kenneth Bolinski conducted a training exercise for  
4 the Disturbance Control Team (DCT) at FCI-Herlong. (See Bolinski Decl., ECF No. 12-2.) As  
5 DCT leader, Lt. Bolinski conducted trainings to certify that all DCT members met minimal  
6 standards necessary to respond to institutional disturbances. (Id., ¶3.)

7 Each federal prison establishes at least one DCT, whose mission is to restore order at the  
8 facility in case of a disturbance, including riots and hostage situations. (Id., ¶ 2.) Team members  
9 train on how to respond to crisis situations, and the team often serves as the primary institutional  
10 response to emergencies. (Id.) DCTs help safeguard institutions' security protocols and play an  
11 important role in keeping inmates, staff, and the general public safe. (Id.)

12 Lt. Bolinski declares as follows:

13 The November 26, 2012 training took place at FCI-Herlong's firing range, roughly 2,500  
14 feet from the inmates' recreation yard. (Id., ¶4.) As part of the training, Lt. Bolinski instructed  
15 the team on the proper use of a Pepper Ball Launcher and continuous discharge (CS) grenades.  
16 (Id., ¶ 5.) CS (the compound 2-chlorobenzalmalononitrile) is the defining component of tear gas,  
17 which is used as a riot control agent. Lt. Bolinski had been trained on such uses and was certified  
18 to instruct others. (Id.)

19 During the training exercise, the wind shifted toward the prison. (Id., ¶ 6.) Lt. Bolinski  
20 decided to continue the training exercise, because the wind shifted back away from the institution.  
21 (Id.) No policy forbids DCT training outside or in certain weather conditions, nor addresses  
22 where DCT training must be located. (Id., ¶ 7.) Such decisions are left to prison management to  
23 implement in a way that balances the need to train with multiple factors, including prisoner well-  
24 being, staff safety, cost, and allocation of resources. (Id., ¶¶ 7-8.)

25 In a verified complaint, plaintiff alleges that, at about 9:00 a.m. that morning, he was  
26 exercising on the recreation yard at FCI-Herlong with other inmates when he smelled a putrid,  
27 gas-like smell that burned his eyes, nose, and lungs, and made him lightheaded and disoriented.  
28 (ECF No. 1 at 2.) He attempted to mask the fumes by covering his face with his shirt, and saw

1 the other inmates in the yard doing the same. (Id.) Plaintiff and others gathered their belongings  
2 as best they could and moved “through the haze” to the inside recreation area, coughing and  
3 choking. (Id.) At approximately 9:30, the inmates were moved to another area. They received  
4 no immediate answers as to why they had been exposed to tear gas.

5 Later that day, plaintiff was told that a correctional officer had conducted a training  
6 operation with chemical agents “and forgot to check his ‘wind flaps.’” (Id. at 4.) Plaintiff asserts  
7 that this training operation was conducted in the prison’s parking lot, adjacent to the recreation  
8 yard and separated only by a chain link fence. (Id.)

#### 9 IV. Analysis

10 Defendant argues that the discretionary function exception to the FTCA applies because  
11 the officer conducting the outdoor training exercise on November 26, 2012 was performing a  
12 “discretionary function” that implicated policy concerns. Thus, defendant contends, the court  
13 lacks subject matter jurisdiction over plaintiff’s negligence claim.

14 Determining whether the DFE applies requires a two-step analysis. The first step requires  
15 the determination of whether the challenged action involves an element of choice or judgment. In  
16 re Glacier Bay, 71 F.3d 1447, 1450 (9th Cir. 1995). When a ‘federal statute, regulation, or policy  
17 specifically prescribes a course of action for an employee to follow,’ the exception will not apply.  
18 Id. To demonstrate that its conduct was discretionary, the government need only show that there  
19 was room for choice in making the challenged decision. Santana–Rosa v. United States, 335 F.3d  
20 39, 43 (1st Cir. 2003).

21 The second step requires determining whether the decision at issue involves  
22 considerations of social, economic or political policy; if it does, the exception applies. Glacier  
23 Bay, 71 F.3d at 1450. “When a statute, regulation or agency guideline allows a government agent  
24 to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when  
25 exercising that discretion.” Conrad v. United States, 447 F.3d 760, 766 (9th Cir. 2006); Alfrey,  
26 276 F.3d at 562 (quoting Weissich v. United States, 4 F.3d 810, 814 (9th Cir. 1993)) (holding that  
27 federal prison officials’ allegedly negligent response to prisoner’s reports of cellmate’s death  
28 threats fell within DFE).

1 Under 18 U.S.C. § 4042, the Bureau of Prisons has a general duty of care to safeguard  
2 prisoners. Section 4042 provides, in relevant part, that the BOP has charge of the management  
3 and regulation of all federal correctional institutions, including providing for the inmates’  
4 safekeeping, care, protection, instruction, and discipline. 18 U.S.C. § 4042(a)(1)-(3). However,  
5 under § 4042, the BOP retains sufficient discretion in the means it uses to fulfill that duty to  
6 trigger the DFE. See McCoy v. United States, 2014 WL 261833, \*4 (N.D. Cal. Jan. 22, 2014),  
7 citing Cohen v. United States, 151 F.3d 1338, 1342 (11th Cir. 1998); Montez v. United States,  
8 359 F.3d 392, 396 (6th Cir. 2004); see also Calderon v. U.S., 123 F.3d 947, 950 (7th Cir. 1997)  
9 (§4042 “sets forth no particular conduct the BOP personnel should engage in or avoid while  
10 attempting to fulfill their duty to protect inmates.”).

11 When a “federal statute, regulation, or policy specifically prescribes a course of action for  
12 an employee to follow,” the DFE will not apply. In re Glacier Bay, 71 F.3d at 1450. Plaintiff  
13 argues that, in addition to breaching the general duty of care in § 4042, prison officials violated  
14 federal regulations governing the use of non-lethal force against inmates. These regulations  
15 provide:

16 (a) The Warden may authorize the use of less-than-lethal weapons,  
17 including those containing chemical agents, only when the situation  
is such that the inmate:

18 (1) Is armed and/or barricaded; or

19 (2) Cannot be approached without danger to self or others; and

20 (3) It is determined that a delay in bringing the situation under  
21 control would constitute a serious hazard to the inmate or others, or  
would result in a major disturbance or serious property damage.

22 28 C.F.R. § 552.25(a)(1)(3). However, plaintiff’s claim is not that prison officials intentionally  
23 used non-lethal force against him, but that they negligently exposed him to chemical agents in a  
24 training exercise. Thus these regulations do not apply to defeat the DFE.

25 Disturbance Control Team leader Lt. Bolinski states in his sworn declaration that  
26 “[n]othing in any policy I am aware of forbids training outside . . . in certain weather conditions .  
27 . . [or] addresses where training must be located . . . the amounts of munitions that must be  
28 utilized . . . or that [teams] train a certain manner with those munitions. Those decisions are left

1 up to the facility’s management, to implement in a way that balances the need to train with other  
2 institutional requirements[.]” (Bolinski Decl., ¶ 7.) Bolinski declares that he considered those  
3 factors on the date in question. (Id., ¶ 8.)

4 Based on the foregoing, defendant has carried its burden to show that the first prong of the  
5 discretionary function test is met: Decisions concerning the specifics of the training exercise on  
6 November 26, 2012, including its location and timing, involved “an element of choice and  
7 judgment” on the part of prison officials.

8 In the second prong, defendant must show that the discretionary decision is based on  
9 social, economic, or political policy considerations. Glacier Bay, 71 F.3d at 1450. Here, the  
10 prison official who conducted the training on November 26, 2012 states that decisions about  
11 when, where, and in what weather, to train prison staff on the use of chemical agents, are made in  
12 consideration of policy factors. These include prisoner well-being, staff safety, cost, and  
13 allocation of resources. (Bolinski Decl., ¶¶ 7-8.)

14 As defendant has shown that the discretionary decision to conduct DCT training on  
15 November 26, 2012, under the conditions in place on that day, was “grounded in policy,” Conrad,  
16 447 F.3d at 766, defendant has carried its burden to show the DFE applies.

17 Based on the foregoing analysis, the court lacks subject matter jurisdiction over plaintiff’s  
18 FTCA claim. Thus the undersigned will recommend dismissal of this action.

19 Accordingly, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff’s motion to file a sur-reply (ECF No. 22) is granted; and
- 21 2. The Clerk of Court is directed to assign a district judge to this action.

22 IT IS HEREBY RECOMMENDED that defendant’s motion to dismiss for lack of subject  
23 matter jurisdiction (ECF No. 12) be granted.

24 These findings and recommendations are submitted to the United States District Judge  
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
26 after being served with these findings and recommendations, any party may file written  
27 objections with the court and serve a copy on all parties. Such a document should be captioned  
28 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are

1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: November 24, 2015



---

CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

4  
5  
6  
7  
8  
9 2 / bari1102.mtd  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28