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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SANDRA DUCHAC

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA

15 Defendant.
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Case No.: 19cv2244-LAB (LL)

**ORDER GRANTING IN PART
MOTION TO DISMISS**

17 Plaintiff Sandra Duchac filed her Complaint, bringing claims under Federal
18 Tort Claims Act (FTCA) based on a sexual assault by Dr. Manzanera¹ at the
19 Veteran's Administration (VA) Medical Center. She clarified that this was the only
20 claim she intended to bring. (See Docket no. 5.) Duchac alleges that the VA
21 ordered her to attend a medical disability examination at a clinic where Dr.
22 Manzanera worked, and where he assaulted her in an examination room.

23 The United States moved to dismiss for lack of jurisdiction and for failure to
24 state a claim. (Docket no. 6.) In particular, the government argued that Dr.
25 Manzanera was an independent contractor, rather than a federal employee, and
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28 ¹ Dr. Manzanera was charged in state court and pled guilty.

1 therefore claims against the United States were barred under the “independent
2 contractor” exception to the FTCA. See 28 U.S.C. § 2671; *United States v.*
3 *Orleans*, 425 U.S. 807, 813–14 (1976). The government supported its argument
4 with an authenticated contract showing that Dr. Manzanera was a contractor rather
5 than an employee.

6 In her opposition, Duchac did not dispute that the independent contractor
7 exception to the FTCA, if it applied, would bar certain claims. But she questioned
8 the extent to which duties were delegated to Dr. Manzanera. Although the
9 government submitted a copy of Dr. Manzanera’s contract, she disputed its
10 authenticity. She also argued that she could bring a claim directly against the
11 United States for negligent hiring and supervision, or failure to warn of Dr.
12 Manzanera’s dangerous propensities. She argues that she was effectively in the
13 VA’s custody or control, and the government therefore assumed nondelegable
14 duties. She also argues that if the Department of Veterans Affairs, through its
15 personnel, had carried out its nondelegable duty to report Dr. Manzanera’s earlier
16 violations and to investigate promptly, the attack on her would have been avoided.
17 These duties, she contends, arise under 38 C.F.R. §§1-201 and 1-204.

18 Because the independent contractor exception implicates the Court’s
19 jurisdiction, see *Autery v. United States*, 424 F.3d 944, 948 (9th Cir. 2005), the
20 Court was bound to inquire further before reaching the merits. See *Steel Co. v.*
21 *Citizens for a Better Env’t.*, 523 U.S. 83, 92–93, 98 (1998). The Court converted
22 the motion to dismiss into a motion for partial summary judgment on the issue of
23 Dr. Manzanera’s independent contractor status only, and permitted the parties to
24 submit evidence. See *Gordon v. United States*, 739 Fed. App’x 408, 411 (9th Cir.
25 2018) (authorizing this type of procedure when jurisdiction is in question). Duchac
26 submitted no new evidence, but rested on her arguments in her opposition. The
27 government, however, submitted substantial evidence.

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1 Legal Standards

2 A Rule 12(b)(6) motion tests the sufficiency of a complaint. *Navarro v. Block*,
3 250 F.3d 729, 732 (9th Cir. 2001). While a plaintiff need not give “detailed factual
4 allegations,” a plaintiff must plead sufficient facts that, if true, “raise a right to relief
5 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545
6 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual
7 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547).
9 In ruling on a motion to dismiss, the Court accepts all allegations of material fact
10 in the complaint as true and construes them in the light most favorable to the non-
11 moving party. *Cedars–Sinai Medical Center v. National League of Postmasters of*
12 *U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). New or expanded allegations in opposition
13 to a motion to dismiss are considered when deciding whether to grant leave to
14 amend, but are not considered when ruling on a 12(b)(6) motion. *See Schneider*
15 *v. Cal. Dep’t of Corr. & Rehab.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

16 The moving party has the initial burden of demonstrating that summary
17 judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).
18 However, to avoid summary judgment, the nonmovant cannot rest solely on
19 conclusory allegations. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.1986).
20 Rather, he must present “specific facts showing there is a genuine issue for trial.”
21 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The Court may not
22 weigh evidence or make credibility determinations on a motion for summary
23 judgment. Rather, the inferences to be drawn from the underlying facts must be
24 viewed in the light most favorable to the nonmoving party. *Id.* at 255; *United States*
25 *v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

26 The United States enjoys sovereign immunity. *See F.D.I.C. v. Craft*, 157 F.3d
27 697, 706 (9th Cir.1998) (“The FTCA is the exclusive remedy for tortious conduct
28 by the United States”). Unless waived (e.g., under the FTCA), sovereign immunity

1 is a jurisdictional bar to suits against the United States. *F.D.I.C. v. Meyer*, 510 U.S.
2 471, 475 (1994); *United States v. Sherwood*, 312 U.S. 584, 586–87 (1941). The
3 FTCA waives the United States’ sovereign immunity for tort actions, and permits
4 suits in federal court arising from the negligence of federal employees. *D.L. by and*
5 *through Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir. 2017). Strict compliance
6 with conditions of the waiver is required. *Irwin v. Dep’t of Veterans Affairs*, 498 U.S.
7 89, 94 (1990). One requirement for waiver to be effective is that before filing suit
8 under the FTCA, a plaintiff must exhaust her administrative remedies. *D.L.*, 858
9 F.3d at 1244 (citing 28 U.S.C. § 2675(a)).

10 The FTCA’s limited waiver of immunity excludes “any contractor with the
11 United States” from its definition of government employee. *Edison v. United States*,
12 822 F.3d 510, 517–18 (9th Cir. 2016) (citing 28 U.S.C. § 2671). Courts construe
13 this to protect the United States from vicarious liability for the acts of its
14 independent contractors. *Id.* at 518 (citing *Yanez v. United States*, 63 F.3d 870,
15 872 n. 1 (9th Cir. 1995)).

16 The FTCA’s waiver also excludes claims based on a government employee’s
17 performance of a “discretionary function. *Sigman v. United States*, 217 F.3d 785,
18 792–93 (9th Cir. 2000). This exception can apply when the challenged action
19 involves choice or judgment, but does not apply when federal law specifically
20 prescribes a course of conduct. *Id.* at 793 (citing *Berkovitz v. United States*, 486
21 U.S. 531, 536 (1988)). But if the decision is “one to which a policy analysis may
22 apply,” it falls within the exception. *Weissich v. United States*, 4 F.3d 810, 813 (9th
23 Cir. 1993). This is so even if the discretion is abused. *Id.* (citing *Mitchell v. United*
24 *States*, 787 F.2d 466, 468 (9th Cir. 1986)).

25 A challenged action falls within the “discretionary function” exception if it
26 meets two criteria: 1) it is discretionary in nature, or involves an element of
27 judgment or choice; and 2) the judgment is the kind of discretionary function that
28 the exception was intended to shield, *i.e.*, government actions and decisions based

1 on considerations of public policy. *Doe v. Holy See*, 557 F.3d 1066, 1083–84 (9th
2 Cir. 2009) (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991)). The second
3 element has also been described as requiring that the conduct implements social,
4 economic, or policy considerations. *Nurse v. United States*, 226 F.3d 996, 1001
5 (9th Cir. 2000). A plaintiff must first plead a claim that falls facially outside this
6 exception; once she does so, however, the burden shifts to the government to
7 prove the exception is applicable. *Holy See*, 557 F.3d at 1084.

8 **Duchac’s Claims**

9 The Complaint alleges that the VA knew or should have known that before
10 the assault of Duchac, numerous female patients had complained of his
11 inappropriate sexual conduct. It alleges that the VA should have realized that Dr.
12 Manzanera was a danger to his female patients, but failed to investigate or take
13 action to suspend him from evaluating women. The Complaint also alleges that the
14 VA failed to warn Duchac about him.

15 The Complaint also attempted to sue the United States under California law,
16 and to sue numerous “Doe” defendants for their part in Duchac’s injury. Duchac
17 has since clarified that her claim arises solely under the FTCA, which means the
18 United States is the only Defendant.

19 **FTCA Waiver Exceptions**

20 The government’s un rebutted evidence shows that Dr. Manzanera
21 contracted as an independent contractor with QTC Medical Services, Inc., and that
22 in turn QTC contracted with the VA. Duchac’s earlier objection, questioning the
23 truth of the government’s representations, is effectively answered by this evidence.
24 Dr. Manzanera’s status as an independent contractor, and not a U.S. government
25 employee, is beyond dispute. Under the “independent contractor” exception,
26 therefore, Duchac can bring no claim based on vicarious liability for Dr.
27 Manzanera’s actions.

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1 In an effort to avoid the independent contractor bar, the Complaint alleges
2 the existence of a “special relationship,” under which the United States assumed
3 a duty of care it could not delegate to contractors. Duchac’s opposition cites
4 *Edison*, 822 F.3d at 518–19 in support of her argument. However, *Edison* stands
5 for the proposition that the government may still be liable when it has delegated
6 some, but not all, of its legal duties to a contractor. *Id.* at 517. Duchac argues that
7 the government did not, and could not, delegate its duty to warn.² Even assuming
8 this is correct, and assuming that the government itself, rather than its contractors,
9 knew in advance that Dr. Manzanera posed a danger to Duchac, the government’s
10 duty to warn is covered by the next exception.

11 In general, negligent hiring, retention, or supervision of personnel falls within
12 the “discretionary function” exception. *Nurse*, 226 F.3d at 1001 (negligent and
13 reckless supervision of agents accused of unlawfully searching the plaintiff “fall
14 squarely within the discretionary function exception”). This includes claims based
15 on failure to warn potential victims of an employee’s history of abuse. *Holy See*,
16 557 F.3d at 1084 (practice of retaining employees and not warning of their history
17 of child abuse fell within the “discretionary function” exception). *See also Gonzalez*
18 *v. United States*, 814 F.3d 1022, 1025–26, 1037 (9th Cir. 2016) (FBI’s decision not
19 to disclose threatened home invasion to local law enforcement fell within the
20 discretionary function exception). The Complaint’s claim for the government’s
21 negligent retention or supervision of Dr. Manzanera, or of its failure to warn
22 patients about his abusive history falls within this exception. The Complaint does
23 not plead a claim for negligent retention or supervision, or failure to warn, that falls
24 outside this exception.

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27 ² She also argues that the VA and its employees had nondelegable duties to report
28 serious misconduct or crimes to the Office of the Inspector General. These duties
are discussed below.

1 In her opposition, Duchac attempts to take her negligent
2 supervision/retention and failure to warn claims outside this exception by pointing
3 to a federally-prescribed course of conduct, which she contends was non-
4 delegable. She cites 38 C.F.R. §§1-201 and 1-204. Section 1-201 requires VA
5 employees with knowledge or information about actual or possible crimes related
6 to VA programs to immediately report what they know to their supervisor, “any
7 management official,” or the Office of the Inspector General. Section 1-204
8 requires that criminal matters involving felonies must be immediately reported to
9 the Office of Inspector General. Among the felonies named as examples are those
10 involving the rape, assault, or serious physical abuse of a VA patient.

11 Assuming these regulations would eliminate any discretion by VA or other
12 government employees, Duchac’s claim would fall outside the exception only if one
13 or more of them failed to report a previous assault as required, and that failure led
14 to the assault of Duchac. Any failure to report the assault of Duchac necessarily
15 occurred after the assault, and could not have caused it. The Complaint does not,
16 however, allege that any VA employees failed to report information about Dr.
17 Manzanera to higher officials or to the Office of the Inspector General. At some
18 point the Office was told, but when that happened is never alleged. The Office
19 began an investigation, but only after the assault of Duchac. Absent from the
20 complaint are any allegations that the VA or any of its employees failed to properly
21 report Dr. Manzanera’s previous misconduct, or that if they did, their failure led to
22 the assault of Duchac. Rather, the Complaint alleges that the VA itself failed to
23 investigate prior complaints or suspend Dr. Manzanera. (Compl., ¶ 15.) Nothing in
24 the Complaint or briefing suggests that either the VA or the Office of the Inspector
25 General had a nondiscretionary duty to investigate. In general, decisions whether,
26 when, and how to investigate are susceptible to policy analysis, and fall within the
27 discretionary function exception. See *Vickers v. United States*, 228 F.3d 944, 951
28 (9th Cir. 2000) (citing *Sabow v. United States*, 93 F.3d 1445, 1451–54 (9th Cir.

1 1996) (holding that agency decisions regarding the scope and manner of
2 investigations are discretionary, so long as the agency does not violate a
3 mandatory directive); *Little v. City of Seattle*, 863 F.2d 681, 684 (9th Cir. 1988)
4 (holding that Inspector General's agent's duty to investigate criminal behavior was
5 a discretionary function).

6 **Conclusion and Order**

7 For these reasons, Duchac has failed to meet her burden of showing that the
8 Court has jurisdiction over her claims. It appears possible, though unlikely, that
9 she can amend to correct these defects.

10 In response to Duchac's arguments in her opposition about new theories, the
11 government attached to its reply brief a copy of the administrative claim she
12 submitted in order to exhaust her remedies. Duchac did not have an opportunity
13 to respond to this or to argue that some of the claims or theories she would like to
14 pursue were in fact exhausted. However, because the government has now raised
15 the issue, Duchac must show that any potential claim was properly exhausted.

16 The motion to dismiss is **GRANTED IN PART**. The Complaint is **DISMISSED**
17 for lack of jurisdiction. If Duchac believes she can successfully amend, she should
18 file an *ex parte* motion for leave to amend, within **21 calendar days of the date**
19 **this order is issued**. Any such motion must show that the claims she intends to
20 pursue in her proposed amended complaint were properly exhausted, and must
21 comply with Civil Local Rule 15.1(b). Her motion must not seek reconsideration of
22 issues decided in this order. If she needs more time, she may seek it by *ex parte*
23 or joint motion, showing good cause for the extension.

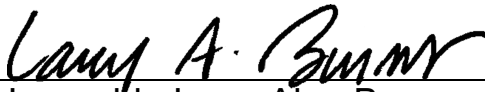
24 If Duchac files such a motion, the government may file an opposition within
25 **14 calendar days of the date it is docketed**. No reply brief is to be filed without
26 leave. Following the filing of this briefing, the matter will be deemed submitted on
27 the papers.

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1 If Duchac does not intend to amend, she should file a notice so stating, and
2 this action will be dismissed for lack of jurisdiction.

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4 **IT IS SO ORDERED.**

5 Dated: March 12, 2021

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8 Honorable Larry Alan Burns
9 United States District Judge

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