

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

MICHELLE LYNN MORTON,

Plaintiff,

v.

CASE NO. 4:16cv313-RH/CAS

UNITED STATES OF AMERICA,

Defendant.

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**ORDER DISMISSING THE COMPLAINT IN PART**

The plaintiff is an inmate in the Bureau of Prisons. She suffered burns when an inmate who was working in food service spilled boiling water on her.

The plaintiff filed this action against the United States. She asserts five claims, all under the Federal Tort Claims Act. The plaintiff abandoned the third claim. The government moved to dismiss the first, second, and fourth claims, and moved for summary judgment on the fifth claim.

The case is before the court on the magistrate judge's report and recommendation, ECF No. 36. No objections have been filed.

The report and recommendation concludes that the first, second, and fourth claims should be dismissed but that the motion for summary judgment on the fifth claim should be denied for procedural reasons.

More recently, the government has moved for leave to amend the motion to dismiss. To avoid delay in ruling on the dismissal of the other claims, this order denies leave to amend the original motion but grants leave to file a new motion to dismiss directed to the fifth claim. A court may grant leave to file a new motion asserting lack of jurisdiction or failure to state a claim because these defenses are not waived by failure to include them in an original motion. *See* Fed. R. Civ. P. 12(h). The government may file any new motion separately or may join it with a renewed summary-judgment motion. Any renewed summary-judgment motion must include a “statement of facts generally in the form that would be appropriate in an appellate brief.” N.D. Fla. Loc. R. 56.1(B).

For these reasons,

IT IS ORDERED:

1. The report and recommendation is accepted.
2. The motion to dismiss or for summary judgment, ECF No. 29, is granted in part. The first, second, third, and fourth claims are dismissed. Summary judgment on the fifth claim is denied without prejudice.

3. I do *not* direct the entry of judgment under Federal Rule of Civil Procedure 54(b).

4. The government's motion, ECF No. 37, for leave to amend its motion to dismiss is denied.

5. The government is given leave to file a motion to dismiss the fifth claim.

6. The case is remanded to the magistrate judge for further proceedings.

SO ORDERED on September 15, 2017.

s/Robert L. Hinkle  
United States District Judge