

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 PAMELA MCSWAIN,)
4)
5 Plaintiff,)
6 vs.)
7 UNITED STATES OF AMERICA;)
8 Defendant.)
9

Case No.: 2:15-cv-01321-GMN-GWF

ORDER

10 Pending before the Court is the Motion for Partial Dismissal, (ECF No. 17), filed by
11 Defendant United States of America (“Defendant”). Plaintiff Pamela McSwain (“Plaintiff”)
12 filed a Response, (ECF No. 20), and Defendant filed a Reply, (ECF No. 25).¹ For the reasons
13 set forth herein, Defendant’s Motion for Partial Dismissal is **GRANTED**.

14 **I. BACKGROUND**

15 This case arises out of a personal injury incident that occurred at the McCarran
16 International Airport on September 29, 2014. (Compl. ¶ 10, ECF No. 1). While near the
17 security checkpoint, Plaintiff claims that she witnessed a Transportation Security
18 Administration (“TSA”) dog barking and pulling on the leash maintained by its handler. (Id. ¶
19 12). Shortly after, Plaintiff alleges she was “attacked from behind by [a] large black TSA dog
20 which knocked both Plaintiff and [her emotional support dog] to the ground.” (Id. ¶ 13).

21 Plaintiff filed her Complaint on July 13, 2015, alleging a claim of negligence against
22 Defendant pursuant to the Federal Tort Claims Act (“FTCA”). (See Compl). Specifically,
23 Plaintiff alleges that “Defendant breached its duty of care towards Plaintiff by failing to either
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25 ¹ Plaintiff filed two motions to extend time to respond to Defendant’s Motion for Partial Dismissal. (ECF Nos. 18, 21). Defendant filed non-oppositions to these motions. (ECF Nos. 19, 22). For good cause appearing, the Court grants these motions and considers Plaintiff’s response timely.

1 properly leash its security dog or provide the handler with appropriate training for doing so.”
2 (Id. ¶ 18) (emphasis added).² In the instant motion, Defendant seeks dismissal on: (1) the
3 negligent training portion of Plaintiff’s claim; (2) the prayer for declaratory relief; and (3) the
4 prayer for a separate award of attorney’s fees.

5 **II. LEGAL STANDARD**

6 “Federal courts are courts of limited jurisdiction. They possess only that power
7 authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
8 375, 377 (1994). Therefore, before a federal court may consider the merits of a case, it must
9 first determine whether it has proper subject matter jurisdiction. *Scott v. Pasadena Unified Sch.*
10 *Dist.*, 306 F.3d 646, 653–54 (9th Cir. 2002).

11 Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for
12 lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When subject matter jurisdiction is
13 challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott v.*
14 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “[t]he party seeking to invoke the
15 court’s jurisdiction bears the burden of establishing that jurisdiction exists”). Accordingly, the
16 court will presume lack of subject matter jurisdiction until the plaintiff proves otherwise in
17 response to the motion to dismiss. *Kokkonen*, 511 U.S. at 377.

18 A motion to dismiss under Rule 12(b)(1) may be construed in one of two ways.
19 *Thornhill Publ’g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It
20 may be described as ‘facial,’ meaning that it attacks the sufficiency of the allegations to support
21 subject matter jurisdiction. *Id.* Alternatively, it may be described as ‘factual,’ meaning that it
22 “attack[s] the existence of subject matter jurisdiction in fact.” *Id.*

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25 ² While the Complaint lists only a single cause of action for “negligence,” Plaintiff in effect advances two alternate negligence theories to support her case. The Court therefore evaluates the “negligent training” assertion as a distinct claim for purposes of this motion to dismiss.

1 When a court considers a ‘facial’ attack made pursuant to Rule 12(b)(1), it must consider
2 the allegations of the complaint to be true and construe them in the light most favorable to the
3 plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989).

4 “Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed
5 without prejudice so that a plaintiff may reassert his claims in a competent court.” *Frigard v.*
6 *United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam). However, where there is no way
7 to cure the jurisdictional defect, dismissal with prejudice is proper. See *id.*

8 **III. DISCUSSION**

9 **1. Timeliness of Defendant’s Motion for Partial Dismissal**

10 Citing the ruling in *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983), Plaintiff
11 argues that Defendant’s Motion for Partial Dismissal is procedurally improper because it was
12 filed after Defendant filed a responsive pleading. (Pl.’s Response 3:13–17, ECF No. 20). While
13 the court in *Augustine* found that Rule 12(b)(1) motions filed after the responsive pleading were
14 “technically untimely,” the court also explained that the issue of subject matter jurisdiction
15 “may be raised by the parties at any time pursuant to Fed. R. Civ. P. 12(h)(3).” *Augustine*, 704
16 F.2d at 1075. As a general rule, “[t]he defense of lack of subject matter jurisdiction cannot be
17 waived, and the court is under a continuing duty to dismiss an action whenever it appears that
18 the court lacks jurisdiction.” *Id.* at 1077. The Court therefore finds that the Defendant’s motion
19 is properly brought before the Court. See Fed. R. Civ. P. 12(h)(3).

20 **2. Negligent Training Claim**

21 Plaintiff raises her negligence claim pursuant to the FTCA, 28 U.S.C. § 2671, et seq.
22 The FTCA provides a limited waiver of the sovereign immunity of the United States for torts
23 committed by federal employees acting within the scope of their employment. See *Valdez v.*
24 *United States*, 56 F.3d 1177, 1179 (9th Cir. 1995). Under the FTCA, the United States may be
25 held civilly liable for the torts of its employees “in the same manner and to the same extent as a

1 private individual under like circumstances.” *Nurse v. United States*, 226 F.3d 996, 1000 (9th
2 Cir. 2000). However, the FTCA’s waiver of immunity is limited by a number of statutory
3 exceptions. See 28 U.S.C. § 2680. If a plaintiff’s cause of action falls within one or more of
4 these exceptions, then federal courts lack subject matter jurisdiction to hear the claim. See
5 *Morris v. United States*, 521 F.2d 872, 874 (9th Cir. 1975).

6 Defendant argues that Plaintiff’s negligent training claim is jurisdictionally barred by the
7 discretionary function exception of the FTCA. (Def.’s Mot. to Dismiss 3:26–27, ECF No. 17).
8 To survive a motion to dismiss under this exception, a claim must “allege facts which would
9 support a finding that the challenged actions are not the kind of conduct that can be said to be
10 grounded in the policy of the regulatory regime.” *United States v. Gaubert*, 499 U.S. 315, 325
11 (1991). The Ninth Circuit has repeatedly found that decisions relating to training, hiring, and
12 supervision “fall squarely within the discretionary function exception.” *Nurse*, 226 F.3d at
13 1001; see also *Vickers*, 228 F.3d at 950; *Gager v. United States*, 149 F.3d 918, 920–22 (9th Cir.
14 1998).

15 In her Response, Plaintiff concedes that “the nature and extent of training provided to
16 the TSA agent is not challengeable under the FTCA.” (Pl.’s Response 4:13–15). However,
17 Plaintiff asserts that “[w]hether the discretionary function bars Plaintiff from receiving
18 compensation for certain challenged actions committed by government employees is best
19 decided at trial when the complete facts will be presented following robust discovery in this
20 case.” (Id. 1:22–2:1). This argument is insufficient to overcome deficiencies in the Complaint
21 itself. See *Gaubert*, 499 U.S. at 325. Here, Plaintiff’s sole basis for her negligent training claim
22 is the broad assertion that Defendant failed to “provide the handler with appropriate training.”
23 (See Compl. ¶ 18). As the Complaint avers no additional facts to suggest that the claim falls
24 outside of the discretionary function exception, the Court dismisses Plaintiff’s negligent
25 training claim without prejudice.

