

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM SAMUEL MCLEAN,	:	
JR.,	:	
	:	
Plaintiff	:	CIVIL NO. 1:14-CV-02298
	:	
vs.	:	
	:	
UNITED STATES OF AMERICA	:	(Judge Rambo)
	:	
Defendant	:	

MEMORANDUM AND ORDER

Background

On December 12, 2014, William Samuel McLean, Jr., an inmate confined at the Federal Correctional Institution at Schuylkill, Minersville, Pennsylvania ("FCI-Schuylkill")<sup>1</sup> filed this action against the Federal Bureau of Prisons ("BOP") pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671.<sup>2</sup> (Doc. 1,

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1. McLean is presently confined at the Federal Correctional Institution, Pekin, Illinois ("FCI-Pekin").

2. The FTCA provides a remedy in damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of [the United States] while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28

(continued...)

Complaint.) Included in the complaint was a "motion for time to file an amended complaint." (Id.) On December 4, 2014, the Clerk of Court sent McLean an Administrative Order directing that within thirty (30) days he pay the filing fee, or file an application to proceed in forma pauperis and an authorization form to have funds deducted from his prison account. (Doc. 4.) On December 12, 2014, McLean filed an application to proceed in forma pauperis and the authorization form. (Docs. 5 and 6.) Also, on December 12, 2014, an Administrative Order was sent to the Warden at FCI-Schuylkill directing him to commence deducting the filing fee from McLean's prison account. (Doc. 7.) On December 16, 2014, the Court granted McLean's application to proceed in forma pauperis. (Doc. 9.)

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2. (...continued)  
U.S.C. § 1346(b)(1). With respect to negligence or wrongful acts or omissions the FTCA excludes several types of claims, including the intentional torts of assault, battery, false imprisonment, false arrest with exception of acts or omissions of investigative or law enforcement officers of the United States. 28 U.S.C. § 2680. "Investigative or law enforcement officer" is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h).

Defendant waived service of the complaint and on February 12, 2015, filed a motion for extension of time to file an answer. (Docs. 10, 14, 17.) By order of February 18, 2015, Defendant was granted an extension of time until May 20, 2015, to file an answer. (Doc. 18.) On February 26, 2015, McLean filed an amended complaint substituting the United States as the Defendant along with a motion to serve the amended complaint. (Docs. 20, 21.) By order of April 10, 2015, the motion to serve the amended complaint was granted, the Federal Bureau of Prisons was terminated as a Defendant, and the United States of America was added as the sole Defendant in this action. (Doc. 25.)

The amended complaint and attachments thereto reveal that McLean alleges that when he arrived at FCI-Schuylkill on December 5, 2011, that he and the other newly arrived inmates were informed by Tamara Blaschak, an emergency medical technician, that they would all receive a skin test for tuberculosis, i.e., a purified protein derivative (PPD) test.<sup>3</sup> (Doc. 20, Amended

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3. The Centers for Disease Control and Prevention  
(continued...)

Complaint.) McLean claims that he informed EMT Blaschak that he previously had TB and also had a PPD test in 1994 and that those facts were documented in his medical records maintained by the BOP.<sup>4</sup> (Id.) McLean alleges

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3. (...continued)  
describes how the test is administered as follows: "The [tuberculin skin test] is performed by injecting 0.1 ml of tuberculin purified protein derivative (PPD) into the inner surface of the forearm. The injection should be made with a tuberculin syringe, with the needle bevel facing upward. The TST is an intradermal injection. When placed correctly, the injection should produce a pale elevation of the skin (a wheal) 6 to 10 mm in diameter." Fact Sheets, Tuberculin Skin Testing, Centers for Disease Control and Prevention, <http://www.cdc.gov/tb/publications/factsheets/testing/skintesting.htm> (Last accessed February 5, 2016). The test is assessed within 48 to 72 hours by measuring in millimeters "the induration (palpable, raised, hardened area of swelling)." (Id.) The interpretation of the test depends on the measurement in millimeters of the induration and the person's risk of being infected. (Id.) With respect to "residents and employees of high risk congregate settings" such as penal institutions "an induration of 10 or more millimeters is considered positive[.]" (Id.)

4. McLean contends that he received the 1994 TB skin test while confined at the United States Penitentiary, Leavenworth, Kansas. (Doc. 23, Exhibits to Amended Complaint, at 5.) At that time McLean alleges that he informed the BOP that he had a history of TB but they still performed the test and that he had a bad reaction to the test but it did not leave a scar on his left forearm. (Id.) Up until his transfer to FCI-Schuylkill on December 5, 2011, he contends that the BOP monitored him for TB by way of chest x-rays. (Id.)

that he objected to the administration of the PPD test and that EMT Blaschak informed him and the other inmates that the test was mandatory and that if he refused he would be taken immediately to a special housing unit cell, strapped down and given the PPD test.<sup>5</sup> (Id. at 22-23.) In light of those threats, McLean claims he submitted to the test which resulted in an allergic reaction within a short period of time and left a permanent scar on his left forearm. (Id. at 11.) McLean also alleges that he suffered damage to the muscle of the left forearm and still suffers pain from the administration of the test. (Id.) McLean contends that EMT Blaschak knew that his medical records showed that administering the test to him was "contraindicated." (Id. at 4, 11.) McLean contends that EMT Blaschak was negligent by administering the test and committed an assault and battery on his person. (Id. 1-6.) He also contends that the clinical director, Ellen Mace-Leibson,

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5. 28 C.F.R. § 549.12(b)(4) states that "[a]n inmate who refuses TB screening may be subject to an incident report for refusing to obey an order. If an inmate refuses skin testing, and there is no contraindication to tuberculin skin testing, then, institution medical staff will test the inmate involuntarily."

D.O., and Health Services Administrator McKinney were negligent for issuing standing orders that all newly arrived inmates receive a PPD test. (Id.) As relief, McLean requests an award of damages in the amount of \$10,000.00. (Id. at 6.)

On June 9, 2015, the United States filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b), or in the alternative for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Doc. 27.) A statement of material facts and a brief in support of the motion were filed on June 23, 2015. (Docs. 29, 30.) The United States argued that McLean's amended complaint should be dismissed because he does not have a medical expert and failed to timely file a certificate of merit as required by Pennsylvania law, or in the alternative, summary judgment should be granted because the undisputed record demonstrates the United States was not negligent in treating McLean. After being granted several extensions of time, on January 22, 2016, McLean filed a brief in opposition, a response to the statement of material facts filed by the United States and evidentiary

materials. (Docs. 55, 56, 57, 58.) The United States' motion became ripe for disposition on February 8, 2016, when it elected not to file a reply brief.

On February 11, 2016, the court granted in part and denied in part the United States' motion. The court dismissed McLean's claims of assault and battery but in all other respects the court permitted the case to proceed. The court, also, set a deadline for the filing of an answer to the amended complaint, the completion of discovery and the filing of any further dispositive motions.

On March 14, 2016, the United States filed an answer to the amended complaint. (Doc. 62.) On March 21, 2016, the United States filed a motion to depose McLean which the court granted by order of March 23, 2016. On April 13, 2016, the court granted the United States' motion for an extension of time of the discovery and dispositive motions deadlines. (Doc. 72.) Under that order all discovery is to be completed by May 11, 2016. On April 25, 2016, McLean filed a motion for appointment of counsel and a motion to depose 11 witnesses, including Tamara Blaschak. (Docs. 75, 76.)

Upon consideration of Mclean's motion for appointment of counsel, this court will conditionally grant the motion. Although prisoners have no constitutional or statutory right to appointment of counsel in a civil case, Parham v. Johnson, 126 F.3d 454, 456-457 (3d Cir 1997), the court has discretion to request "an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1); see also Montgomery v. Pinchak, 294 F.3d 492, 499 (3d Cir. 2002); Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993). The court finds that the difficulties associated with the legal issues and discovery in this case and the necessity of factual investigation in this case support the appointment of counsel for McLean. See Montgomery, 294 F.3d at 499 (citing Tabron, 6 F.3d at 155-157). McLean is cautioned however, that if the court is unable to find counsel to represent him, he will be required to continue with his case pro se.

**ACCORDINGLY**, this 4<sup>th</sup> day of May, 2016, **IT IS HEREBY ORDERED THAT:**

1. McLean's motion for appointment of counsel (Doc. 75) is conditionally **GRANTED**. The Clerk of Court



shall forward a copy of this Order to the Chair of the Federal Bar Association's Pro Bono Committee, James P. DeAngelo, Esquire, McNees Wallace & Nurick, 100 Pine Street, Harrisburg, Pennsylvania 17101, for the purpose of obtaining counsel for McLean.

2. All filing obligations and other deadlines are stayed for sixty (60) days while Attorney DeAngelo attempts to find counsel to represent McLean.

3. A new discovery and dispositive motion deadlines will be established when deemed appropriate by the Court.

4. McLean's motion to depose witnesses (Doc. 76) is **DENIED** without prejudice to his right to refile the motion after the court sets a new discovery and dispositive motions deadline.

5. McLean is advised that if the court is unable to find counsel to represent him, he will be required to continue with his case pro se.

s/Sylvia H. Rambo  
United States District Judge