

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Darryl L. Cook,

Plaintiff,

v.

United States of America,

Defendant.

Case No. 0:11-2669-RMG

ORDER

This matter is before the Court upon the recommendation of the Magistrate Paige J. Gossett that Defendant's motion for summary judgment (Dkt. No. 32) be granted. For the reasons set forth below, the Court adopts the Magistrate's Report and Recommendation ("R & R") as the order of the Court.

Background

Plaintiff, currently a detainee at FCI-Estll, brings this action pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-91 ("FTCA"). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(d) DSC, this matter was referred to the United States Magistrate Judge for all pretrial proceedings. Plaintiff claims that Defendant violated the FTCA by negligently transferring him from a Bureau of Prisons ("BOP") facility in Atlanta, Georgia, to FCI-Estll in South Carolina. On April 16, 2012, Defendant filed a motion for summary judgment (Dkt. No. 32). Subsequently, the Magistrate issued an R & R recommending this Court grant Defendant's motion. (Dkt. No. 39). Plaintiff then timely filed an objection to the R & R. (Dkt. No. 45).

Law/Analysis

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with

this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. Additionally, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate judge with instructions.” *Id.* In the absence of specific objections to the Report and Recommendation, this Court is not required to give any explanation for adopting the recommendation. *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983).

The Court agrees with and wholly adopts the Magistrate’s Report and Recommendation granting Defendant’s motion. The Magistrate determined that the BOP’s decision to transfer Plaintiff from Atlanta to Estill FCI falls within the discretionary function exception to the FTCA and that Defendant is therefore immune from suit on these claims. This holding is amply supported by case law from this and other jurisdictions. *E.g., Bethae v. United States*, 465 F. Supp. 2d 575, 583 (D.S.C. 2006).

Plaintiff apparently objects by arguing that the case *Berkovitz v. United States*, 486 U.S. 531 (1988), Federal Rule of Appellate Procedure 23(a), and BOP Program Statement 5180.05 mandate the use of certain procedures and render the discretionary function exception inapplicable. These arguments are unavailing. First, *Berkovitz* does not, as Plaintiff argues, “prohibit the transfer of custody of a prisoner” with a pending habeas petition. (Dkt. No. 45 at 2). Rather, that case involved a FTCA claim alleging negligent licensing of a polio vaccine by the National Institute of Health. *Berkovitz*, 486 U.S. 531. Second, Federal Rule of Appellate Procedure 23(a) does not apply to Plaintiff’s case because that rule applies only to habeas proceedings pending appellate review. *See Mitchell v. McCaughtry*, 291 F. Supp. 2d 823, 835

(E.D. Wis. 2003). Plaintiff currently has a habeas proceeding pending only in district court. *Cook v. United States*, 2:10-cv-8029-RDP-RRA (N.D. Ala.). Finally, Plaintiff's objections regarding Program Statement 51805.05 are misplaced because it does not require any written notice prior to transfer as Plaintiff argues. (Dkt. No. 32-2).

Conclusion

Based on the reasoning set forth above, the Court adopts the Report and Recommendation of the Magistrate. (Dkt. No. 39). Accordingly, the Court **GRANTS** Defendant's motion for summary judgment (Dkt. No. 32).

A handwritten signature in black ink, appearing to read 'R. M. Gergel', written over a horizontal line.

Richard Mark Gergel
United States District Court Judge

November 1, 2012
Charleston, South Carolina