

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 ALVARO MENDEZ,

5 Plaintiff,

6 v.

7 THE GEO GROUP, INC., et al.,

8 Defendants.

CASE NO. C16-5279 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS

9 This matter comes before the Court on Defendant United States of America's
10 motion to dismiss (Dkt. 43). The Court has considered the pleadings filed in support of
11 and in opposition to the motion and the remainder of the file and hereby grants in part
12 and denies in part the motion for the reasons stated herein.

13 **I. PROCEDURAL HISTORY**

14 On October 4, 2016, Plaintiff Alvaro Mendez ("Mendez") filed a Fourth Amended
15 Complaint asserting claims for assault, battery, negligence, intentional infliction of
16 emotional distress, and negligent infliction of emotional distress. Dkt. 37 ("FAC").

17 On February 23, 2017, the Government filed the instant motion to dismiss counts
18 1, 2, 4, and 5 for lack of jurisdiction. Dkt. 43. On March 13, 2017, Mendez responded.
19 Dkt. 44. On March 16, 2017, the Government replied. Dkt. 45.

20 **II. FACTUAL BACKGROUND**

21 In March of 2015, Immigration and Customs Enforcement ("ICE") identified
22 Mendez as a person subject to deportation, and Mendez was subsequently placed in

1 custody at the Northwest Detention Center. FAC ¶¶ 2.1–2.2. On June 10, 2015, Mendez
2 alleges that Defendant Joseph Tucker, a guard at the center, assaulted him while he was
3 waiting in line for religious services. *Id.* ¶¶ 2.6–2.10. Relevant to the instant motion,
4 Mendez also alleges as follows:

5 Plaintiff was prevented from attending the religious service that day.
6 On subsequent days, plaintiff did not attend his religious service due to
7 intimidation and fear of being beaten again.

8 Is believed, and therefore alleged, that a substantial motivating factor
9 for Defendant Tucker to violently shove Plaintiff was to prevent him from
10 attending the Catholic church service.

11 *Id.* ¶¶ 2.11, 2.12.

12 Based on this conduct Mendez asserts numerous claims, including the intentional
13 and negligent infliction of emotional distress. In relevant part, Mendez asserts as
14 follows:

15 Defendants’ acts of shoving and pushing/shoving Plaintiff,
16 preventing plaintiff from attending church service, yelling derogatory
17 language while Plaintiff was injured and suffering, doing this in front of all
18 the other detainees, and not providing prompt medical treatment and/or
19 delaying medical attention caused Plaintiff severe and extreme emotional
20 distress.

21 ***

22 Defendant Tucker and the other Defendants had a duty to provide a
safe detainee environment. Defendant Tucker and the other defendants
breached their duty by shoving and pushing/shoving Plaintiff, preventing
Plaintiff from attending church service, yelling derogatory language while
Plaintiff was injured and suffering, doing this in front of all the other
detainees, and not providing prompt or delaying medical attention. As a
direct and proximate cause of Defendant Tucker’s and the other defendant’s
breach of their duty, Plaintiff has suffered extreme emotional distress and
damages to be proven at trial. Defendant Tucker and the other defendants
knew, or should have known, that his actions were distressing to the
Plaintiff. It was foreseeable that Defendants’ actions would cause emotional
distress to Plaintiff.

1 *Id.* ¶ 3.5, 3.6.

2 III. DISCUSSION

3 The Government moves to dismiss Mendez’s claims for assault, battery,
4 intentional infliction of emotional distress, and negligent infliction of emotional distress.
5 Mendez concedes his claims for assault and battery. Dkt. 44 at 2. Therefore, the Court
6 grants the Government’s motion as to assault and battery and will discuss the merits of
7 the other two claims.

8 A. Standard

9 A defendant may move to dismiss an action for lack of subject matter jurisdiction
10 under Federal Rule of Civil Procedure 12(b)(1). “A Rule 12(b)(1) jurisdictional attack
11 may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
12 2004). “In a facial attack, the challenger asserts that the allegations contained in a
13 complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* The Court
14 “resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): [after]
15 [a]ccepting the plaintiff’s allegations as true and drawing all reasonable inferences in the
16 plaintiff’s favor, the court determines whether the allegations are sufficient as a legal
17 matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th
18 Cir. 2014).

19 B. Waiver of Sovereign Immunity for Specific Torts

20 “It is axiomatic that the United States may not be sued without its consent and that
21 the existence of consent is a prerequisite for jurisdiction.” *United States v. Navajo*
22 *Nation*, 537 U.S. 488, 502 (2001) (quoting *United States v. Mitchell*, 463 U.S. 206, 212

1 (1983)). The Federal Tort Claims Act (“FTCA”) provides a limited waiver of the United
2 States’ sovereign immunity, and is the exclusive remedy for damages for injury or loss of
3 property “resulting from the negligent or wrongful act or omission of any employee of
4 the Government while acting within the scope of his office or employment” 28
5 U.S.C. § 2679(b)(1).

6 Congress expressly limited the FTCA’s waiver of sovereign immunity by carving
7 out numerous exceptions that prohibit suit against the United States for certain types of
8 claims. Specifically, the FTCA exceptions prohibit suing the United States for “[a]ny
9 claim arising out of assault, battery, false imprisonment, false arrest, malicious
10 prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference
11 with contract rights” by a federal employee that is not a federal law enforcement officer.
12 28 U.S.C. § 2680(h). These exceptions are to be strictly construed in favor of the United
13 States, with all ambiguities resolved in favor of the United States. *United States v. Nordic*
14 *Village, Inc.*, 503 U.S. 30, 33 (1992). Thus, “[i]f the asserted liability falls within an
15 exception to the FTCA, then the claims must be dismissed for lack of subject matter
16 jurisdiction.” *Bibeau v. Pac, Northwest Research Found. Inc.*, 339 F.3d 942, 945 (9th
17 Cir. 2003) (citations omitted).

18 Even if the claim is not explicitly labeled as an FTCA listed exception, courts
19 “look beyond the labels used to determine whether a proposed claim is barred [under §
20 2680(h)].” *Snow-Erlin v. United States*, 470 F.3d 804, 808–09 (9th Cir. 2006) (“Plaintiff
21 cannot sidestep the FTCA’s exclusion of false imprisonment claims by suing for the
22 damage of false imprisonment under the label of negligence.”) In other words, “if the

1 gravamen of Plaintiff's complaint is a claim for an excluded tort under § 2680(h), then
2 the claim is barred." *Id.*; see also *Sheehan v. United States*, 896 F.2d 1168, 1171 (9th
3 Cir. 1990) ("Regardless of the plaintiff's characterization of the cause of action, §
4 2680(h) bars suit for claims based on conduct which constitutes one of the excepted torts
5"). Applying this reasoning, the Ninth Circuit has affirmed the dismissal of a claim
6 for negligent infliction of emotional distress where the allegation was simply a
7 restatement of plaintiff's slander claim which was an excluded tort under the FTCA.
8 *Thomas-Lazear v. Fed. Bureau of Investigation*, 851 F.2d 1202, 1207 (9th Cir. 1988).

9 The touchstone for the analysis of determining whether a claim arises out of an
10 excluded tort is an examination of the conduct alleged. *Sheehan*, 896 F.2d at 1172.
11 Under circumstances where the essential conduct giving rise to plaintiff's claim of
12 negligent or intentional infliction of emotional distress is the same conduct that is an
13 excluded tort under the FCTA, then the relabeled claim fails. *Id.* at 1207 (citing *Metz v.*
14 *United States*, 788 F.2d 1528, 1535 (11th Cir. 1986) (finding plaintiff's claim of
15 intentional infliction of emotion distress was factually indistinguishable from the
16 misconduct alleged in plaintiff's false arrest claim which was barred under the FTCA,
17 requiring dismissal of both causes of action)); see also *Edwards v. United States*, 2016
18 WL 5676338 (D.D.C. Sept. 30, 2016) (plaintiff's allegations insufficient to sustain a
19 claim under the FTCA where plaintiff simply relabeled the excepted tort of false
20 imprisonment as the negligent handling of paperwork).

21 In this case, the Government moves to dismiss Mendez's claims for the infliction
22 of emotional distress arguing that the claims arise out of the excluded torts of assault and

1 battery. Dkt. 43 at 13–14. Mendez counters that his claims do not arise out of the
2 alleged assault and battery because the claims include allegations (1) that Defendants
3 subsequently prevented Mendez from attending church services after the alleged assault
4 and battery, (2) that Tucker inflicted emotional distress by verbally abusing Mendez after
5 the assault, and (3) that Defendants refused Mendez medical treatment days after the
6 assault. Dkt. 44 at 9–12. The Court concludes that, as alleged, Mendez’s claims rely on
7 conduct independent from that which supports assault or battery.

8 First, the alleged verbal abuse does not necessarily depend on the facts supporting
9 the assault. Mendez alleges that Tucker was “yelling derogatory language while
10 [Mendez] was injured and suffering” FAC ¶ 3.5. The Government contends that
11 “the gravamen of the plaintiff’s claim is that only when he was suffering in pain from the
12 assault did the use of ‘derogatory language’ then affect his well-being.” Dkt. 45 at 5.
13 The Court disagrees with this characterization of Mendez’s claim because the claim does
14 not depend on the physical state of Mendez at the time he was allegedly subjected to
15 derogatory language. Moreover, an individual yelling derogatory language does not
16 constitute an assault. *Brower v. Ackerley*, 88 Wn. App. 87, 93 (1997) (“words alone are
17 not enough to make an actor liable for assault”). If the conduct alleged does not
18 constitute an assault, then the claim is not barred. *Sheehan*, 896 F.2d at 1171 (9th Cir.
19 1990) (“issue in this case is whether the conduct upon which plaintiff rests her claim for
20 intentional infliction of emotional distress constitutes an assault as that tort is traditionally
21 defined. If it does, then the claim is barred by § 2680(h)”). Accordingly, Mendez’s
22 claims are not barred.

