LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

Present: The Honorable	GARY ALLEN FEESS	
Renee Fisher	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers)**

ORDER RE: MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. INTRODUCTION

In the present action, Plaintiff Arjang Panah ("Plaintiff") filed suit for negligence against Defendant United States of America ("Defendant") pursuant to the Federal Tort Claims Act ("FTCA") after he contracted a disease called Coccidioidomycosis ("cocci" or "Valley Fever") during his incarceration at Taft Correctional Institution ("Taft"). Specifically, Plaintiff avers in the complaint three separate negligence causes of action based on the following acts or omissions: (a) Defendant's failure to provide Plaintiff with a safe and habitable place of incarceration where he would not be infected by a fatal disease (Claim One); (b) Defendant's failure to take steps to either make the facility safe or adequately warn Plaintiff of the cocci illness (Claim Two); and (c) Defendant's assignment of Plaintiff to Taft despite the presence of cocci at the facility (Claim Three). (Docket No. 1, Compl. ¶¶ 26-37.)

Pending now before the Court is Defendant's motion to dismiss the case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and, in the alternative, for summary judgment. (Docket No. 19, Not.) In sum and substance, Defendant contends (1) that its motion to dismiss should be granted because Plaintiff's claims are barred by the discretionary function exception to the FTCA; and (2) that if the motion to dismiss is not granted, the Court should summarily adjudicate the case to the extent Plaintiff's negligence claims allege medical malpractice by the health care providers at Taft.

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

For the reasons stated below, the Court **DISMISSES** the third negligence claim, **DENIES** the motion to dismiss the first and second negligence causes of action, and **DENIES** Defendant's motion for summary judgment.

II. BACKGROUND

A. THE SPREAD OF COCCI AT TAFT

Cocci is a disease caused by a fungus, which has been in the soil for thousands of years and is impossible to eradicate. (Mem., Catanzaro Decl. ¶ 4); (Wallach Decl., Ex. B [National Center for Infectious Disease Report at 1]). This fungus is endemic to the southwestern region of the United States, and, in California, the highest incident of cocci is in Kern County. (Catanzaro Decl. ¶ 2.) Cocci infects human beings almost exclusively through the respiratory route, and is not spread person-to-person. (Wallach Decl., Ex. M ["Coccidioidomycosis: A Reemerging Infectious Disease" at 1]); (Mem., Pelton Decl. ¶ 10). Generally, individuals are at a greater risk of contracting cocci if they engage in outdoor activities, are a member of a particular race, such as African-American or Filipino, and if the soil is disturbed because of natural disasters or construction. (Catanzaro Decl. ¶ 6); (Wallach Decl., Ex. B [National Center for Infectious Disease Report at 1]); (Pelton Decl. ¶ 12).

Moreover, once infected, anti-fungal medication merely limits the growth of cocci, but does not kill the fungus. (Catanzaro Decl. ¶ 5.) As such, reoccurrence of cocci is common, and is seen in up to thirty percent of individuals within the first few months following successful treatment. (Id.) In addition, "the severity of [the] disease and the occurrence of the more severe disseminated forms of [cocci] are much more likely in the presence of medical co[-]morbidities such as HIV infection, immunosuppression . . . or the third trimester of pregnancy. . . ." (Id. ¶ 6.) Further, planting grass or paving roads in highly populated areas decrease the amount of airborne dust, and thus, lower the risk of individuals contracting cocci. (Wallach Decl., Ex. M ["Coccidioidomycosis: A Reemerging Infectious Disease" at 8].)

In 2004, the Federal Bureau of Prisons ("BOP") learned that the number of inmates diagnosed with cocci at Taft had increased since 2003. (Pelton Decl. ¶ 7); (Wallach Decl., Exs. J-L, [Emails Regarding Cocci in Federal Prisons]). Because of this increase, in September of 2004, the BOP contacted the Center for Disease Control ("CDC") to initiate an investigation, and began transferring high risk inmates to other facilities and excluding inmates that were most susceptible to this illness from being assigned to Taft. (Id. ¶¶ 8, 13); (Wallach Decl., Ex. F [CDC Memorandum at 1]).

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

Subsequently, on November 30, 2004, a team from the CDC traveled to Kern County to assist with the epidemiological investigations at the facility. (Wallach Decl., Ex. F [CDC Memorandum at 1].) Specifically, the objectives of the CDC were to describe the cocci epidemic at Taft and to evaluate the early diagnosis and treatment program that was in place at the facility. (Id. at 2.) After analyzing the steps taken to treat the eighty-eight inmates who were diagnosed with cocci in 2003 and 2004 and Taft's procedures pertaining to the cocci disease, the CDC recommended as follows:

> **Recommendations**
> **1. In an effort to standardize the approach to diagnosis and treatment of [cocci].**
> a. Improve compliance of performing chest x-rays in patients who are being evaluated for [cocci], as outlined in the program.
> b. Consider improving the compliance of antifungal treatment, in patients in whom treatment is indicated, upon receipt of test results. However, data did not demonstrate a benefit of treatment initiated [less] than four weeks after symptom onset.
> **2. Continue to facilitate early diagnosis of [cocci].**
> a. Consider education of inmates about [cocci] symptoms during initial intake at prison.
> b. Consider [cocci] evaluation in all patients seen in the clinic for lower respiratory infection to avoid unnecessary use of antibacterial agents.
> **3. Continue to treat higher risk individuals with fluconazole, as outlined in the IDSA guidelines.**

(Id. at 5) (emphasis in original).

B. PLAINTIFF'S INCARCERATION AND INFECTION WITH COCCI

In May of 2004, Plaintiff, who was born in Iran, entered a plea of guilty to distribution of a controlled substance (Methamphetamine), and was initially incarcerated in New York, and subsequently transferred to Taft on March 21, 2005. (Panah Decl. ¶¶ 4-5, 10), (Mem., Martz Decl. ¶ 3). When he first arrived at the facility, Plaintiff, who was in good health and had not been previously exposed to cocci, was not advised to avoid exposure to dust and dry soil, was not provided with any special protective masks or other devices, and was not educated about cocci, the risks associated with disseminated cocci, or steps one could take to avoid contracting this illness. (Panah Decl. ¶¶ 8, 14-15, 18); (Wallach Decl., Ex. Q [Duty Status Assignment]). Moreover, while at Taft, Plaintiff states in his declaration that going outdoors was optional, and that prison authorities did not prohibit outdoor activities during excessively dusty conditions.

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

(Panah Decl. ¶ 17); (Mem., Panah Depo. at 128:3-5).

When Plaintiff traversed from one building to another at the facility, he would have to walk across various types of terrain, which included paved walkways, gravel, sand, grass, and plants. (Panah Depo. at 130:17-134:2); (Panah Decl. ¶ 19). Further, the "outdoor areas that were not cemented and not covered in grass, gravel, shrubs, or sand, contained the same dust-laden land that surround[ed] the facility (as did the running track), and the staircase that [Plaintiff] was obligated to descend daily fully exposed to the surrounding dust." (Panah Decl. ¶ 3.)

On December 20, 2005, while at Taft, Plaintiff was taken to the facility's health clinic after his temperature increased to 102.2 degrees. (Panah Decl. ¶ 20.) After an initial misdiagnosis, the Taft medical health staff ultimately determined that Plaintiff had Valley Fever. (Wallach Decl., Exs. R-Y); (Panah Decl. ¶ 20). The cocci illness caused Plaintiff to experience joint pain, lesions, chills, and night sweats, (Panah Decl. ¶ 21), and to develop a painful and enlarged testicle—medically referred to as a "hydrocele"—which signaled that the illness had disseminated throughout his body. (Einstein Decl. ¶ 6); (Wallach Decl., Ex. W [Testicular Plan/Swelling Protocol Report]).

Following the diagnosis, the Taft medical staff prescribed him 400mg of Flucanazole (also known as "Diflucan") as part of his treatment, (Einstein Decl. ¶ 6), and, in May of 2006, Plaintiff was transferred to a federal correction institution at LaTuna, Texas, where he was restricted from participating in various physical activities. (Mem., Panah Depo. at 51:25-52:4); (Wallach Decl., Ex. Z [Medical Duty Status]). Plaintiff was subsequently released from federal custody in 2008. (Id. at 34:11-17.) After his release, Plaintiff temporarily continued his regimen of Flucanazole, and was hospitalized on one occasion due to a serious flare-up of Valley Fever. (Panah Decl. ¶¶ 23-24.)

III. DISCUSSION

A. Rule 12(b)(1) Motion

1. Legal Standard

Federal courts are courts of limited jurisdiction. "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted). Accordingly, a court without jurisdiction over certain claims has no choice but to dismiss them

regardless of their gravity or potential validity. "When a defendant submits a motion to dismiss under [Rule 12(b)(1)], the plaintiff bears the burden of establishing the propriety of the court's jurisdiction." Coleman v. S. Wine & Spirits of California, Inc., 2011 WL 3359743, at *4 (N.D. Cal. Aug. 2, 2011) (citing Kokkonen, 511 U.S. at 377). Moreover, under Rule 12(b)(1), jurisdictional attacks may be facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the defendant challenges the basis of jurisdiction as alleged in the complaint; however, in a factual attack, the defendant may submit, and the court may consider, extrinsic evidence to address factual disputes as necessary to resolve the issue of jurisdiction, and no presumption of truthfulness attaches to the plaintiff's jurisdictional claims." Coleman, 2011 WL 3359743, at *4 (citing Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004); and Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)).

2. APPLICATION

Parties may state claims against the United States only "to the extent that the government waives its sovereign immunity." Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir. 1995) (citing United States v. Orleans, 425 U.S. 807, 814 (1976)). Under the FTCA, 28 U.S.C. § 1346(b), the federal government waives sovereign immunity for "tort claims arising out of the conduct of a government employee acting within the scope of his or her employment." Valdez, 56 F.3d at 1179; 28 U.S.C. § 1346(b). However, the immunity waiver is limited by the "discretionary function exception." Valdez, 56 F.3d at 1179. The Supreme Court has established a two-part test for determining whether this exception applies. Whisnant v. United States, 400 F.3d 1177, 1180 (9th Cir. 2005) (citing United States v. Gaubert, 499 U.S. 315, 322-25 (1991); and Berkovitz v. United States, 486 U.S. 531, 536-37 (1988)). Courts must first determine whether the challenged action is governed by a mandatory statute, policy or regulation, or whether it was an act in which the applicable statues and regulation conferred discretionary authority on the agency. Whisnant, 400 F.3d at 1180-81. "If the action is not discretionary, it cannot be shielded under the discretionary function exception." Id. at 1181. "Second, courts ask whether the challenged action is of the type Congress meant to protect—i.e., whether the action involves a decision susceptible to social, economic, or political policy analysis." Id. (citing O'Toole v. United States, 295 F.3d 1029, 1033-34 (9th Cir. 2002)). If both elements are present, the discretionary exception to the waiver of sovereign immunity applies. "It is the government's burden to demonstrate the applicability of the discretionary function exception." Id. (citing Marlys Bear Medicine v. United States ex rel. Sec'y. of the Dep't. of the Interior, 241 F.3d 1208, 1213 (9th Cir. 2001)).

a. First Prong of the Discretionary Function Exception Test

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

"The discretionary function exception does not apply when 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow' because then the 'employee has no rightful option but to adhere to the directive.'" Schafer v. United States, 2011 WL 3269126, at *5 (C.D. Cal. July 27, 2011) (quoting Berkovitz, 486 U.S. at 536; and Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1026 (9th Cir. 1989)). "Courts . . . have found that general policy guidelines and regulations do not impose mandatory duties, but instead create broad policy goals attainable only by the exercise of discretionary functions." Schafer, 2011 WL 3269126, at *5 (internal quotation marks and citations omitted).

Here, Plaintiff alleges that Defendant was negligent when it transferred Plaintiff to Taft, failed to provide Plaintiff with a safe and habitable place of incarceration, and did not take measures to protect Plaintiff from contracting Valley Fever or warn him of this disease. (Compl. ¶¶ 26-37.) In its moving papers, Defendant contends that its alleged acts and omissions "involved the exercise of judgment or choice" because there was no "mandatory, non-discretionary rule or standard applicable to the BOP's decisions at issue." (Reply at 2.) Plaintiff, on the other hand, argues that Defendant's actions, or inaction, do not meet the first prong of the discretionary function exception test because 18 U.S.C. § 4042 required the BOP to provide inmates with a safe and habitable facility. (Opp. at 10.) Plaintiff, however, concedes that "little, if any guidance is available as to what [§ 4042] dictates as it relates to the first prong [of this test]." (Id.)

Section 4042 provides that the BOP, "under the direction of the Attorney General, shall . . . (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042. As recognized in Cohen v. United States, however, this statute does not prevent a finding that the challenged conduct was discretionary because even though "§ 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception." 151 F.3d 1338, 1343 (11th Cir. 1998); see also Calderon v. United States, 123 F.3d 947, 950 (7th Cir. 1997) (stating that "[w]hile it is true that [§ 4042] sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty. . . ."). Indeed, Ninth Circuit law teaches that broad policies that mandate the government to protect others, but do not provide the specific means by which these goals are to be met, require employees to exercise discretion. Blackburn v. United States, 100 F.3d 1426, 1430-31 (9th Cir. 1996). Here, because—as recognized by the authorities discussed above and the plain language of the statute—§ 4042 is a broad provision that does not provide the specific means by which the BOP is required to provide safe housing for inmates,

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

the Defendant retained broad discretion in the placement of inmates within Bureau of Prisons facilities. This reading of the statute is consistent with 18 U.S.C. § 3621(b), under which the BOP is given broad authority in designating and transferring inmates to a particular facility. For these reasons, the Court concludes that no federal statute, regulation, or policy specifically prescribed a course of action for Defendant to follow when it transferred Plaintiff to Taft.

Accordingly, the Court holds that the first prong of the discretionary function exception is satisfied with respect to all three negligence causes of action.

b. Second Prong of the Discretionary Function Exception Test

The central dispute between the parties is whether Defendant has established the second prong of the discretionary function exception test. Based on the discussion below, the Court finds that the second prong of this test fails for the first and second negligence claims, but not as to the third cause of action.

"The second prong of the discretionary function test requires the Court to determine whether the discretion left to the government is the kind protected by 'public policy,' which is 'understood to include decisions grounded in social, economic, or political policy.'" Schafer, 2011 WL 3269126, at *6 (quoting Terbush v. United States, 516 F.3d 1125, 1129 (9th Cir. 2008)). "Notably, to be protected from suit, the challenged decision need not ***actually*** be grounded in policy considerations so long as it is, by its nature, susceptible to a policy analysis." Nurse v. United States, 226 F.3d 996 (9th Cir. 2000) (internal quotation marks and citation omitted) (emphasis in original). Moreover, "[t]he determination of whether given conduct falls within the discretionary function exception must focus on the 'nature of the conduct, rather than the status of the actor.'" Id. (quoting Gaubert, 499 U.S. at 322).

The Ninth Circuit has found two predominant themes with respect to the second prong of the discretionary function exception test. The first dominant theme "is the need to distinguish between design and implementation. . . ." Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005). Circuit law teaches "that the ***design*** of a course of government action is shielded by the discretionary function exception, whereas the ***implementation*** of that course of action is not." Id. (emphasis in original). "Second, . . . matters of scientific and professional judgment—***particularly judgments concerning safety***—are rarely considered to be susceptible to social, economic, or political policy." Id. (emphasis added).

i. Defendant's Failure to Ensure Safety and Warn of Danger (Claims One and Two)

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

(1) Providing a Safe and Habitable Place of Incarceration

The Court first finds that Plaintiff's allegations pertaining to Defendant's failure to provide Plaintiff with a safe and habitable place of incarceration and to take preventative measures against the cocci infection are not susceptible to social, economic, or political policy. For this issue, the Court is particularly persuaded by the Ninth Circuit decision in Whisnant. In that case, the plaintiff filed suit against the United States for negligence after an accumulation of mold at a government owned commissary caused her to contract pneumonia. Whisnant, 400 F.3d at 1179-80. Specifically, the plaintiff in that case "alleged that the government ignored indications of the dangerous condition of the meat department and intentionally or recklessly . . . permitted employees and customers to work and shop at the commissary in spite of the health hazards about which the government knew or should have known." Id. at 1180. After filing suit, the government, as in this case, moved to dismiss the action pursuant to Rule 12(b)(1) and the discretionary function exception. Id.

In addressing the second prong, the court stated that "the government's duty to maintain its grocery store as a safe and healthy environment for employees and customers is not a policy choice of the type the discretionary function exception shields." Id. at 1183. The court further explained:

> Cleaning up mold involves professional and scientific judgment, not decisions of social, economic, or political policy. Indeed, the crux of our holdings on this issue is that a failure to adhere to accepted professional standards is not susceptible to a policy analysis. . . . Because removing an obvious health hazard is a matter of safety and not policy, the government's alleged failure to control the accumulation of toxic mold in the . . . commissary cannot be protected under the discretionary function exception.

Id. (internal quotation marks and citations omitted)

> Finally, the court concluded as follows:
>
> While the government has discretion to decide how to carry out its responsibility to maintain safe and healthy premises, it does not have discretion to abdicate its responsibility in this regard. When it does so, the discretionary function exception cannot shield the government from FTCA liability for its negligent conduct.
>
> In this case, [the plaintiff] has alleged negligence in the implementation, rather than the design, of government safety regulations, and the governmental decisions [the plaintiff]

> claims were negligent concerned technical and professional judgments about safety rather than broad questions of social, economic, or political policy. Therefore, the discretionary function exception to the FTCA does not bar [the plaintiff's] suit.

Id. at 1185.

Here, this case is similar to Whisnant in many respects and the holding in that case is equally applicable to the present action. Similar to the plaintiff in that case, Plaintiff is not bringing a negligence claim against Defendant based on its design of safety regulations. Rather, like the plaintiff in Whisnant, Plaintiff is claiming that Defendant was negligent because it failed to take any action to prevent him from catching the cocci illness and to provide him with a safe and habitable place of incarceration. (Compl. ¶¶ 27-32.) While cocci could not have been "cleaned up" like the mold in Whisnant, Defendant could have taken preventative measures to protect Plaintiff against exposure by limiting outdoor activities, not disturbing the soil, planting more grass to cover dusty areas, or paving more areas in the facility. (Catanzaro Decl. ¶ 6); (Wallach Decl., Ex. M ["Coccidioidomycosis: A Reemerging Infectious Disease at 8]); (see also id., Ex. J [Email From CDC Doctor]). By failing to control the cocci illness through preventative measures, Circuit law teaches that the discretionary function exception "cannot [now] shield the government from FTCA liability for its negligent conduct." Whisnant, 400 F.3d at 1185.

Defendant, however, contends that its decision to not take preventive measures was grounded in policy:

> the decision not to warn of the possible exposure to Cocci or to take preventive measures was both discretionary and required the balancing of security concerns for both inmate and staff, orderly running of the prison, effectiveness of any such warning and available prison resources. These judgments included balancing of the ability of the prisoners to circulate within the prison, attend classes in the education building, (classes taught by plaintiff himself), as well as the ability of the prisoners to exercise and engage in other outdoor activity. These judgments implicate social, economic and public policy considerations, protected by the discretionary function exception.

(Reply at 4.)

These arguments, however, are unavailing on a number of grounds. First, to the extent Defendant contends that deciding not to take any action was based on the availability of prison resources, the court in Whisnant addressed a similar argument raised by the defendant in that

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

case and squarely rejected it. Specifically, in Whisnant, the defendant argued that the discretionary function exception applied because implementing health and safety regulations would require employees "to balance the agency's goal of occupational safety against such resource constraints as costs and funding." 400 F.3d at 1183. In holding that the defendant's position was without any merit, the court stated that "to permit the government to use the mere presence of budgetary concerns to shield allegedly negligent conduct from suit under the FTCA . . . 'would permit the discretionary function exception to all but swallow up the [FTCA].'" Id. at 1184 (quoting ARA Leisure Servs. v. United States, 831 F.2d 193, 196 (9th Cir. 1987)); see also O'Toole v. United States, 295 F.3d 1029, 1037 (9th Cir. 2002) ("Were we to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly. Instead, in order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly.").

Moreover, Defendant's position that declining to take any preventive measures to protect Plaintiff was a policy choice involving considerations of security and orderly running of the prison is equally unpersuasive. Defendant's duty to prevent or control further influx of cocci at Taft "is not a policy choice of the type the discretionary function exception shields." Whisnant, 400 F.3d at 1183. Rather, it "involves professional and scientific judgment, not decisions of social, economic, or political policy." Id. Indeed, consistent with the rationale in Whisnant, because controlling the cocci disease at Taft was a matter of safety, as opposed to policy, Defendant's failure to take preventive measures cannot be protected under the discretionary function exception. Id.; see also ARA Leisure Servs., 831 F.2d at 195 (stating that the decision to maintain a road in a safe condition was not grounded in social, economic, or political policies).

Further, Defendant also argues in its moving papers that, in the exercise of its discretion, it did take some preventative measures in reaction to the cocci outbreak. Specifically, Defendant has introduced evidence that after learning that the number of inmates diagnosed with cocci had risen from 2003 to 2004, it contacted the CDC to initiate an investigation, and in September of 2004, the BOP began transferring high risk inmates, i.e, those on chemotherapy, immunosuppressant medications, and inmates who were HIV positive, to other facilities. (Pelton Decl. ¶¶ 7-8, 13.) These facts, however, do not take this case outside of Whisnant's purview. The allegations in this case focus on the fact that Taft was a particularly dangerous facility because of the cocci problem, and that Defendant failed to take preventative measures to protect Plaintiff, who still remained at the facility even after the BOP transferred high risk inmates to other facilities. (Compl. ¶¶ 27-28, 31-32.) Accordingly, whether or not Defendant acted to protect ***some*** inmates does not take away from the fact that they took no preventative measures

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

to protect the inmates that remained at the facility.

Thus, consistent with the holding in Whisnant, the Court finds that the second prong of the discretionary function exception test fails to the extent the negligence claims are based on Defendant's alleged failure to provide Plaintiff with a safe and habitable place of incarceration and to take preventative measures against the cocci outbreak

(2) Defendant's Failure to Warn of Danger

Next, Plaintiff's allegations that Defendant was negligent for failing to warn him of the cocci disease is also not subject to the discretionary function exception. It is well established under Circuit law that "a failure to warn [of danger] involves considerations of safety, not public policy." Faber v. United States, 56 F.3d 1122, 1125 (9th Cir. 1995) (citation omitted). As explained in Faber,

> It would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign, or to erect a guardrail, or to make a safer path. Such a judgment would be no different than a judgment made by a private individual not to take certain measures to ensure the safety of visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress's intent in creating the discretionary function exception. ***Therefore, in cases where the government has allegedly failed to warn, the use of the discretionary function exception must be limited*** to those unusual situations where the government was required to engage in ***broad, policy-making activities*** or to consider unique social, economic, and political circumstances in the course of making judgments related to safety.

Id. (emphasis added).

The Ninth Circuit has applied this principle in a number of "failure to warn of danger" cases to preclude applying the discretionary function exception test. See, e.g., Oberson v. United States Dep't. of Agriculture, Forest Service, 514 F.3d 989, 995, 998 (9th Cir. 2008) (holding that when the Forest Service knew of a sudden and steep drop on a hill but failed to post a warning sign to snowmobilers, this was not a discretionary act grounded in policy); see, e.g., Sutton v. Earles, 26 F.3d 903, 910 (9th Cir. 1994) (stating that the Navy's decision not to post a speed limit sign in an area where they had placed a partially submerged obstruction in the waters was "not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect."); see, e.g., Summers v. United States, 905 F.2d 1212,

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

1216 (9th Cir. 1990) (holding that the National Park Service's failure to identify and warn of the danger to barefoot visitors of hot coals on park beaches was a departure from safety considerations rather than a discretionary judgment involving social, economic, or political factors); see, e.g., Green v. United States, 630 F.3d 1245, 1251-52 (9th Cir. 2011) (holding that the Forest Service's failure to notify property owners that firefighters were going to start a backfire was not the type of public policy judgment that the discretionary function exception was designed to shield).

Here, consistent with Circuit law, this Court also finds that when Defendant failed to warn Plaintiff of the cocci disease, its decision was not grounded in social, economic, or political policy; rather, it was based on considerations of safety. Indeed, the evidence in the record indicates that Defendant was aware since as early as 2003 that inmates were contracting this disease, (Pelton Decl. ¶ 7), and nevertheless took no action to notify Plaintiff or the other inmates about the cocci illness. (Panah Decl. ¶ 18.) Had it done so, Plaintiff could have taken action to reduce the likelihood of exposure to this illness by, for example, avoiding outdoor activities during excessively dusty conditions. (See Wallach Decl., Ex. B [National Center for Infectious Disease Report at 1] (indicating that outbreaks of cocci are common when individuals engage in activities that create a lot of dust); (see also Catanzaro Decl. ¶ 6) (explaining that risk factors for contracting cocci included engaging in outdoor activities or disturbing the soil).

Even though Plaintiff could not have ***completely*** eliminated the risk of contracting cocci at the facility even if he was properly warned of its presence, (Einstein Decl., Ex. A [Einstein Opinion at 2]), educating him about cocci could have at least allowed him to take action to reduce his chances of contracting Valley Fever or be aware of the symptoms associated with this illness to seek early medical assistance. See Green, 630 F.3d 1251 ("We agree with [the plaintiffs] . . . [that] there is no evidence in the record to support the Forest Service's contention that the nature of its actions in this case— i.e., its decisions when and whether to communicate directly with private citizens whose properties might have been in harm's way—are susceptible to policy analysis. . . . If the [plaintiffs] had been notified of the proposed backfire, they ***might have been able to take measures to protect their properties, or at least ensured the Forest Service took measures to do so.***") (emphasis added).

In short, the discretionary function exception test does not apply to Plaintiff's negligence claims to the extent they are based on Defendant's failure to warn of the cocci outbreak.

ii. Defendant's Decision to Transfer Plaintiff to Taft (Claim Three)

Finally, the Court finds that Defendant's decision to assign Plaintiff to Taft was a choice

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

grounded in policy considerations and was protected under the discretionary function exception. The U.S. Supreme Court in Gaubert has held that "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations. 499 U.S. at 324; see also Nurse, 226 F.3d at 1001 ("When a statute or regulation allows a federal agent to act with discretion, there is a 'strong presumption' that the authorized act is based on an underlying policy decision.") (citation omitted).

Here, as noted above, 18 U.S.C. § 3621 provides the BOP broad discretion in designating the place of a prisoner's confinement. 18 U.S.C. § 3621(b). Indeed, as seen from the statute, deciding which prison facility an inmate should be assigned to is grounded heavily in economic and social policy considerations, i.e., the resources of the facility, nature of the offense, history of the inmate, statements by the court that imposed the sentence, and policy statements by the Sentencing Commission. Id.; (see also Martiz Decl. ¶ 13) ("The decision to designate an individual prisoner to a specific correctional institution is a BOP judgment involving policy considerations including inmate safety, prison security and effective use of prison resources, budgetary, staffing and otherwise. Additionally, the BOP balances factors including but not limited to, the history and characteristics of the prisoner, the nature and circumstance of the offense, and the resources of the contemplated facility.").

Thus, because this statute provided Defendant with discretionary authority involving policy considerations when assigning Plaintiff to Taft, the second prong of the discretionary function exception test is satisfied for the third negligence claim.

c. Conclusion re: Discretionary Function Exception

Based on the foregoing discussion, the Court concludes that Defendant has adequately established that the discretionary function exception applies to the negligence claim that is based on its decision to transfer Plaintiff to Taft. For that reason, the Court **GRANTS** the motion as to the Third Claim for Relief which is hereby **DISMISSED**. However, because the negligence claims that pertain to Defendant's alleged failure to provide Plaintiff with a safe and habitable place of incarceration, to take preventative measures to ensure Plaintiff's safety, and to warn him of the cocci illness at the facility fail to meet the second prong of the discretionary function exception test, the Court **DENIES** Defendant's motion to dismiss the first and second causes of action.

B. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON MEDICAL MALPRACTICE CLAIMS

LINK: 19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

1. LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Thus, when addressing a motion for summary judgment, the Court must decide whether there exists "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. at 256. The moving party can meet this burden by presenting evidence establishing the absence of a genuine issue or by "pointing out to the district court . . . that there is an absence of evidence" supporting a fact for which the nonmoving party bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). To defeat summary judgment, the nonmoving party must put forth "affirmative evidence" that shows "that there is a genuine issue for trial." Anderson, 477 U.S. at 256–57. The nonmoving party cannot prevail by "simply show[ing] that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, the nonmoving party must show that evidence in the record could lead a rational trier of fact to find for it. See id. at 587. In reviewing the record, the Court must believe the nonmoving party's evidence, and must draw all justifiable inferences in its favor. Anderson, 477 U.S. at 255.

2. APPLICATION

In its motion for summary judgment, Defendant argues that "[t]o the extent that [P]laintiff's claims may be interpreted as alleging medical malpractice by the health care providers at TCI Taft, defendant United States may not be held liable for wrongful acts of its contractors." (Mem. at 16.) In opposition, Plaintiff contends that Defendant's motion for summary judgment should be denied because Defendant is inaccurately seeking this Court to interpret his negligence claims as medical malpractice causes of action. (Opp. at 20.) Plaintiff is correct.

Here, nowhere in the complaint does Plaintiff allege a negligence claim against Defendant based on medical malpractice. (See Compl.) Instead, Plaintiff alleges causes of action based on Defendant allegedly (1) failing to provide Plaintiff with a safe and habitable place of incarceration; (2) not taking preventative measures to protect Plaintiff against cocci or warn him of this illness; and (3) transferring Plaintiff to a facility known to be inherently unsafe for human habitation. (Id. ¶¶ 26-37.)

Thus, because there are no medical malpractice claims alleged in the complaint, the Court

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Case No.	CV 09-06535 GAF (PLAx)	Date	August 25, 2011
Title	Arjang Panah v. United States of America		

DENIES Defendant's motion for summary judgment.

IV. CONCLUSION

Based on the foregoing reasons, the Court **DENIES** Defendant's motion to dismiss the first and second negligence claims, **DISMISSES** the third cause of action, and **DENIES** Defendant's motion for summary judgment.

IT IS SO ORDERED.