

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAN DAVID UNGER, : 3:00cv117
Plaintiff, :
 :
v. :
 :
UNITED STATES OF AMERICA, :
Defendant :

RULING ON DEFENDANT'S MOTION TO DISMISS

The plaintiff, Jan David Unger, brought this action against the United States under the Federal Torts Claim Act ("FTCA"). The plaintiff alleges that as part of a pattern and practice engaged in by agents of the United States government, said agents intruded on his solitude and seclusion in violation of his state common law right to privacy, and caused him to suffer loss of liberty, inconvenience, annoyance, humiliation, and severe emotional distress. Currently pending is the government's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure [doc.# 12]. For the reasons set forth below, the government's motion will be granted.

BACKGROUND

For the purposes of the present motion, the Court must assume the following allegations of the plaintiff to be true. At all times relevant to this case, the plaintiff was a citizen of the United States residing in Norwalk, Connecticut, and was engaged in lawful business activities which required frequent

travel throughout the world but particularly between the United States and Germany. On at least seven occasions between October 1, 1998, and late June of 1999, as the plaintiff arrived at Newark International Airport from Dusseldorf, Germany, business trips, the plaintiff was detained for questioning and his luggage was intensively searched.

Specifically, the plaintiff brings this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 through 2680. The plaintiff alleges that the defendant's agents have "flagged" him in Immigration and Naturalization Service ("INS") and/or Customs computers, without cause or justification, resulting in invasions upon his person, inconvenience, annoyance, humiliation, and severe emotional distress.

The government has moved to dismiss the complaint on grounds that the plaintiff's claims are barred by the discretionary function exception to the FTCA, that the plaintiff's constitutional claims are not cognizable pursuant to the FTCA, and because the plaintiff has failed to state a claim pursuant to the law of New Jersey.

DISCUSSION

Motion to Dismiss

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy

Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept as true the well pleaded allegations of the complaint. Albright v. Oliver, 510 U.S. 266, 268 (1994). In addition, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The FTCA and the Discretionary Function Exception

The United States government is immune from suit except to the extent the government has waived its sovereign immunity. The FTCA is a limited waiver of sovereign immunity, providing a remedy against the federal government for claims based on the negligence of its employees. Sicignano v. United States, 127 F.Supp.2d 325, 328 (D. Conn. 2001). This waiver is subject to a number of statutory exceptions, including the provision known as the discretionary function exception ("DFE"). The DFE bars FTCA liability for any claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

Although this exception within the FTCA could be viewed as the government giving with one hand and taking away with the other, there are legitimate policy concerns behind the exception:

The legal uncertainties surrounding government responsibility for torts committed by its agents reflect a number of political and doctrinal factors, including the multiplicity of conflicting values at stake. Among others, these values include society's interests in encouraging government to act vigorously without undue caution, deterring unreasonably risky conduct, avoiding judicial control of discretionary and policy decisions entrusted to the politically accountable branches, protecting the public fisc from excessive claiming attracted by government's uniquely deep pockets, and vindicating and exemplifying the rule of law. Striking a just balance among these goals has proven exceedingly difficult.

Peter H. Schuck, The Discretionary Function Exception in the Second Circuit, 20 QLR 55 (2000).

The present case is no exception in terms of the difficulty of striking a just balance between the competing goals of the government's right to protect its borders and the citizen's right to privacy. The first determination to be made, therefore, is whether the INS and Customs Service agents were acting with discretion when they took the plaintiff to a room for questioning, and subsequently searched his luggage.

The Supreme Court has provided a two-step analysis to determine if an action is exempted from liability under the DFE. In Berkovitz v. United States, 486 U.S. 531 (1988), the Court held that in examining the nature of the challenged conduct, a court must first consider whether the action is a "matter of choice for the acting employee." The Supreme Court instructed that the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a

course of action for an employee to follow.

According to Berkovitz, a court must then determine whether the employee's judgment is the kind that the discretionary function exception was designed to shield. The impetus behind the discretionary function exception enacted by Congress was to prevent suits in tort from becoming the medium for judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy.

To determine if the agents were acting with discretion, the authorizing statutes must be consulted, with special notice of 19 U.S.C. § 1467, which states, in pertinent part, that

whenever a vessel from a foreign port or place arrives at a port or place in the United States, the appropriate customs officer may cause inspection, examination, and search to be made of the persons, baggage and merchandise discharged or unladen from such vessel.

In addition, 19 C.F.R. § 162.3 states that

all persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer. District directors and special agents in charge are authorized to cause inspection, examination, and search to be made *if such action is deemed necessary or appropriate*" [emphasis added].

The plain language of the statutes leaves no doubt that the appropriate customs officer, director, or agent in charge has discretion to inspect, examine, or search persons, baggage, or

merchandise arriving from a foreign place. Thus, the first prong of the discretionary function analysis is met.

This court must now determine whether the actions taken by the agents in the present case were the kind that the discretionary function exception was designed to shield. To facilitate this process, the policy considerations behind the statutes must be assessed. As the Supreme Court has stated, since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border without probable cause or a warrant, in order to prevent the introduction of contraband into this country. Routine searches of persons and baggage entering the country are not subject to any requirement of reasonable suspicion, probable cause, or warrant. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

The Supreme Court has also held that a port of entry is not a traveler's home. His right to be let alone does not prevent the search of his luggage. Customs officials characteristically inspect luggage and their power to do so is not questioned. "It is an old practice and is intimately associated with excluding illegal articles from the country." United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971).

This Court concludes that the decision by the INS and Customs agents to detain the plaintiff for questioning and to

conduct a baggage search was discretionary in nature, and is deeply rooted in U.S. policy considerations, satisfying the second prong of the discretionary function analysis.

It is well settled that "once governmental actions have been labeled discretionary, it is immaterial whether those actions have been negligently performed for purposes of determining the applicability of the exception of Section 2680(a)." 14 Wright, Miller, & Cooper, Federal Practice and Procedure, § 3658.1, 639 (3d ed. 1998). However, to reinforce the validity of this ruling, there is one more issue that the Court will address, the issue of routine versus non-routine searches.

Many courts have split U.S. Customs search authority into sub-categories of routine and non-routine searches. In determining whether a border inspection was routine, courts have considered the degree of invasiveness or intrusiveness associated with the search in determining whether or not the search qualifies as routine. United States v. Braks, 842 F.2d 509, 511 (1st Cir. 1988). As stated in Braks, searching a traveler's luggage, purse, wallet, overcoat and other personal effects at the border is routine.

In United States v. Johnson, 991 F.2d 1287, 1291-92 (7th Cir. 1993), the court held that routine border inspections are those that do not pose a serious invasion of privacy and that "do not embarrass or offend the average traveler." A non-routine

search entails significantly more than inspecting a traveler's luggage.

In the present case, the plaintiff was detained for questioning and his suitcase was searched. He makes no claim that his person was searched in any way. The actions of the Customs and INS personnel fall well within the boundaries of a routine search.

Inasmuch as this Court finds that the plaintiff's claims are barred by the discretionary function exception to the Federal Tort Claims Act, thus dismissing the federal claims, the Court will decline to exercise supplemental jurisdiction over the remaining state-law claims pursuant to 28 U.S.C. § 1367(c)(3).

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss [doc.# 12] is GRANTED. The court declines to exercise supplemental jurisdiction over the remaining state law claims, which are dismissed without prejudice. The Clerk is directed to close this case.

SO ORDERED.

Dated at Bridgeport, Connecticut this ___ day of April, 2001.

Warren W. Eginton, Senior U.S. District Judge