APPENDIX A US Court of Appeals Decisions, Judgments and Orders

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2009

BLANCHE A. BROWN,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-17-cv-01551)
District Judge: Honorable Mitchell S. Goldberg

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 19, 2020
Before: AMBRO, GREENAWAY, JR. and PORTER, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on June 19, 2020. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 1, 2019, be and the same is hereby affirmed. No costs will be taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

Dated: July 30, 2020

s/ Patricia S. Dodszuweit
Clerk

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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July 30, 2020

Blanche A. Brown
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Scott W. Reid
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615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

RE: Blanche Brown v. USA
Case Number: 19-2009
District Court Case Number: 2-17-cv-01551

ENTRY OF JUDGMENT

Today, **July 30, 2020** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.

Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ Caitlyn
Case Manager
267-299-4956

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2009

BLANCHE A. BROWN,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-17-cv-01551)
District Judge: Honorable Mitchell S. Goldberg

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 19, 2020
Before: AMBRO, GREENAWAY, JR. and PORTER, Circuit Judges

(Opinion filed: July 30, 2020)

OPINION*

PER CURIAM

Appellant Blanche A. Brown appeals the final judgment and multiple decisions entered by the United States District Court for the Eastern District of Pennsylvania in her lawsuit brought pursuant to the Federal Tort Claims Act ("FTCA"). We will affirm.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not

The parties are familiar with the background, and their briefs provide an ample accounting of the details, so we provide only a summary. Brown alleged the following in her complaint. As a cardiac patient in the United States Department of Veterans Affairs ("VA") health program, she received medical care at the Coatesville VA Medical Center ("VAMC"), Coatesville, Pennsylvania. Her half-brother, James, was employed there as a groundskeeper. In early 2014, while recuperating at home from open heart surgery, she received more than 250 telephone calls from James, complaining to her about his workplace issues. During that period, James assaulted and threatened to kill VA Registered Nurse R. Solomon, and he later used Solomon's personal email account to threaten and harass Brown. Brown filed a protection from abuse action against him, but James's conduct escalated to violent incidents, including when James cut her home telephone line and discharged his firearm outside her window. On May 12, 2014, as Brown arrived at the VAMC, James drove up to her in the parking lot, glared at her, and drove away. James's harassment continued for months. Brown asserted that VAMC officials and employees failed to discipline or fire James and were dismissive when she expressed concerns about her safety. Further, Brown also alleged that James's brother, A.W. Brown,[1] a VAMC patient records office employee, disclosed some of her medical information to James.

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constitute binding precedent.

[1] Brown clarified in a later filing that she was not raised with her siblings James and A.W. and became acquainted with them in 2003. (Motion to file Amended Complaint at

Ultimately, Brown filed an administrative claim, followed by her FTCA complaint against the United States. Brown set forth her claims in fifteen counts: (1) negligence/gross negligence; (2) negligent retention; (3) negligence per se; (4) privacy violation; (5) negligent hiring, retention, and supervision; (6) failure to protect and prevent abuse; (7) patient abuse; (8) failure to report abuse; (9) patient abandonment; (10) harassment, intimidation, and retaliation; (11) discrimination; (12) negligent infliction of extreme mental distress; (13) negligent investigation; (14) intentional infliction of mental distress; and (15) punitive damages. The Government filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and Brown filed her response.

By memorandum and order entered on February 7, 2018, the District Court dismissed Counts 1-3 and 5-14 for lack of subject matter jurisdiction under Rule 12(b)(1), because those counts fell outside the FTCA's limited waiver of sovereign immunity.[2] The Court based its rulings on the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), and the FTCA's scope of employment requirement, 28 U.S.C. §§ 1346(b)(1) and 2679(b)(1). It dismissed Count 15 for failure to state a claim under Rule 12(b)(6) because the FTCA itself precludes punitive damages. See 28 U.S.C. § 2674. It also found that amendment of the complaint would be futile. The matter

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4, Docket #43.)

[2] The District Court dismissed Count 11 for lack of subject matter jurisdiction for failure to exhaust the matter in her administrative claim. See 28 U.S.C. § 2675(a). Brown does not argue this issue on appeal, and we will not discuss it further.

proceeded to discovery on Count 4, the privacy violation claim, with a July 13, 2018 discovery deadline.

Brown filed a series of motions, including motions for leave to amend her complaint, motions for the District Court Judge's recusal, and motion to quash the Government's notice of deposition, which was scheduled for July 9, 2018. The District Court denied Brown's motions and directed her to appear for her deposition at the Courthouse. Brown did not appear for the deposition, having informed opposing counsel by email about an hour earlier that she was not feeling well. The Government filed a motion to dismiss for lack of prosecution, or alternatively, to compel discovery. Brown responded by explaining, among other things, that she had been ill the previous week due to the heat wave and the stress of preparing for the deposition, that she was afraid that James would harm her as she departed her home for the Courthouse, that she had to take a nap due to her exhaustion, and that the Government's deposition created a dangerous situation causing her to risk bodily harm to pursue her case. On July 26, 2018, the District Court issued an order for Brown to appear for her deposition within thirty days, at a date and time to be agreed upon by the parties. The District Court restricted the attendees to Brown and any counsel she may retain, Government counsel, and the court reporter. Further, the District Court gave notice that Brown's case may be dismissed for lack of prosecution if she failed to reasonably agree to a new date and time for her deposition or again failed to appear. The District Court also denied Brown's recusal motions.

Brown declined Government counsel's requests for possible deposition dates. Instead, she responded that she was going to report counsel to the state bar association for attorney misconduct, because scheduling her deposition in Philadelphia was part of a malicious scheme to cause her to default on her claims. Brown also filed a motion for a protective order to prevent her deposition for reasons echoing those raised in her earlier motion to quash. For example, Brown contended that Government counsel was misusing the discovery process to trigger James's violence and cause her to suffer from cardiac distress or heat stroke by holding the deposition in Philadelphia in August. Brown suggested alternatives, such as appearance by telephone or at some location closer to Lancaster County, or providing her with a United States Marshal escort to Philadelphia. On February 21, 2019, upon the Government's motion to dismiss for lack of prosecution, the District Court dismissed the remainder of Brown's complaint under Federal Rule of Civil Procedure 41(b), with prejudice, for failure to prosecute. Brown filed post-judgment motions, which the District Court denied. This appeal followed.[3] We have appellate jurisdiction under 28 U.S.C. § 1291.

We begin with the District Court's decision to grant the Government's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief could be granted).

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[3] Brown's first motion for reconsideration was timely filed within 28 days of the District Court's dismissal of the case, thus tolling her deadline to appeal; she had 60 days to appeal after entry of the District Court's March 25, 2019 order denying her motion. See Fed. R. App. P. 4(a)(1)(B) & (4)(A). Brown's May 1, 2019 notice of appeal identifies

Our review is plenary. See Free Speech Coal., Inc. v. Attorney Gen. of U.S., 677 F.3d 519, 529-30 (3d Cir. 2012).

The FTCA permits claims to be brought against the United States for certain torts committed by federal employees, when private individuals engaging in analogous behavior would be subject to state law liability. See 28 U.S.C. § 1346(b)(1); 28 U.S.C. §§ 2671-2680. However, this waiver of sovereign immunity is subject to jurisdictional requirements and limitations, and the District Court appropriately considered those initial jurisdictional limitations when ruling on the Government's motion to dismiss. See CNA v. United States, 535 F.3d 132, 144 (3d Cir. 2008) (explaining that disputes over the § 1346(b)(1) scope of employment requirement is a jurisdictional question appropriate for consideration under Rule 12(b)(1)); see also Gotha v. United States, 115 F.3d 176, 178-79 (3d Cir. 1997) (treating the § 2680(a) discretionary function exception to the FTCA as jurisdictional). We conclude that the District Court correctly decided that it lacked subject matter jurisdiction over Brown's FTCA claims.[4]

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numerous decisions made throughout the proceedings and was timely as to all.

[4] Brown emphasizes that she brought her complaint against the United States under the FTCA. She contends that the District Court improperly classified her case as a civil rights action against government subdivisions and employees, thereby misinforming its adjudication of her claims. However, it is evident that the Court analyzed Brown's complaint to determine whether it had FTCA subject matter jurisdiction as a threshold matter, given that "the FTCA itself is the source of federal courts' jurisdiction to hear tort claims made against the Government," not the general grant of federal question jurisdiction under 28 U.S.C. § 1331. See CNA, 535 F.3d at 140-41.

The District Court properly determined that the discretionary function exception barred claims 1-3, 5, 6, 8, 12, and 13. This exception to the FTCA provides that no liability shall lie for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty[.]" 28 U.S.C. § 2680(a). The alleged negligence by VAMC supervisors and employees in (1) failing to train, supervise, discipline, or fire its employees and (2) failing to report, or investigate reports, of abuse by James against Brown involve an element of judgment of the sort that the exception was designed to shield. See Mitchell v. United States, 225 F.3d 361, 363-64 (3d Cir. 2000) (quoting United States v. Gaubert, 499 U.S. 315, 322-23 (1991)). Employment and termination decisions, and decisions as to investigation, are within the category of conduct covered by the discretionary function exception. See e.g., Sydnes v. United States, 523 F.3d 1179,1185-86 (10th Cir 2008) (employment-related decisions); Bernitsky v. United States, 620 F.2d 948, 955 (3d Cir. 1980) (investigation-related discretionary judgments). Moreover, the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); see Merando v. United States, 517 F.3d 160, 167 (3d Cir. 2008). Brown did not identify a federal statute, regulation, or policy that mandated the actions that she asserted were warranted.

In addition, we agree with the District Court's conclusion that claims 7, 9, 10, and 14 did not fall within the scope of FTCA subject matter jurisdiction, because the alleged negligent acts by VAMC employees were not taken "within the scope of [their] employment." See 28 U.S.C. §§ 1346(b) and 2679(b)(1). As explained by the District

Court, the actions by R. Solomon (e.g., allowing James to use her personal email account to threaten Brown and thwarting Brown's attempts to report James's conduct to his workplace authorities) and by James (stalking and telephoning Brown at home and confronting Brown in the VAMC parking lot when he was on leave from work[5]) had nothing to do with their VAMC jobs, did not take place within authorized time and space of their jobs, and had no purpose of serving the VA. See CNA, 535 F.3d at 146-47 (applying Pennsylvania law as the law where the act or omission occurred). The same is true of the other allegations of intimidation and infliction of mental distress. Given that Brown's allegations relate to conduct prompted by the employees' personal motives rather than job-related activities, these claims do not fall under the FTCA.

Brown argues that the District Court improperly denied leave to amend her complaint. However, it did grant Brown a 14-day period to file an amended complaint. (See District Court March 23, 2018 Scheduling Order, Docket #28.)[6] She did not do so within that allotted time. As for her later requests for leave to amend her complaint and

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[5] (See Govt's Mot. to Dismiss, Exhibits 1, 2.) When considering a factual attack to the District Court's subject matter jurisdiction, the District Court was permitted to review evidence and make factual findings outside of the pleadings. See CNA, 535 F.3d at 145.

[6] Brown argues that she did not receive timely notice of this March 23, 2018 order because the District Court revoked her CM/ECF account privileges around that time, and she later found the Court's notification of the order in her email spam folder. See Appellant's Brief at 7. We do not find evidence of account revocation on the docket, but it appears that Brown did have CM/ECF account access at least as of March 26, 2018; she successfully filed and served a motion via CM/ECF that day. (See Docket #30.) Also, Brown asserts that the Court's allowance of time to amend her complaint was "obscure," but it appears in numbered paragraph two of the order.

resurrect the claims dismissed for lack of subject matter jurisdiction, the District Court correctly denied those requests for the reasons stated in its July 16, 2018 order. The Government's Rule 12(b)(1) factual attack on the existence of subject matter jurisdiction is distinct from a facial attack on sufficiency of the pleadings, and it put the burden of persuasion on Brown. See CNA, 535 F.3d at 145. Dismissal for lack of subject matter jurisdiction may occur at any time, even before discovery occurs. See id. at 145-46. Brown had the opportunity to present her basis for FTCA jurisdiction when she responded to the Government's motion to dismiss, and her legal arguments do not cure the deficiencies in FTCA jurisdiction.

We now turn to the District Court's Rule 41(b) dismissal of Brown's privacy violation claim for failure to prosecute. We review this decision for an abuse of discretion. See Briscoe v. Klaus, 538 F.3d 252, 257 (3d Cir. 2008). In our review, we consider how the court balanced the six factors set out in Poulis v. State Farm Fire and Casualty Company, 747 F.2d 863, 868 (3d Cir. 1984): (1) the plaintiff's personal responsibility; (2) the extent of prejudice to the defendant caused by the failure to meet scheduling orders and to respond to discovery; (3) any history of dilatoriness; (4) whether the conduct was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of the claim. See Poulis, 747 F.2d at 868. No single factor alone is determinative to the outcome, and not all of the factors need to be satisfied to support dismissal. See Briscoe, 538 F.3d at 263 (3d Cir. 2008).

After considering the record and the parties' briefs, we conclude that the District Court did not abuse its discretion in dismissing the action. The District Court amply memorialized its Poulis findings in dismissing Brown's case and provided a detailed account of Brown's actions and filings to avoid the scheduled deposition. We need not revisit the specifics here, but the District Court considered Brown's numerous filings containing variable reasons for protesting her deposition, as well as her failure to comply with the District Court's order. It suffices to say that the record supports the District Court's analysis of the Poulis factors, including the findings that Brown was personally responsible for her litigation while proceeding pro se, that alternative sanctions would not be helpful given her unwillingness to abide by court orders, and that her behavior could not be characterized as "inadvertent or negligent" and was instead "intentional or self-serving." See Briscoe, 538 F.3d at 262. Also, the District Court deemed the potential merits of Brown's remaining privacy claim to be a neutral Poulis factor because Brown had yet to substantiate her claim during discovery. Although doubts concerning a Rule 41(b) dismissal should be resolved in favor of reaching a decision on the merits, see Briscoe, 538 F.3d at 257 (3d Cir. 2008), the District Court did not commit an abuse of discretion in balancing all of the Poulis factors and dismissing Brown's remaining claim.

In addition, Brown challenges the District Court's denial of her motions for recusal pursuant to 28 U.S.C. § 455. We find no abuse of discretion in those denials. See Securacomm Consulting, Inc. v. Securacom Inc., 224 F.3d 273, 278 (3d Cir. 2000). Brown argues, among other things, that the District Court's adverse decisions contain

word choice, style, and tone that minimize and mischaracterize her claims. See Appellant's Brief at 22-23. However, Brown's dissatisfaction with unfavorable decisions does not necessitate the District Judge's recusal. See Liteky v. United States, 510 U.S. 540, 555 (1994). Further, Brown's allegations that the District Judge had former employers and an alma mater in common with defense counsel would not cause an objective person to reasonably question the Judge's impartiality. See 28 U.S.C. § 455(a) (requiring recusal when the judge's impartiality "might reasonably be questioned"); In re United States, 666 F.2d 690, 694 (1st Cir. 1981) (noting that a judge's recusal is not required on the basis of "unsupported" or "highly tenuous speculation").

Finally, the District Court did not err in denying Brown's post-judgment motions. Her motions did not demonstrate sufficient basis for granting reconsideration, such as an intervening change in controlling law, new evidence, or the need to correct clear error of law or fact or prevent manifest injustice, see Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999), or sufficient grounds for reopening the final judgment under the provisions of Rule 60(b).

We have considered Brown's remaining arguments and conclude that they are unpersuasive. Accordingly, we will affirm the District Court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2009

BLANCHE A. BROWN,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. Action No. 2-17-cv-01551)
District Judge: Honorable Mitchell S. Goldberg

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

BY THE COURT,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: October 5, 2020
Lmr/cc: Blanche A. Brown
Scott W. Reid
Jacqueline C. Romero

APPENDIX B: US District Court of Eastern District of Pennsylvania Opinions, Judgments and Orders

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

BLANCHE A. BROWN,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 17-1551**
UNITED STATES, et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 21st day of February, 2019, upon consideration of Plaintiff's Motion for Protective Order (Doc. No. 67), Defendants' Motion to Dismiss for Lack of Prosecution and Response to the Motion for Protective Order (Doc. No. 69), and Plaintiff's Response in Opposition to the Motion to Dismiss for Lack of Prosecution and Counter-Motion for Default Judgment (Doc. No. 73), it is hereby **ORDERED** that the Motion for Protective Order and Counter-Motion for Default Judgment are **DENIED** and the Motion to Dismiss is **GRANTED**. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE** and the Clerk of Court is directed to mark this case **CLOSED**.

It is further **ORDERED** that Plaintiff's First Motion to Compel Discovery (Doc. No. 68), Third Motion for Recusal (Doc. No. 70), and Motion for Sanctions (Doc. No. 75) are **DENIED AS MOOT**.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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

BLANCHE A. BROWN,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 17-1551**
UNITED STATES, et al.	:	
	:	
Defendants.	:	

Goldberg, J. **February 21, 2019**

MEMORANDUM OPINION

Plaintiff Blanche Brown, proceeding *pro se*, brings the current Federal Tort Claims Act ("FTCA") action against the United States, Coatesville Veterans' Administration Medical Center ("Coatesville VAMC"), and administrators of the Region 4 Veterans Integrated Services Network, alleging negligence by the Coatesville VAMC administrators in not supervising and discharging a VA employee who repeatedly harassed Plaintiff.

On February 6, 2018, I dismissed all but one of Plaintiff's claims. Subsequent to that ruling, the litigation took a contentious turn, with Plaintiff refusing to come to Philadelphia for court conferences or depositions, repeatedly requesting recusal, and seeking sanctions against defense counsel. Following Plaintiff's second failure to appear for her deposition, Defendants filed the current Motion to Dismiss for Lack of Prosecution. For the reasons set forth below, the Motion will be granted and the remainder of Plaintiff's Complaint will be dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initiated the current action on April 5, 2017, alleging that she was a patient at the Coatesville VAMC and that her brother James ("JAB") worked as a groundskeeper there. Her

Complaint detailed multiple instances of JAB harassing Plaintiff at her home. Plaintiff claimed that Coatesville VAMC had known for decades about JAB's physical abuse of women employees, yet fostered a culture of hostility towards veterans, particularly women and minorities. According to Plaintiff, Coatesville VAMC's managers, human resources, administrators, and other decision makers failed to discipline JAB and/or terminate his employment. In light of Defendants' alleged actions, Plaintiff set forth claims for negligence/gross negligence (Count I); negligent retention (Count II), negligence per se (Count III), a privacy violation (Count IV), negligent hiring, retention, and supervision (Count V), failure to protect and prevent abuse (Count VI), patient abuse (Count VII), failure to report abuse (Count VIII), patient abandonment (Count IX), harassment, intimidation, and retaliation (Count X), discrimination (Count XI), negligent infliction of extreme mental distress (Count XII), negligent investigation (Count XIII), intentional infliction of mental distress (Count XIV), and punitive damages (Count XV).

Defendant filed a Motion to Dismiss Plaintiff's Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 6.) On February 6, 2018, I issued a Memorandum and Order dismissing all of Plaintiff's causes of action, except for her claim for invasion of privacy, for either lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted. (ECF Nos. 12–13.)

Thereafter, an in-person Rule 16 scheduling conference was set for March 22, 2018. (ECF No. 15.) Plaintiff's original request that the conference be conducted by telephone was denied and Plaintiff was ordered to appear. (ECF No. 23.) Due to inclement weather, the Rule 16 conference was rescheduled for March 23, 2018, to be conducted by telephone. (ECF No. 27.) Following that conference, I issued a scheduling order referring the case to United States Magistrate Judge Timothy Rice for settlement purposes, ordering fact discovery to be completed by July 13, 2018, and

directing that all motions for summary judgment be filed no later than August 13, 2018. (ECF No. 28.)

On March 26, 2018, Plaintiff moved to stay proceedings until the resolution of her then-pending motion for reconsideration of the February 6, 2018 Order. (ECF No. 30.) In addition, Plaintiff filed (1) a second Rule 54 Motion to Alter/Reverse Partial Judgment (ECF No. 35, April 8, 2018); (2) a request to modify the scheduling order and for extension of time to amend the complaint (ECF No. 36, April 21, 2018); (3) an amended complaint (ECF No. 38, May 16, 2018; ECF No. 39, May 24, 2018); and (4) a motion for leave to file an amended complaint. (ECF No. 43, May 30, 2018.)

In the interim, Defendants issued a notice of deposition and subpoena *duces tecum* to Plaintiff to appear at the Philadelphia Office of the United States Attorney on July 9, 2018. (ECF No. 47, Ex. 1.) On June 24, 2018, Plaintiff moved to quash the notice of deposition and sought a protective order, claiming medical and financial hardship. (ECF No. 47.) Finding no basis to quash the deposition, I denied Plaintiff's motion to quash, acceded to Plaintiff's request that her deposition not be held at the U.S. Attorney's office, and ordered her to appear for the scheduled deposition in the United States Courthouse. (ECF No. 52.) Plaintiff then filed her first motion for recusal alleging that both my staff and the assigned Magistrate Judge were not impartial and were showing favoritism to Defendants' counsel. (ECF No. 56.)

On July 16, 2018, I denied Plaintiff's two motions for reconsideration, motion to stay discovery, second motion to alter judgment, motion to deem the February 7, 2018 Order a "final" order, multiple motions for leave to file an amended complaint, motion for appointment of counsel,

motion to sanction defense counsel, and first motion for recusal.[1] (ECF No. 63.) This Order prompted Plaintiff's second motion for recusal. (ECF No. 65.)

Plaintiff failed to appear for her deposition on July 9, 2018, and emailed Defendants' counsel one hour prior to the deposition to state that she was not feeling well and was not up for the drive to Philadelphia. (ECF No. 59, Ex. 2.) Defendants then filed a motion to dismiss for lack of prosecution or, in the alternative, to compel discovery. (ECF No. 59.) On July 26, 2018, I ordered that Plaintiff "appear for a deposition, with the documents requested in Defendants' subpoena, to the United States Courthouse . . . in a courtroom to be determined, at a date and time to be agreed upon by the parties, but in no event later than thirty (30) days from the date of this Order." (ECF No. 66 (emphasis omitted).) I again tried to address Plaintiff's stated concerns about the deposition process and ordered that the only persons permitted to be present at the deposition were Plaintiff, any counsel she may retain, counsel for Defendants, and the court reporter. Finally, I directed that if Plaintiff failed to either reasonably agree to a date and time for her deposition or appear for her deposition, her case may be dismissed for lack of prosecution. (Id. ¶ 4.) I also denied Plaintiff's second motion for recusal for the same reasons as set forth in the July 16, 2018 order. (Id.)

Defense counsel emailed Plaintiff on July 26, 2018, to request dates for her deposition. (ECF No. 69, Ex. 1.) Plaintiff declined to provide these dates and responded that she was going to report defense counsel to the Pennsylvania Bar Association for "Attorney Misconduct." (Id.) Defense counsel followed up with Plaintiff the next day on the request for deposition dates, but received no response. (ECF No. 64, Ex. 4.)

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[1] With respect to the recusal motion, I noted that Plaintiff's claims of bias and prejudice were based on her disagreement with many of the judicial rulings. As it is well established that "disagreement with a judge's determinations and rulings cannot be equated with the showing required to so reflect on impartiality as to require recusal," (See ECF No. 63, pp. 5–6 n.9 (quoting In re TMI, 193 F.3d 613, 728 (3d Cir. 1999)), I denied Plaintiff's motion.

On August 6, 2018, Plaintiff filed a motion for protective order to "enjoin defendants and defense counsel from further harassment, revenge, retaliation, witness intimidation and inciting violence against Plaintiff." (ECF No. 67.) A week later, she filed her first motion to compel discovery. (ECF No. 68.)

On August 20, 2018, Defendants filed the current Motion to Dismiss alleging that Plaintiff refused to provide defense counsel available deposition dates. (ECF No. 69.) They asserted that because Plaintiff refused to comply with the Court's orders, there was good cause to dismiss her case with prejudice. (Id.) Two days later, Plaintiff filed a third motion for recusal. (ECF No. 70.) On September 3, 2018, she filed a response in opposition to the Motion to Dismiss (ECF No. 73), and, on September 12, 2018, she submitted another response and a "Motion for Sanctions Against Defense Counsel and Defendant for Abusing Judicial Policies." (ECF No. 75.)

To date, Plaintiff has refused to appear for her deposition.

II. DISCUSSION

Federal Rule of Civil Procedure 41(b) provides:

> **(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Fed. R. Civ. P. 41(b).

The United States Court of Appeals for the Third Circuit has recognized that "[d]istrict court judges, confronted with litigants who flagrantly violate or ignore court orders, often have no appropriate or efficacious recourse other than dismissal of the complaint with prejudice." Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). To determine the propriety of punitive dismissals,

the Third Circuit, in Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984), has outlined a series of factors to be considered. The six Poulis factors include:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis, 747 F.2d at 868. Although "[d]ismissal is a harsh remedy and should be resorted to only in extreme cases," Marshall v. Sielaff, 492 F.2d 917, 918 (3d Cir. 1974), not all of the Poulis factors need be satisfied in order to dismiss a complaint." Mindek, 964 F.2d at 1372. Indeed, there is no "magic formula" or "mechanical calculation" with regard to the Poulis analysis. Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008) (quoting Mindek, 964 F.2d at 1372). Instead, the decision should be made "in the context of the district court's extended contact with the litigant." Mindek, 964 F.2d at 1373. A court retains the inherent authority to dismiss a case in order to manage its own affairs and "achieve the orderly and expeditious disposition of cases." Marshall, 492 F.2d at 918 (quotations omitted).

With these principles in mind, I consider the Poulis factors in the context of this case.

A. Personal Responsibility

"The first Poulis factor is an inquiry into the noncompliant party's personal responsibility." In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 319 F.R.D. 480, 485 (E.D. Pa. 2017). This factor focuses more closely on whether the party himself has failed to comply with the court's orders as opposed to whether counsel for the party is responsible. Briscoe, 538 F.3d at 258–59; Vittas v. Brooks Bros. Inc., Grp., No. 14-3617, 2017 WL 6316633, at *2 (D.N.J. Dec. 11, 2017). "[I]t is logical to hold a *pro se* plaintiff personally responsible for delays in his case because a pro

se plaintiff is solely responsible for the progress of his case, whereas a plaintiff represented by counsel relies, at least in part, on his or her attorney." Briscoe, 538 F3d at 258–59.

Here, it is undisputed that Plaintiff, has refused to attend her scheduled deposition, proposing either a deposition closer to Lancaster County, a phone deposition, or a deposition done entirely in writing. She filed her litigation in this forum, was well aware of the date and time of the first deposition, and was ordered to attend. She nevertheless failed to appear. Thereafter, she was ordered to confer with Defendants' counsel about a mutually agreeable date and time for a rescheduled deposition, but failed to do so. Plaintiff does not attempt to deny her personal responsibility. Accordingly, I find this Poulis factor to weigh in favor of dismissal.

B. Prejudice to the Adverse Party

Under the second Poulis factor, "[e]vidence of prejudice to an adversary would bear substantial weight in support of a dismissal or default judgment." Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 873-74 (3d Cir. 1994) (internal quotation marks and citation omitted). Prejudice is not limited to "irremediable" or "irreparable" harm. Briscoe, 538 F.3d at 259; see also Ware v. Rodale Press, Inc., 322 F.3d 218, 222 (3d Cir. 2003). It also includes "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy." Ware, 322 F.3d at 222. A finding of prejudice to the opposing party "weighs heavily in favor of dismissal." Huertas v. City of Philadelphia, No. 02-7955, 2005 WL 226149, at *3 (E.D. Pa. Jan. 26, 2005).

Here, Plaintiff's refusal to attend her deposition and comply with the subpoena *duces tecum* has precluded the advancement of this litigation. Plaintiff initiated this suit and is the source for most of the allegations. A plaintiff is required to prove his or her case, "as well as give the defendant an opportunity to prepare against it." Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988) (dismissing case under Poulis for plaintiff's refusal to give a deposition); see also Preston v. MR Scrap, No. 16-

2612, 2017 WL 4222935, at *2 (E.D. Pa. Sept. 22, 2017) ("Plaintiff's failure to submit to deposition prevents Defendants from developing and implementing their trial strategy"); Smith v. Altega Credit Co., No. 02-8221, 2004 WL 2399773, at *5 (E.D. Pa. Sept. 22, 2004) (A "'prolonged delay in litigating a case creates a presumption of prejudice' because it harms a defendant's ability 'to present a full and fair defense on the merits of plaintiff's claim.'") (quoting Beckman v. Integrated Sys. Int'l, Inc., No. 88-4534, 2002 WL 22832098 (E.D. Pa. Sept. 30, 2002)). This factor therefore weighs in favor of dismissal as well.[2]

C. History of Dilatoriness

The third Poulis factor looks at Plaintiff's history of dilatoriness. "Extensive or repeated delay or delinquency constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders." Chiarulli v. Taylor, No. 08-4400, 2010 WL 1371944, at *3 (D.N.J. Mar. 31, 2010) (quoting Adams, 29 F.3d at 874). "[C]onduct that occurs one or two times is insufficient to demonstrate a 'history of dilatoriness.'" Briscoe, 538 F.3d at 261 (quotations omitted). Rather, this factor is more concerned with "consistent delay." Id.

Plaintiff has certainly exhibited dilatoriness, having first resisted personally attending a Rule 16 conference and thereafter repeatedly refusing to appear for a deposition in Philadelphia. It is true that Plaintiff otherwise has no history of delay and has met other deadlines in responding to motions. But her refusal to be deposed has substantially delayed the discovery process in this case. Accordingly, I find that this factor favors dismissal.

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[2] In addition, Defendants have suffered other prejudice aside from their inability to develop a defense. Due to Plaintiff's last minute cancellation of the first deposition, Defendants incurred court reporter fees. (ECF No. 59, Ex. 3.) Further, as they have been unable to re-schedule the deposition, they were unable to file a motion for summary judgment prior to the August 14, 2018 deadline.

D. Willfulness or Bad Faith

The fourth Poulis factor inquires whether the actions of a party suggest willfulness or bad faith. A court must consider whether the conduct was "the type of willful or contumacious behavior which was characterized as flagrant bad faith." Adams, 29 F.3d at 875 (internal quotation marks and citation omitted). Generally, "[w]illfulness involves intentional or self-serving behavior." Id. "If the conduct is merely negligent or inadvertent, we will not call the conduct 'contumacious.'" Briscoe, 538 F.3d at 262; see also Poulis, 747 F.2d at 868–69 (finding that plaintiff's counsel's behavior was not contumacious because, although he had missed deadlines, there was no suggestion that his delays were for any reason other than his poor health and his wife's pregnancy issues). A "persistent failure to honor discovery orders may be viewed as a willful effort to evade discovery." Huertas, 2005 WL 226149, at *4 (quotations omitted).

Plaintiff initially moved to quash Defendants' subpoena alleging that travelling to and from Philadelphia was "all-day and very taxing event." (ECF No. 47, p. 1.) She claimed that it would subject her to undue medical, physical, mental, and financial burden, especially given her health problems and the ongoing heat. (Id. at 2.) She also maintained that two weeks was insufficient notice for her to gather the required documents and prepare for the trip from her home in Chester County to Philadelphia. (Id.) Finally, Plaintiff asserted that "a face-to-face oral deposition (especially on Defense Counsel's own turf) would signal an open invitation for Defense Counsel to engage in a free-for-all feeding frenzy—predatory mobbing behavior—against a medically vulnerable and un-represented plaintiff (in a forum where there would NOT be a neutral arbiter of facts or referee)." (ECF No. 47, p.5.) She offered to appear for an oral deposition, conducted by telephone, for a period of no more than sixty minutes. (Id. at 5.)

Finding no basis to quash the subpoena, I denied the motion on July 26, 2018, and directed Plaintiff to appear for a deposition at a date and time to be agreed upon by the parties, but "in no

event later than thirty (30) days from the date of this Order." (ECF No. 66.) Taking into account Plaintiff's fear of appearing in defense counsel's offices alone, I further instructed that the deposition take place in the courthouse and that the only persons permitted to be present were Plaintiff, any counsel she may retain, counsel for Defendants and the court reporter. (Id.) In that same Order, I warned that "[s]hould Plaintiff fail to (a) reasonably agree to a date and time for her deposition and/or (b) appear for her deposition, her case may be dismissed for lack of prosecution." (Id.) That same day, Plaintiff emailed my Chambers to state that she would not come to Philadelphia for a deposition unless someone arranged a U.S. Marshal escort for her. (ECF No. 69, Ex. 3.)

Eleven days later, on August 6, 2018, Plaintiff filed a "Motion for Protective Order to Enjoin Defendants and Defense Counsel from Further Harassment, Revenge, Retaliation, Witness Intimidation, and Inciting Violence Against Plaintiff." (ECF No. 67.) In a twenty-four page brief, Plaintiff accused defense counsel of exploiting the court system, engaging in witness intimidation, and inciting violence against her. (Id.) A week later, Plaintiff filed a motion to compel discovery that lodged additional allegations against Court staff and defense counsel, and demanded discovery on a wide range of topics beyond her remaining claim of invasion of privacy. (ECF No. 68.)

On August 20, 2018, having yet to secure a date from Plaintiff for her deposition availability, Defendants filed a motion to dismiss for lack of prosecution. In that motion, defense counsel explained that they had emailed and sent a certified letter to Plaintiff, informing her about the Court's Order and requesting dates of availability for deposition. (ECF No. 69.) As of the date of the motion, Plaintiff has not replied to their request.

Plaintiff responded to Defendants' motion with a third motion for recusal seeking to preclude Court staff and defense counsel's further involvement with the case. (ECF. No. 70.) Over the course of forty pages, Plaintiff lodged serious, but unsubstantiated, accusations against various

individuals.[3] She then responded to the current motion to dismiss, arguing that she faced life-threatening harm and extreme danger if she appeared for the deposition, and that Defendants had numerous alternatives by which to obtain the information they needed. (ECF No. 73.) Via that same response, Plaintiff again accused defense counsel of harassment and lodged ethical accusations against Court staff. (Id.) In a September 12, 2018 filing, Plaintiff accused Defendants and defense counsel of "put[ting] out a hit on Plaintiff" and requested sanctions against defense counsel. (ECF No. 75, p. 15.)

Given this history, I find that Plaintiff's repeated disregard of Court orders and refusal to appear for a deposition was done in bad faith. Federal rules require "plaintiff or its agents to appear for the taking of depositions in the district in which the suit is brought," South Seas Catamaran, Inc. v. Motor Vessel Leeway, 120 F.R.D. 17, 21 (D.N.J. 1988). Plaintiff complained about threats to her safety, yet nothing in defense counsel's actions evidence that she ever faced any risk. Despite the fact that I arranged for the deposition to be held in the Courthouse to accommodate her concerns, Plaintiff continued to offer a multitude of ever-changing and unsupported reasons for why she could not appear and why Defendants did not need her deposition or discovery. She also lodged multiple serious accusations against defense counsel, who, by all accounts, did nothing other than proceed through the normal course of adversarial litigation. As Plaintiff's actions were "intentional" and "self-serving," I find that this Poulis factor favors dismissal.

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[3] Specifically, she alleged, for example, that (a) the Court was abusing its authority by manufacturing false law and cooperating with defense counsel; (b) defense counsel was purposely placing her in harm's way; (c) that defense counsel has been using an intimidation campaign and that the Court has condoned these actions; (d) that Court staff was interfering with the fair adjudication of the case; (e) that the Court had predetermined the disposition of this case; (f) that Defendants and defense counsel were knowingly subjecting Plaintiff to health and safety risks; (g) that Court staff were cooperating with defense counsel to coerce her into dropping her complaint or "entrapping" her; and (h) that Defendants, through defense counsel and Court staff, were targeting Plaintiff as a member of a vulnerable population. (See ECF No. 70.)

E. The Effectiveness of Sanctions Other Than Dismissal

The fifth Poulis factor considers whether alternative sanctions would be more effective than dismissal. Generally, a district court "should be reluctant to deprive a plaintiff of the right to have his claim adjudicated on the merits[,]" Titus v. Mercedes Benz of North Am., 695 F.2d 746, 749 (3d Cir. 1982), and therefore "must consider the availability of sanctions alternative to dismissal." Briscoe, 538 F.3d at 262. The Third Circuit has recognized that alternative sanctions "include a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs or attorney fees, the temporary suspension of the culpable counsel from practice before the court, . . . dismissal of the suit unless new counsel is secured[,] . . . the preclusion of claims or defenses, or the imposition of fees and costs upon plaintiff's counsel under 28 U.S.C. § 1927." Titus, 695 F.2d at 749 n.6.

A factually-analogous case from the Third Circuit offers some guidance on the application of this Poulis factor. In Hicks v. Feeney, 850 F.2d 152 (3d Cir. 1988), the plaintiff was involuntarily committed to a state hospital and subsequently brought a § 1983 action against the director of the hospital for alleged deprivation of procedural due process. Id. at 153–54. In connection with his suit, the plaintiff was deposed for forty minutes, after which he refused to answer any more questions and failed to return after the break. Id. at 154. He subsequently failed to appear for other scheduled depositions. Id. The plaintiff's counsel then emailed the court indicating that the plaintiff "did not want to discuss what he believed to be extremely private matters concerning what happened to him while he was confined at the Delaware State Hospital." Id. The court ordered the plaintiff to appear at a deposition and pay for the costs of the previous depositions. It further warned that additional sanctions, including outright dismissal, would be imposed if he failed to appear. Id. at 154–55. The plaintiff did not appear again. Id. at 155. When defendant moved for sanctions, plaintiff agreed to waive his "actual" injury claim, but still press for presumed and punitive

damages. Id. The plaintiff also suggested that even a $1.00 award of nominal damages would be an alternative sanction to an outright dismissal. Id. Nonetheless, the district court dismissed the case.

On appeal, the Third Circuit reviewed the Poulis factors and declined to find any abuse of discretion, noting that the plaintiff's conduct was willful, that review of the record revealed no conduct by defense counsel to intimidate or harass the plaintiff, and the defendant suffered substantial prejudice from the plaintiff's failure to appear at the depositions. Id. at 156. It remarked, "[a]lthough we sympathize with Hicks's reluctance to recount the facts surrounding his incarceration at DSH, he is the plaintiff and as such must prove his case, as well as give the defendant an opportunity to prepare against it." Id. Turning to the possibility of alternative sanctions, the Third Circuit agreed with the district court that a lesser sanction would not be appropriate. Id. at 157. It noted that the district court properly considered alternatives, such as precluding the plaintiff from testifying about his mental status, prohibiting evidence rebutting the hospital's medical records, and finding that the plaintiff suffered no actual injuries, thereby precluding compensatory damages. Id. It found no error in the district court's ultimate conclusion that the case simply could not proceed on presumed and punitive damages without giving the defendant an opportunity to depose the plaintiff. Id.[4]

Considering the Poulis factors, and specifically whether alternative sanctions were an option, the court found that no other sanctions would be effective. Id. at *4. It found that monetary

[4] See also Preston v. EMR Scrap, No. 16-2612, 2017 WL 4222935 (E.D. Pa. Sept. 22, 2017) (dismissing case for plaintiff's repeated failure to appear for his deposition, reasoning that "[a] party's failure to attend his own deposition on multiple occasions without informing counsel and in direct violation of a Court Order is obviously unacceptable conduct . . . . "); Huertas v. City of Philadelphia, No. 02-7955, 2005 WL 226149 (E.D. Pa. Jan. 26, 2005) (dismissing case for plaintiff's failure to attend deposition, especially after court accommodated plaintiff's fear of heights and ordered that deposition take place no higher than the second floor of a building).

sanctions were unhelpful because the plaintiff was proceeding *in forma pauperis* and that lesser sanctions dismissing portions of the plaintiff's case, prohibiting the plaintiff from introducing certain matters into evidence, or staying the case would not be helpful and would likely harm defendants by forcing them to expend more time and money on the case. Id. at *4.

Similarly here, I find that no other possible sanctions would be effective. In light of Plaintiff's *pro se* status, fines are not a viable option. Plaintiff has already received warnings in the form of orders directing her to comply with deposition notices. Finally, Plaintiff has only one claim remaining, meaning that the preclusion of her one claim would be tantamount to a dismissal. Plaintiff has not only failed to appear for her deposition in Philadelphia, but has affirmatively indicated both her refusal to appear and her unwillingness to abide by the Court's orders. Due consideration of the possible alternatives leads me to conclude that dismissal with prejudice is an appropriate sanction in this case.

G. Meritoriousness of the Claim or Defense

The final factor under Poulis looks at the meritoriousness of the plaintiff's claim or the defendant's defense. The standard of meritoriousness when reviewing a dismissal is not stringent:

> [W]e do not purport to use summary judgment standards. A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense.

Poulis, 747 F.2d at 869–870.

Although almost all of Plaintiff's claims in her Complaint were dismissed, her invasion of privacy claim survived a motion to dismiss. This claim, if substantiated by discovery, could potentially warrant a recovery by Plaintiff. I would be remiss, however, to disregard the relatively scant nature of Plaintiff's allegations in support of this claim. Plaintiff alleges that a Coatesville VA employee provided unauthorized access and disclosure of Plaintiff's private health information

to Plaintiff's brother, who is also a Coatesville VA employee. (Compl. at p. 15.) To substantiate this claim, Plaintiff has offered few supporting facts and Defendants have yet had the opportunity to obtain discovery to test the merits of this claim. Therefore, I deem this Poulis factor neutral.

H. Conclusion as to *Poulis* Factors

Upon careful review of the Poulis factors, I find that Plaintiff's repeated refusal to appear for a deposition in defiance of Court orders constitutes adequate grounds for dismissal of this case. Plaintiff initiated this action and has propounded numerous requests for discovery, while giving no discovery in return. Moreover, she has lodged numerous, unfounded accusations against defense counsel, Court staff, and others. In turn, Defendants have been completely stymied in their ability to investigate and defend this case. As Poulis factors one, two, three, four, and five weigh heavily in favor of dismissal, and factor six is neutral, Plaintiff's Complaint will be dismissed with prejudice.

III. CONCLUSION

In light of the foregoing, I will grant Defendants' Motion to Dismiss for Lack of Prosecution. An appropriate Order follows.

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

BLANCHE A. BROWN,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 17-1551**
UNITED STATES, et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 25th day of March, 2019, upon consideration of Plaintiff's Motion for Reconsideration (Doc. No. 82), it is hereby **ORDERED** that the Motion is **DENIED**.[1]

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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[1] A motion for reconsideration or motion to alter or amend judgment is properly raised under Federal Rule of Civil Procedure 59(e). Keifer v. Reinhart Foodservs., LLC, 563 F. App'x 112 (3d Cir. 2014). "The standard for obtaining relief under Rule 59(e) is difficult to meet." Invista N. Am. S.A.R.L. v. M & G USA Corp., 35 F. Supp. 2d 583 (D. Del. 2014). The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Café ex rel. Lou–Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (quotations omitted). "A court should exercise its discretion to alter or amend its judgment only if the movant demonstrates one of the following: (1) a change in the controlling law; (2) a need to correct a clear error of law or fact or to prevent manifest injustice; or (3) availability of new evidence not available when the judgment was granted." Keifer, 563 F. App'x at 115. A motion for reconsideration is not an "opportunity for a party to relitigate already decided issues and should not be used 'to put forward additional arguments, which [the movant] could have made but neglected to make before judgment.'" Garzella v. Borough of Dunmore, No. 05–1626, 2007 WL 1450416, at *2 (M.D .Pa. May 15, 2007) (quoting Dodge v. Susquehanna Univ., 796 F. Supp. 829, 830 (M.D. Pa. 1992)). Stated differently, a motion for reconsideration "is not proper where it simply asks the court to rethink what [it] had already thought through—rightly or wrongly." Romero v. Allstate, 1 F. Supp. 3d 319, 420 (E.D. Pa. 2014) (internal quotation marks omitted).

Plaintiff's Motion is premised on the assertion that the February 21, 2019 final judgment was premised on a clear error of fact or law. In support of this Motion, however, Plaintiff simply rehashes the same arguments that I previously considered and rejected. Accordingly, reconsideration is unwarranted.

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

BLANCHE A. BROWN,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 17-1551**
UNITED STATES,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 16th day of July, upon consideration of Plaintiff's Motions under **(1)** Rules 54(b), 59(e) and 60 for "Review and Revise Interlocutory Order; Partial Reconsideration; Alter Judgment; and for Relief from Partial Judgment . . . Motion for Leave to Amend and Supplement Pleadings; Motion for Leave to Retain Effective Legal Counsel; Request for Limited Discovery; Motion to Strike Defendant's Pleadings and Sanction Defense Counsel for Misconduct" (Doc. No. 18); **(2)** Plaintiff's Motion to "Stay Discovery, Scheduling and Other Proceedings and Stay Enforcement of Partial Judgment Pending Determination on Plaintiff's Request for Reconsideration and Any Possible Ensuing Interlocutory Appeal" (Doc. No. 30); **(3)** Plaintiff's supporting documents and attachments to these Motions (Doc. Nos. 19–21, 26, and 29); **(4)** Defendant's Response to Plaintiff's Motions and Attachments at Docket Nos. 18–21, 26, 29, and 30 (Doc. No. 34); **(5)** Plaintiff's Second "Rule 54 Motion to Alter/Reverse Partial Judgment or in the Alternative 54b Final Determination Declaration of Final Judgment, and Motion Reply to Defendant's Opposition to Plaintiff Request for Review, Reconsideration, Reversal" (Doc. No. 35); **(6)** Plaintiff's Motion for Leave to File an Amended Complaint (Doc. No. 43); **(7)** Plaintiff's Motion for Leave to File an Amended Complaint (Doc. No. 44); **(8)** Defendant's Response to Plaintiff's Motions for Leave to File an Amended Complaint (Doc.

No. 45); **(9)** Plaintiff's Reply in Support of Motion for Leave to File an Amended Complaint (Doc. No. 46); **(10)** Plaintiff's Motion for Recusal (Doc. No. 56); and Defendant's Response to Motion for Recusal (Doc. No. 61), it is hereby **ORDERED** all of the aforementioned Motions are **DENIED IN THEIR ENTIRETY** as follows:

1. Plaintiff's Motions for Reconsideration of the Court's February 7, 2018 Memorandum and Order under Federal Rule of Civil Procedure 59(e) are **DENIED.**[1]
2. Plaintiff's request to deem the February 7, 2018 Memorandum and Order "final" for purposes of appeal under Federal Rule of Civil Procedure 54(b) is **DENIED.**[2]

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[1] A motion for reconsideration is the "functional equivalent" of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1352 (3d Cir. 1990). "The standard for obtaining relief under Rule 59(e) is difficult to meet." Invista N. Am. S.A.R.L. v. M & G USA Corp., 35 F. Supp. 3d 583, 593 (D. Del. 2014). The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Café ex rel. Lou–Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (quotations omitted). "A court should exercise its discretion to alter or amend its judgment only if the movant demonstrates one of the following: (1) a change in the controlling law; (2) a need to correct a clear error of law or fact or to prevent manifest injustice; or (3) availability of new evidence not available when the judgment was granted." Keifer v. Reinhart Foodservs., LLC, 563 F. App'x 112, 115 (3d Cir. 2014) (quotations omitted).

Notably, "[a] motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." Ogden v. Keystone Residence, 226 F. Supp. 2d 588, 606 (M.D. Pa. 2002) (quotations omitted). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." In re Asbestos Prods. Liab. Litig. (No. VI), 801 F. Supp. 2d 333, 334 (E.D. Pa. 2011) (quoting Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995)).

Plaintiff's Motion does not present any of the requisite grounds for reconsideration. She has not pointed to any interim change in the controlling law, identified any clear error of law or fact, or produced any new evidence not available at the time the judgment was issued.

[2] Under Rule 54(b), "a district court may convert an order adjudicating less than an entire action to the end that it becomes a 'final' decision over which a court of appeals may exercise jurisdiction under 28 U.S.C. § 1291." Elliott v. Archdiocese of New York, 682 F.3d 213, 219 (3d Cir. 2012). "By allowing a district court to enter a final judgment on an order adjudicating only a portion of the matters pending before it in multi-party or multi-claim litigation and thus allowing an immediate appeal, Rule 54(b) 'attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best

5. Plaintiff's multiple Requests to Amend and/or Supplement Pleadings are **DENIED**.[5]

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by incarceration; (3) the complexity of the legal issues; (4) the degree to which factual investigation is required and the plaintiff's ability to pursue such investigation; (5) the plaintiff's capacity to retain counsel on his or her own behalf; and (6) the degree to which the case turns on credibility determinations or expert testimony. See Montgomery, 294 F.3d at 499 (citing Tabron, 6 F.3d at 155).

Plaintiff here is not proceeding *in forma pauperis* and has not shown any financial inability to privately retain counsel. Moreover, Plaintiff has demonstrated ample ability to represent herself and pursue her claims. As such, appointment of counsel under the Tabron factors is not warranted.

[5] Federal Rule of Civil Procedure 15(a)(2) provides that when a party makes a request to amend its complaint, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. Rule 15(a)(2). Nevertheless, "[t]he policy favoring liberal amendment of pleadings is not . . . unbounded." Dole v. Arco Chem. Co., 921 F.2d 484, 487 (3d Cir. 1990). When a party moves to amend its complaint simultaneously with a motion to amend a final judgment pursuant to Rule 59, "the liberality of Rule 15(a) is no longer applicable." Burtch v. Milberg Factors, Inc., 662 F.3d 212, 230 (3d Cir. 2011). Instead, the Rule 15 and 59 inquiries turn on the same factors, with a view to "favoring finality of judgments and the expeditious termination of litigation." Id. at 231 (quotations omitted). A district court may deny leave to amend a complaint where "it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." Lake v. Arnold, 232 F.3d 360, 373 (3d Cir. 2000) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Plaintiff's proposed amended complaint (attached to her motions at docket numbers 43 and 44) attempts to reassert all of her claims that were dismissed by the Court for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and to allege several new claims under the Privacy Act and Americans With Disabilities Act. She posits that her amendments will serve several purposes: (a) clarify the Court's jurisdiction under the FTCA; (b) make clearer statements about the government's vicarious liability; (c) clarify relevant statutes/regulations/policies that impose a duty of care on the VA; (d) make clearer statements about the federal policies and regulations; (e) present clearer context for the VA's affirmative duty; (f) more clearly explain the agency's duty of care; (g) clarify the link between negligence per se and violations of HIPAA, Privacy Act, ADA and various agency regulations and state laws; (h) more clearly elucidate relevant Restatement Torts; (i) make a clearer statement on federal statutes that implicate government employee off-duty misconduct on government premises; (j) more clearly connect Pennsylvania Supreme Court and U.S. Supreme Court rulings to claims; (k) clarify the connection between the Restatement (Second) of Torts § 213 and VA use of the Agency's instrumentalities; and (l) request declaratory relief under multiple statutes. (Doc. No. 18, at p. 4.)

These proposed amendments are not proper for several reasons. First, all of Plaintiff's claims, but for her privacy claim, were dismissed without prejudice for lack of subject-matter jurisdiction. Plaintiff may not simply rekindle these claims through an amended complaint. Second, Plaintiff does not purport to offer new facts that would establish a basis for the Court to

6. Plaintiff's request for limited discovery of relevant agency information is **DENIED.**[6]

7. Plaintiff's Motion to Stay Discovery, Scheduling and Other Proceedings, and Stay Enforcement of Partial Judgment is **DENIED.**[7]

8. Plaintiff's Motion to Strike Defendant's Pleadings and Sanction Defense Counsel for Misconduct is **DENIED.**[8]

9. Plaintiff's Motion for Recusal (Doc. No. 56) is **DENIED.**[9]

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exercise jurisdiction. Rather, she seeks to present new legal arguments to justify the merits of her claims. Aside from the fact that these new arguments do not overcome the jurisdictional problems identified in my Memorandum of February 7, 2018, such contentions are not appropriate for an amended complaint, but rather should have been raised in response to the Motion to Dismiss. See Reginella Constr. Co., Ltd. v. Travelers Cas. & Sur. Co. of Am., 971 F. Supp. 2d 470, 479 (W.D. Pa. 2013) (holding that a party cannot "file an amended complaint that contains new facts and legal arguments that could have been raised before the original complaint was dismissed"). Finally, my March 23, 2018 Scheduling Order specifically directed that all motions to amend the complaint should be filed within fourteen days from the date of the Order. (Doc. No. 28). Although Plaintiff had previously requested leave to amend in her March 14, 2018 Motion for Reconsideration, she delayed in offering any proposed amended complaint until May 16, 2018, well after discovery had already begun.

[6] Plaintiff's March 14, 2018 Motion requested discovery of relevant agency information "not accessible" to her. (Doc. No. 18, at p. 5.) Contrary to Plaintiff's assertion, however, all agency regulations relevant to whether the Court has jurisdiction over her dismissed claims were and are publicly available. At this point, a Scheduling Order is in place setting forth a time period during which Plaintiff may seek any discovery related to her remaining claim.

[7] In her March 26, 2018 Motion (Doc. No. 30), Plaintiff requested a stay of discovery, scheduling, and other proceedings pending a ruling on her request for reconsideration. As these motions have been ruled upon, there is no basis for staying the proceedings.

[8] Plaintiff has requested that I sanction defense counsel and strike Defendant's pleadings for "knowingly and intentionally advancing discriminatory disinformation and encouraging the Court to Discriminate Against Plaintiff—hence affording her unequal and inferior Justice;" "accessing Plaintiff's medical records without her consent;" and "[p]ersistently using deception and misinformation to distract, deceive and derail the judicial process and sabotage Plaintiff's case." (Doc. No. 18, at p. 5.) Plaintiff has not identified any evidence of this alleged misconduct and, having reviewed defense counsel's filings in this matter, I find no basis for imposing any sanctions.

[9] Plaintiff appears to suggest that because the legal rulings issued here have been unfavorable, there must be some underlying bias. It is well established that "disagreement with a judge's

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

determinations and rulings cannot be equated with the showing required to so reflect on impartiality as to require recusal." In re TMI, 193 F.3d 613, 728 (3d Cir. 1999). Plaintiff's claims of bias and prejudice based on judicial rulings with which she disagrees are, therefore, a legally insufficient basis on which to premise a request for recusal.

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

BLANCHE A. BROWN, Plaintiff, v. UNITED STATES, Defendant.	CIVIL ACTION NO. 17-1551

ORDER

AND NOW, this 29th day of June, 2018, upon consideration of Plaintiff's Motion to Quash Defendant's Notice of Deposition and Subpoena (Doc. No. 47) and Defendant's Response (Doc. No. 51), it is hereby ORDERED that the Motion is DENIED. Plaintiff shall appear for the deposition with the documents requested in Defendant's subpoena to the United States Courthouse, 601 Market Street, Philadelphia, PA 19106 at 11:00 a.m. on July 9, 2018, in a courtroom to be determined. Plaintiff and counsel for the Government shall contact Chambers at 267-299-7500 the Friday prior to July 9 regarding the courtroom assignment.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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

BLANCHE A. BROWN, Plaintiff, v. UNITED STATES, Defendant.	:	CIVIL ACTION NO. 17-1551

ORDER

AND NOW, this 29th day of May, 2018, upon consideration of Plaintiff's proposed "Amended Complaint" (Doc. No. 39), it is hereby ORDERED that because Plaintiff has neither obtained consent from Defendants nor requested leave to file an amended complaint as required by Federal Rule of Civil Procedure 15(a)(2), the "Amended Complaint" shall not be filed.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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

BLANCHE A. BROWN, Plaintiff, v. UNITED STATES, ET AL., Defendants.	:	CIVIL ACTION NO. 17-1551

ORDER

AND NOW, this 20th day of March, 2018, upon consideration of Plaintiff's letter of March 19, 2018 (Doc. No. 22) requesting that the Rule 16 conference on March 22nd be cancelled and/or conducted by telephone, it is hereby ORDERED that the request is DENIED and that all parties shall appear for the Rule 16 conference at 11:30 a.m. in Courtroom 4-B.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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

BLANCHE A. BROWN,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 17-1551**
UNITED STATES, ET AL.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 27th day of February, 2018, upon consideration of Plaintiff's letter of February 27, 2018 (Doc. No. 16), it is hereby **ORDERED** that Plaintiff shall have until March 16, 2018 to file a motion for reconsideration of the Court's February 7, 2018 Memorandum and Order (Doc. No. 13). The other requests in Plaintiff's letter are DENIED.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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

BLANCHE A. BROWN, Plaintiff, v. UNITED STATES, ET AL., Defendants.	:	CIVIL ACTION NO. 17-1551

ORDER

AND NOW, this 6th day of February, 2018, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint (Doc. No. 6), Plaintiff's Response in Opposition and Counter-motion for Summary Judgment (Doc. No. 9), Defendants' Reply and Response in Opposition to the Counter-motion (Doc. No. 10), and Plaintiff's Reply (Doc. No. 11), it is hereby ORDERED as follows:

1. Defendants' Motion to Dismiss (Doc. No. 6) is GRANTED IN PART and DENIED IN PART:

   a. Counts 1–3 and 5–14 of the Complaint are dismissed for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1);

   b. Count 15 of the Complaint is dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6);

   c. Count 4 of the Complaint is dismissed against all Defendants EXCEPT Defendant United States of America.

2. Plaintiff's Counter-motion for Summary Judgment (Doc. No. 9) is DENIED.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

3. Plaintiff's request for relief from a final judgment, order, or proceeding under Federal Rule of Civil Procedure 60 is **DENIED**.[3]

4. Plaintiff's Motion for Appointment of Counsel is **DENIED**.[4]

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serves the needs of the parties.'" Id. at 220 (quoting Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 363 (3d Cir. 1975)). "Certification of a judgment as final under Rule 54(b) is the exception, not the rule, to the usual course of proceedings in a district court." Id. In determining whether to issue a 54(b) certification, the Third Circuit has enumerated the following factors:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Allis-Chalmers, 521 F.3d at 364.

Plaintiff has not offered any analysis under these factors. My independent review of these factors reveals no basis to grant the requested certification. Plaintiff retains an invasion of privacy claim against Defendant that is highly intertwined with the facts underlying the dismissed claims. Allowing interlocutory appeal of the dismissed claims, prior to a final determination on the privacy claim, may result in piecemeal litigation and/or appeals.

[3] Rule 60(b) allows a court to relieve a party "from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b). The Third Circuit has held that Rule 60(b) "applies only to 'final' judgments and orders." Penn West Assocs., Inc. v. Cohen, 371 F.3d 118, 125 (3d Cir. 2004) (quoting Torres v. Chater, 125 F.3d 166, 168 (3d Cir. 1997)). The Supreme Court defined a "final decision" for purposes of appeal "generally [as] one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

Plaintiff still maintains a claim against Defendant for invasion of privacy. Accordingly, there has been no final judgment and Rule 60(b) does not apply.

[4] A *pro se* litigant has no constitutional or statutory right to representation by counsel. See Brightwell v. Lehman, 637 F.3d 187, 192 (3d Cir. 2011); Montgomery v. Pinchak, 294 F.3d 492, 498 (3d Cir. 2002). Representation by counsel of a *pro* se litigant proceeding *in forma pauperis* may be appropriate under certain circumstances, after a finding that a plaintiff's claim has arguable merit in fact and law. Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993). Factors to be considered by a court in deciding whether to request a lawyer to represent an indigent plaintiff include: (1) the merits of the plaintiff's claim; (2) the plaintiff's ability to present his or her case considering his or her education, literacy, experience, and the restraints placed upon him or her

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

BLANCHE A. BROWN, Plaintiff, v. UNITED STATES, ET AL., Defendants.	:	CIVIL ACTION NO. 17-1551

ORDER

AND NOW, this 6th day of February, 2018, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint (Doc. No. 6), Plaintiff's Response in Opposition and Counter-motion for Summary Judgment (Doc. No. 9), Defendants' Reply and Response in Opposition to the Counter-motion (Doc. No. 10), and Plaintiff's Reply (Doc. No. 11), it is hereby ORDERED as follows:

1. Defendants' Motion to Dismiss (Doc. No. 6) is GRANTED IN PART and DENIED IN PART:

   a. Counts 1–3 and 5–14 of the Complaint are dismissed for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1);

   b. Count 15 of the Complaint is dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6);

   c. Count 4 of the Complaint is dismissed against all Defendants EXCEPT Defendant United States of America.

2. Plaintiff's Counter-motion for Summary Judgment (Doc. No. 9) is DENIED.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

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

BLANCHE A. BROWN, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 17-1551
UNITED STATES, ET AL., Defendants.	:	

Goldberg, J. February 6, 2018

MEMORANDUM OPINION

Plaintiff Blanche Brown, proceeding *pro se*, brings the current Federal Tort Claims Act ("FTCA") action against the United States, Coatesville Veterans' Administration Medical Center ("Coatesville VAMC"), and administrators of the Region 4 Veterans Integrated Services Network. Her claims arise out of the allegedly negligent acts and omissions of the Coatesville VAMC administrators in not supervising and discharging a VA employee, who was known to be chronically violent and who repeatedly harassed Plaintiff. Defendant moves to dismiss the Complaint both for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted. In response, Plaintiff has filed a Counter-Motion for Summary Judgment.

For the reasons that follow, I will grant Defendants' Motion to Dismiss in part and deny it in part, and will deny Plaintiff's Motion for Summary Judgment in its entirety.

FACTUAL ALLEGATIONS IN THE COMPLAINT

The following facts are taken from Plaintiff's Complaint:[1]

[1] When determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Fowler v. UPMC Shadyside, 578 F.3d 203, 211

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

BLANCHE A. BROWN, Plaintiff, v. UNITED STATES, ET AL., Defendants.	:	CIVIL ACTION NO. 17-1551

ORDER

AND NOW, this 6th day of February, 2018, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint (Doc. No. 6), Plaintiff's Response in Opposition and Counter-motion for Summary Judgment (Doc. No. 9), Defendants' Reply and Response in Opposition to the Counter-motion (Doc. No. 10), and Plaintiff's Reply (Doc. No. 11), it is hereby ORDERED as follows:

1. Defendants' Motion to Dismiss (Doc. No. 6) is GRANTED IN PART and DENIED IN PART:

   a. Counts 1–3 and 5–14 of the Complaint are dismissed for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1);

   b. Count 15 of the Complaint is dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6);

   c. Count 4 of the Complaint is dismissed against all Defendants EXCEPT Defendant United States of America.

2. Plaintiff's Counter-motion for Summary Judgment (Doc. No. 9) is DENIED.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

In early 2011, Plaintiff enrolled in the Veteran's Assistance ("VA") Health Program as a cardiac patient, and was assigned to the Coatesville VAMC for her primary medical care. (Compl. p. 8.)

Plaintiff's brother, James ("JAB"), worked as a groundskeeper at Coatesville VAMC and was allegedly involved in workplace violence, in late 2012, which resulted in federal criminal charges. Following this incident, JAB phoned Plaintiff more than 250 times during work hours from January to March 2014 to complain to her about his supervisors, management, co-workers, and union representatives. Because Plaintiff was home recuperating from open heart surgery, she became a captive sounding board for JAB. (Id.)

In early 2014, JAB assaulted VA Registered Nurse R. Solomon and threatened to kill her. Solomon filed a Protection from Abuse action against JAB, causing him to turn his rage on Plaintiff. When Plaintiff asked JAB to stop contacting her, JAB used Solomon's personal email account to send Plaintiff a credible, threatening, and profane e-mail. In mid-April 2014, following Plaintiff's complaint to the police, JAB stated "If I go back to work tomorrow and hear that [Plaintiff] has contacted VA, then there's gonna be trouble." Plaintiff contacted the VA and reported the threats. The next day, she was taken by ambulance to the hospital for stress-induced high blood pressure. (Id. at pp. 8–9.)

After Plaintiff contacted the VA and filed her own Protection from Abuse petition against JAB, his harassment escalated into threats and attempts on her life. On April 25, 2014, JAB made a pre-dawn visit to Plaintiff's home after she refused to drop the Protection from Abuse order. He cut her phone line and discharged his 22-caliber firearm outside her window. (Id. at p. 9.)

(3d Cir. 2009). Thus, my recitation of the facts assumes the truth of the factual statements in the Complaint.

In May 2014, while Plaintiff was on her way to her primary care appointment at Coatesville VAMC, JAB drove up to her in the VAMC parking lot. He used his car to block Plaintiff's entrance to the VA police station, glared at her, and then drove off. (Id.)

Months later, in August 2014, Nurse Solomon, sent Plaintiff an email with JAB's bogus EEOC files attached. Out of fear that Plaintiff "could somehow derail his (bogus) EEOC claim by forwarding his files to his employer," JAB returned to Plaintiff's home with a loaded firearm. (Id. at pp. 9–10.)

In December 2014, JAB resumed his stalking campaign, made false reports to the state and local police that Plaintiff was a dangerous and "mentally disturbed veteran," and attempted to have her involuntarily committed. (Id. at p. 11.)

Plaintiff claims that Coatesville VAMC had known for decades about JAB's physical abuse of women employees, and it fostered a culture of hostility towards veterans, particularly women and minorities. Plaintiff had warned the VA about JAB's threats against the workplace and supervisors, but supervisors did not take her seriously. According to the Complaint, VA administrators actually reported Plaintiff's alerts back to JAB without any regard for Plaintiff's welfare. (Id. at pp. 10–11.)

Plaintiff also alleges that Coatesville VAMC's managers, human resources, administrators, and other decision makers had just cause to terminate JAB's employment in 2007 and 2012. Coatesville VAMC police knew that, in 2010, another female employee filed a formal complaint with the VA police because JAB sent her repeated unsolicited texts and began stalking her. The VA police, however, repeatedly failed to investigate. (Id.)

Plaintiff's primary care provider and other administrators were similarly dismissive when Plaintiff reported JAB's intimidation and vandalism of her home. Coatesville VAMC staff was condescending and patronizing, treating Plaintiff as though she was delusional. (Id.) As a result

of the continuing dangers, Plaintiff transferred her medical care away from Coatesville, disrupting her treatment. (Id. at pp. 11–12.)

In December 2015, Plaintiff filed an FTCA administrative claim, along with documentation of JAB's threats of violence and vandalism. VA Chief Counsel George Burns subsequently sent Plaintiff a letter indicating that the VA found no evidence of negligence of misconduct. Plaintiff filed a request for reconsideration and, sometime after November 3, 2016, she received a final determination letter from Director Michael Adelman, dismissing her claim. (Id. at p. 12.)

Plaintiff initiated the current federal litigation under the FTCA on April 5, 2017. Her complaint sets forth numerous causes of action, including: negligence/gross negligence (Count I); negligent retention (Count II), negligence per se (Count III), privacy violation (Count IV), negligent hiring, retention, and supervision (Count V), failure to protect and prevent abuse (Count VI), patient abuse (Count VII), failure to report abuse (Count VIII), patient abandonment (Count IX), harassment, intimidation, and retaliation (Count X), discrimination (Count XI), negligent infliction of extreme mental distress (Count XII), negligent investigation (Count XIII), intentional infliction of mental distress (Count XIV), and punitive damages (Count XV).

On August 11, 2017, Defendant filed a Motion to Dismiss. Plaintiff responded on October 12, 2017, and filed a Counter-motion for Summary Judgment.

DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss the entire Complaint for both lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). I address each portion of the motion separately.

I. Subject-Matter Jurisdiction

A. Rule 12(b)(1) Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the power of a federal court to hear a claim or a case. Petruska v. Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006). When presented with a Rule 12(b)(1) motion, the plaintiff "will have the burden of proof that jurisdiction does in fact exist." Id. at 302 n.3 (quotation omitted).

There are two types of Rule 12(b)(1) motions. A "facial" attack assumes that the allegations of the complaint are true, but contends that the pleadings fail to present an action within the court's jurisdiction. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). A "factual" attack, on the other hand, argues that, while the pleadings themselves facially establish jurisdiction, one or more of the factual allegations is untrue, causing the case to fall outside the court's jurisdiction. Mortensen, 549 F.2d at 891. In such a case, "no presumptive truthfulness attaches to plaintiff's allegations" and the court must evaluate the merits of the disputed allegations because "the trial court's . . . very power to hear the case" is at issue. Id. With a factual attack, the Court is free to consider evidence outside the pleadings and weigh that evidence. Petruska, 462 F.3d at 302 n.3; see also Gould Elecs., Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000). "[T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Petruska, 462 F.3d at 302 n.3 (quoting Mortenson, 549 F.2d at 891).

B. Discussion

The United States maintains sovereign immunity from suit, except to the extent that it consents to being sued. See FDIC v. Meyer, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act constitutes one such waiver of the federal government's sovereign immunity with respect to tort claims for money damages. See 28 U.S.C. § 1346(b)(1). Under the FTCA, the United States

may be liable for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(l). A plaintiff "bears the burden of demonstrating that his claims fall within the scope of the FTCA's waiver of government immunity." Merando v. U.S., 517 F.3d 161, 164 (3d Cir. 2008).

Defendants assert that most, if not all, of Plaintiff's claims do not fall within the scope of the FTCA's waiver of immunity, thereby depriving the Court of subject-matter jurisdiction. They premise this argument on three grounds: (1) the discretionary function exception to the Federal Tort Claims; (2) the failure to meet the scope of employment provision of the FTCA; and (3) failure to exhaust.[2]

1. Discretionary Function Exception

The well-established "discretionary function exception" of the FTCA limits the FTCA's waiver of sovereign immunity by "eliminating jurisdiction for claims based upon the exercise of a discretionary function on the part of an employee of the government." Baer v. U.S., 722 F.3d 168, 172 (3d Cir. 2013) (citing 28 U.S.C. § 2680(a)). Under this exception, the government retains sovereign immunity with respect to "[a]ny claim . . . 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." Id. In this manner, the discretionary function exception draws a "boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." United States v. Varig Airlines, 467 U.S. 797, 808 (1984). Congress enacted the discretionary function exception

[2] Defendants also argue that the Court lacks jurisdiction over FTCA claims that involve certain intentional torts and claims concerning medical benefits. As I dismiss those claims on other jurisdictional grounds, I need not reach these arguments.

to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. at 814.

Application of the discretionary function exception is analyzed under a two-part test. First, a court must "consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice." Baer, 722 F.3d at 172 (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)). Second, a court must determine whether the judgment exercised "is of the kind that the discretionary function exception was designed to shield." Id. (citing Berkovitz, 486 U.S. at 536). The discretionary function exception "protects only governmental actions and decisions based on considerations of public policy." Id. "[I]f 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." United States v. Gaubert, 499 U.S. 315, 324 (1991). Notably, the government "has the burden of proving the applicability of the discretionary function exception." Merando, 517 F.3d at 164.

Pursuant to this legal framework, Defendants contend that multiple counts of the Complaint are barred by the discretionary function exception. I agree and will dismiss counts one, two, three, five, six, eight, and twelve on this basis.

a. Negligent Hiring, Retention, Training, Discipline, and Supervision Claims

Counts one, two, three, five, and twelve of the Complaint[3] allege that VA employees negligently hired, trained, retained, supervised, and failed to remove JAB and other employees.

[3] Count one asserts that Defendants had a duty to protect VA clients from known violent employees and that they breached this duty by failing to properly hire, train, and supervise JAB as an employee. Count two asserts that Defendants were aware that JAB was a chronically violent

Applying the two-step inquiry defined above, I find that the discretionary function exception deprives the Court of jurisdiction over these claims.

Federal appellate courts stand in agreement that decisions relating to the hiring, training, and supervision of employees are inherently a discretionary function.[4] Although the issue has not been explicitly addressed by the Third Circuit, numerous trial courts within the Third Circuit have reached the same conclusion.[5] Underlying these decisions is the notion that "employment and

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employee, but were negligent in disciplining and retaining him as an employee. Count three sets forth a negligence per se claim, asserting that Defendants' decision to retain JAB violated their duties under the VA Handbook 5021. Count five alleges negligent hiring, training, and supervision as to employees Nurse Solomon, Coatesville VAMC managers, and final decision makers. Count twelve asserts that Defendants committed negligent infliction of emotional distress on Plaintiff by negligently retaining a dangerous employee whose violence should have been foreseeable.

[4] See, e.g., Snyder v. U.S., 590 F. App'x 505, 510 (6th Cir. 2014) (holding that agency hiring, supervision, training, and retention generally fall within discretionary function exception); Guile v. U.S., 422 F.3d 221, 231 (5th Cir. 2005) (holding that hiring of a contractor and supervision of a contractor's work, including the degree of oversight to exercise, is inherently a discretionary function); Vickers v. U.S., 228 F.3d 944, 950 (9th Cir. 2000) ("This court and others have held that decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield."); Burkhart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("[D]ecisions concerning the hiring, training, and supervision of WMATA employees are discretionary in nature, and thus immune from judicial review."); Tonelli v. U.S., 60 F.3d 492, 496 (8th Cir. 1995) ("Issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception."); Richman v. Straley, 48 F.3d 1139, 1146–47 (10th Cir. 1995) ("Decisions regarding employment and termination are inherently discretionary . . . . Such sensitive decisions are precisely the types of administrative action the discretionary function exception seeks to shield from judicial second-guessing.") (citation omitted); Attallah v. U.S., 955 F.2d 776, 785 (1st Cir. 1992) ("[T]he supervisory functions of [a government agency] constitute discretionary functions as defined by 28 U.S.C. § 2680(a).").

[5] See, e.g., Amberg-Blyskal v. Transp. Sec. Admin., No. 10-6816, 2011 WL 4470883, at *2 (E.D. Pa. Sept. 26, 2011) (holding that hiring and supervising decisions are the types of discretionary acts susceptible to policy analysis); Woods v. United States, No. 07–593, 2007 WL 3243852, at *5 (D.N.J. Nov. 1, 2007) (holding that hiring and supervision of agency personnel is discretionary); CAC v. U.S., 09-6057, 2010 WL 5239237, at *3 (D.N.J. Dec. 16, 2010) (holding that the failure to discipline employee for wrongful acts and the reassignment of that employee to

termination decisions are, as a class, the kind of matters requiring consideration of a wide range of policy factors, including 'budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition.'" Sydnes v. U.S., 523 F.3d 1179, 1186 (10th Cir. 2008) (quoting Burkhart, 112 F.3d at 1217).

Consistent with this principle, cases involving allegations of negligent hiring, supervision, and retention against the VA have generally found that—absent a policy mandating specific supervision, retention, or hiring procedures—such claims fall within in the discretionary function exception to the FTCA's waiver of liability absent a policy that expressly mandates specific supervisory, retention, or hiring practices. See Anasazi v. U.S., No. 16-2227, 2017 WL 2264441 (D. Kan. May 23, 2017) (finding that negligent hiring and retention claims were within exception where no policy, Handbook, or Directive mandated specific hiring or employment retention decisions); French v. U.S., 195 F. Supp. 3d 947, 954 (N.D. Ohio 2016) (holding that the VA's conduct in hiring, retaining, entrusting, training, and supervising a chaplain and other members of the VA team "fall squarely within the discretionary function exception."); Gibbons v. Fronton, 533 F. Supp. 2d 449, 456 (S.D.N.Y. 2008) (finding that decision by VA to contract with clinic for the provision of primary and preventative care in veterans' local communities was within discretion granted to VA by statute and, therefore, barred negligent hiring and supervision claims by plaintiff patient).[6]

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a new location with knowledge of his wrongful conduct is within the discretionary function exception).

[6] Plaintiff cites two Third Circuit cases—Cestonaro v. United States, 211 F.3d 749 (3d Cir. 2009) and Gotha v. United States, 115 F.3d 176 (3d Cir. 1997)—for the proposition that "when a governmental actor has reason to know about a specific risk of injury or harm but does nothing to remedy the danger, then future harm by the same known source of danger renders the discretionary function exception inapplicable and does NOT bar a negligence claim." (Pl.'s Opp'n Mot. to Dismiss p. 15.)

The crux of the discretionary function analysis in this case thus turns on whether Plaintiff can identify statutes and/or regulations that limited the discretion of the VA in its hiring, retention, or supervision decisions of employees such as JAB. None of the regulations identified by Plaintiff meet this standard.

First, Plaintiff cites to Pennsylvania state common law, which imposes a legal duty to avoid reckless or negligent behavior that will not expose others to risks of injury which are reasonably foreseeable. (Pl.'s Opp'n Mot. to Dismiss, p. 13–14.) "To overcome the discretionary function exception . . . plaintiffs must show that the federal employee's discretion was limited by a *federal* statute, regulation, or policy." Sydnes v. United States, 523 F.3d 1179, 1184 (10th Cir. 2008) (emphasis in original) (quotation omitted). States cannot waive the federal government's immunity and, therefore, a plaintiff must point to a federal policy incorporating state tort law as a limit on the discretion of federal employees. Id.

Alternatively, Plaintiff points to VHA Directive 5025, "38 C.F.R. 0.735,[7] 5 U.S.C. § 7511 [and] 5 C.F.R. § 752.401(c)," which purportedly set out mandatory standards of employee conduct, as well as the standard course of action and procedures for adverse actions against violent employees. A review of these citations, however, reveals that Defendants retain discretion in their employment decisions. For example, 5 U.S.C. § 7513 and 5 C.F.R. § 752.401 are general provisions that prescribe certain procedures a federal agency must follow before taking a serious adverse action against administrative personnel; they do not dictate when an employee must be

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Both of those cases are inapposite as they involved "garden variety" decisions where the government agencies failed to physically maintain their properties, resulting in physical injuries to the plaintiffs. In both situations, the court found that the failure to act was a result of administrative missteps as opposed to a policy-based decision. Cestanaro, 211 F.3d at 755; Gotha, 115 F.3d at 181. By contrast, this case involves hiring and retention decisions that have been found to fall squarely within the discretionary function exception.

[7] This provision does not exist in the Code of Federal Regulations.

disciplined. Similarly, 38 U.S.C. § 7461, et seq., which applies specifically to VA employees, defines the procedures that the VA has to follow when taking adverse actions against employees without dictating the circumstances under which any adverse actions must be taken.

Finally, Plaintiff relies heavily on VHA Policy Handbook 5021, which enumerates appropriate punishments for various offenses by VA employees. The Handbook, however, does not constrain the judgment of VA supervisors to make employment decisions or impose discipline. Rather, it rests on "[t]he policy of the VA to maintain standards of conduct and efficiency that will promote the best interests of the service." Handbook 5021, Ch. 1. Indeed, contrary to Plaintiff's argument that the "Schedule of Offenses and Penalties" in the Handbook is mandatory and prescribes minimum penalties for certain offenses, Appendix A to the Schedule of Offenses states that "[t]his appendix will be used as a guide in the administration of disciplinary and major adverse actions to help ensure that like actions are taken for like offenses." (Handbook, Part I, App'x A (emphasis in original).) Moreover, the Handbook provides that the responsible official that has initiated an action should consider "[a]ny extenuating or mitigating circumstances or other contributing factors which may have some bearing on the situation." VA Handbook 5021, Part I, Ch. 1, at I-8. In short, Plaintiff identifies no policy or regulation that cabins the discretion of VA employees in making hiring, supervision, training, or retention decisions and leaves them "no rightful option but to adhere to the directive."[8] Berkovitz v. United States, 486 U.S. 531, 536 (1988).

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[8] Citing to Woods v. U.S., 2007 WL 3243852, Plaintiff argues that the discretionary function exception applies to only agency-level administrative and legislative acts that are related to and impact public policy. Woods actually contradicts that argument as it found that decisions by individual FBI agents regarding how to select and supervise an informant, whether to investigate an act, and whether to use an undercover operation are all decisions that fall within the discretionary function exception. Id. at *5; see also Newsham v. Transp. Sec. Admin., No. 08-105, 2010 WL 715838, at *9 (D.N.J. Feb. 26, 2010) ("The discretionary function exception is not limited to those agencies and heads of agencies who make choices based in policy concerns. The

With respect to the second prong of the discretionary function analysis—whether the judgment is of the kind the discretionary function was designed to shield—I find that the acts at issue in these counts are policy-based in nature. As set forth above, Handbook 5021 specifically allows for the use of discretion in imposing discipline on an employee and sets forth various factors that the supervisor should consider when determining what penalty to impose. "[I]f 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." Gaubert, 499 U.S. at 324.

Accordingly, I will dismiss counts one, two, three, and five for lack of subject-matter jurisdiction.

b. Claims that the VA Negligently Investigated Plaintiff's Complaints and that Employees Failed to Report Abuse and Protect Plaintiff from Abuse

Counts six and eight[9] of the Complaint allege that VA employees disregarded and failed to report abuse by JAB against Plaintiff, and count thirteen[10] contends that the VA supervisors failed to investigate complaints of JAB's abuse.

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exception also extends to shield the actions of employees who act within the scope of that policy.").

[9] Count six alleges that "by repeatedly disregarding management's Proposals for Removing violent CVAMC Employee JAB from federal employment (or at least transfer him to a different VA facility), Defendants gave JAB the clear message that he is untouchable and cannot be fired." Count eight asserts that JAB's brother, AWB, who was also a VA employee, knew of threats made by JAB towards Plaintiff, but failed to report JAB's patient abuse to VA authorities. In addition, Count 8 contends that Nurse Solomon also failed to report both JAB's threatening email to Plaintiff that was sent from her account and JAB's threat against Plaintiff, made in her presence, to his brother AWB.

[10] Count thirteen contends that "Defendants at VISM 4 Regional Headquarters (Carla Sivek and Michael Adelman) had a duty to fully and fairly investigate Complaints before and following her Administrative Claim," but breached that duty.

Under the first element of the discretionary function test, the Third Circuit has held that "[d]ecision making as to investigation and enforcement, particularly where there are different types of enforcement action[s] available, are discretionary judgments." Bernitsky v. U.S., 620 F.2d 948, 955 (3d Cir. 1980); see also Donaldson v. U.S., 281 F. App'x 75, 77 (3d Cir. 2008). This rule applies equally to administrative agency decisions regarding whether to bring enforcement actions. Green v. U.S., No. 94-5706, 1995 WL 574495, at *6 (E.D. Pa. Sept. 22, 1995) (holding that prison officials' decision as to whether to issue an incident report against an inmate based on another inmate's complaint "clearly falls within the discretionary function exception"). "With respect to conduct on VA property . . . the VA is entitled to the range of discretion properly accorded other law enforcement agencies." Pooler v. U.S., 609 F. Supp. 198, 203 (E.D. Pa. 1985), aff'd, 787 F.2d 868 (3d Cir. 1986); see also French v. U.S., 195 F. Supp. 3d 947, 955 (N.D. Ohio 2016) (VA's delay in investigating alleged abuse by VA chaplain is a question that involves an element of judgment and, thus, falls within the discretionary function exception).

Under the second element, the decision of the VA employees as to whether to report threats by another employee outside the workplace or whether to investigate any such reports is one susceptible to policy analysis. See Ochran v. U.S., 117 F.3d 495, 501 (11th Cir. 1997) ("[I]t is not relevant whether the government employee in fact made a policy judgment in this case . . . . The inquiry is whether the nature of the conduct at issue is 'susceptible to policy analysis.'"). Among the factors that an employee or supervisor would have to consider are the nature of the threat, whether it is credible, and whether it implicates workplace safety.

Plaintiff has not identified any statute, regulation, or policy that mandated specific action either by VA employees in reporting the alleged abuse by JAB that occurred off VA premises, or by VA supervisors in failing to investigate Plaintiff's administrative complaints about JAB.

Although Plaintiff cursorily references the VA's "Medical Center Policy on Workplace Violence Prevention and Intervention," she offers no explanation about how this policy circumscribed the VA's investigative discretion. Indeed, a review of this policy reveals no explicit requirement regarding how or when VA staff conduct any investigation. Therefore, I will dismiss counts six, eight, and thirteen of the Complaint for lack of subject matter jurisdiction.

2. Claims Involving Acts by Employees Committed Outside the Scope of Their Employment

Defendants' second jurisdictional argument asserts that all but two of Plaintiff's remaining claims[11] do not satisfy the "scope of employment" element of the FTCA's waiver provision. Specifically, Defendants contend that these claims all involve JAB's alleged threatening actions, which were done outside the scope of his employment.

The FTCA waives the government's immunity for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting *within the scope of his office or employment.*" 28 U.S.C. § 1346(b)(l) (emphasis added). The explicit language of this provision mandates that, for the waiver of immunity to apply, the act complained of must have been done within the scope of the offending individual's employment. Id. In the Third Circuit, the scope-of-employment requirement in the FTCA is jurisdictional. CNA v. U.S., 535 F.3d 132, 144 (3d Cir. 2008). The court must, however, take care not to resolve the merits of the action and therefore should require less of a factual showing from plaintiff than would be required at trial. Id.

To determine whether the "scope of employment" provision has been satisfied, a court must look to the law of the place where the act or omission occurred, which, in this case, is Pennsylvania. Id. at 146. Pennsylvania has adopted the Restatement (Second) of Agency's

[11] Plaintiffs do not challenge counts four and eleven on this ground.

definition of conduct within the scope of employment. Id. Under this definition, "'conduct is within the scope of employment if, but only if: (a) it is the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits[; and] (c) it is actuated, at least in part, by a purpose to serve the master.'" Id. (quoting Brumfield v. Sanders, 232 F.3d 376, 380 (3d Cir. 2000) (quoting Restatement (Second) of Agency § 228)). For an individual's actions to be within the scope of employment, all three factors must be satisfied. CNA, 535 F.3d at 147.

Here, even taking the allegations of the Complaint as true, it is undisputed that all of the acts that make up the basis for Counts seven, nine, ten, and fifteen occurred either outside the time and space limitations of the offending individuals' employment with the VA, or were not committed on behalf of or with the authorization of the VA.

For example, count seven for "patient abuse" alleges that Nurse Solomon (1) allowed JAB to send a violent, threatening email to Plaintiff from her personal email account; (2) helped JAB retaliate against Plaintiff for reporting his abuse to the Patient Advocate; and (3) recklessly emailed Plaintiff a copy of JAB's bogus EEOC file without warning her that JAB would attempt to stop Plaintiff from forwarding the email to either the VA Police or CVAMC administrators. The Complaint contains no allegations that any of these events took place during work hours at the VA, on the VA premises, or using a VA work email. Moreover, the allegations of the Complaint, taken as true, do not permit an inference either that these actions by Nurse Solomon were the kind that she was employed to perform or that they were actuated in any part with intent to serve the VA. Quite to the contrary, the Complaint expressly alleges that Solomon acted for purposes of either personally retaliating against JAB or helping JAB retaliate against Plaintiff.

Count nine alleges "patient abandonment,"[12] claiming that "[a]s a result of the harassment, intimidation, threats and stalking, Plaintiff was forced to stop receiving her primary care treatment and other medical treatment at Coatesville VA Medical Center." (Compl. p. 17.) Plaintiff explicitly alleges that almost all of the alleged harassment, intimidation, threats, and stalking occurred off the VA premises. Plaintiff specifically states that JAB called her *at home* more than 250 times to complain about VA officials. In addition, JAB allegedly twice-threatened Plaintiff with a firearm at her home and sent her a threatening e-mail from Solomon's personal e-mail address. See Doughty v. U.S. Postal Serv., 359 F. Supp. 2d 361, 366 (D.N.J. 2005) (holding that postal worker was acting outside scope of employment when he visited fellow postal employee during non-working hours, at her home, using a pretext that had nothing to do with his employment, and allegedly assaulted her). The only act that occurred on VA premises involved JAB driving his vehicle up to Plaintiff while she was on Coatesville VA property to see her primary care physician. The evidence reveals, however, that JAB was off duty from work on the relevant day and he immediately drove away after the incident. (Defs.' Mot. to Dismiss, Exs. 1 & 2.) The Complaint permits no plausible inference that any of these acts were taken in the scope of JAB's employment as groundskeeper or were designed to fulfill his employment duties.

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[12] To the extent Plaintiff alleges in this Count that she was deprived of medical care to which she was entitled, this Court has no jurisdiction over this claim. 38 U.S.C. § 511(a) states that the Secretary of Veterans Affairs:

> shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.... Subject to subsection (b), *the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court,* whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a) (emphasis added). Section 511(a) specifically "precludes judicial review in Article III courts of VA decisions affecting the provision of veterans' benefits." Price v. United States, 228 F.3d 420, 421 (D.C. Cir. 2000).

Count ten alleges harassment, intimidation, and retaliation by JAB, Solomon, and JAB's brother AWB, all of whom were VA employees. For the reasons set forth above, the actions by JAB and Solomon cannot be deemed to be within the scope of employment. As to AWB, Plaintiff alleges only that he worked in the VA Patient Records Office and that he relayed several threatening messages from JAB to Plaintiff. No facts allow any inference that AWB relayed these messages in the course of his employment with the VA.

Finally, count fourteen repeats the allegations of count ten under the guise of an intentional infliction of mental distress claim. For the same reasons set forth above, these actions were not within the scope of the individuals' employment.

In short, Plaintiff incorrectly assumes that because JAB, Solomon, and AWB were employed by Coatesville VA during the relevant time period, all of their actions with respect to Plaintiff were done within the scope of their employment. Without some showing that these actions were the kind these individuals were employed to perform, occurred substantially within the authorized time and space limits, and were actuated at least in part by a purpose to serve the master, Plaintiff cannot plausibly allege that they fell within the waiver of immunity provision of § 1346(b)(1). Accordingly, I will dismiss counts seven, nine, ten, and fourteen for lack of subject-matter jurisdiction.

3. Failure to Exhaust

Defendants' last jurisdictional argument contends that Plaintiff failed to exhaust her administrative remedies as to count eleven.

The FTCA expressly provides that "[a]n action shall not be instituted upon a claim against the United States" for damages "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing. . . ." 28 U.S.C. § 2675(a). "Although an administrative claim need not propound every possible

theory of liability in order to satisfy section 2675(a), . . . a plaintiff cannot present one claim to the agency and then maintain suit on the basis of a different set of facts." Roma v. U.S., 344 F.3d 352, 362 (3d Cir. 2003) (quotation omitted). Given the strict construction of the limited waiver of sovereign immunity by the United States, the Third Circuit has held that "the requirement that the appropriate federal agency act on a claim before suit can be brought is jurisdictional and cannot be waived." Id.

In count eleven, Plaintiff contends that VA employees JAB, Solomon, and AWB targeted her as a disabled, woman veteran, and portrayed her as a psychiatric patient, even though she was a cardiac patient, with the intent of perpetuating negative stereotypes and having her involuntarily committed. (Compl. p. 18.) As a result, Plaintiff's primary care provider, Dr. Cooper, treated her as though she was delusional and dismissed her reports about vandalism, harassing, and stalking. (Id.) In addition, when she asked the Coatsville VAMC to help her get admitted to the Wilmington VAMC, the Coatesville staff insisted that they were only willing to admit her to the psychiatric ward. (Id.)

Neither this claim nor its underlying facts appear anywhere in Plaintiff's administrative complaint. Plaintiff limited her administrative claims to negligent infliction of emotional anguish/mental stress; negligent application of VHA Directive 2010-053, 38 C.F.R. 17.07; negligent omission of threat assessment; negligent retention of dangerous employee; patient abuse; negligent actions which encouraged known violent employee to dehumanize and stalk women veterans; and Health Insurance Portability & Accountability Act and Privacy Act violations. (Compl., Ex. 1, exh. A.) At no point did Plaintiff discuss discriminatory treatment by Dr. Cooper or mention the refusal to assist her admission to the Wilmington VAMC.

As Plaintiff has failed to exhaust this claim, and as the exhaustion requirement is jurisdictional, I must dismiss this claim for lack of subject matter jurisdiction.

II. Failure to State a Claim

A. Rule 12(b)(6) Standard

Under Federal Rule of Civil Procedure 12(b)(6), a defendant bears the burden of demonstrating that the plaintiff has not stated a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); see also Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005). The United States Supreme Court has recognized that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quotations omitted). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and "only a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint does not show an entitlement to relief when the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct. Id.

The United States Court of Appeals for the Third Circuit has detailed a three-step process to determine whether a complaint meets the pleadings standard. Bistrian v. Levi, 696 F.3d 352 (3d Cir. 2014). First, the court outlines the elements a plaintiff must plead to state a claim for relief. Id. at 365. Next, the court must "peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth." Id. Finally, the court "look[s] for well-pled factual allegations, assume[s] their veracity, and then 'determine[s] whether they plausibly give rise to an entitlement to relief.'" Id. (quoting Iqbal, 556 U.S. at 679). The last step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (quoting Iqbal, 556 U.S. at 679).

B. Discussion

Having found no subject-matter jurisdiction over thirteen of Plaintiff's fifteen causes of action, only counts four and fifteen remain. I now turn to the merits of these counts to address whether Plaintiff has properly stated a claim under Federal Rule of Civil Procedure 12(b)(6).

1. Privacy Violation

Count four of the Complaint alleges that

> At all times relevant in 2014 VA Employee AWB (JAB[']s brother) was an employee in Coatesville VAMC's PATIENT RECORDS OFFICE. Defendant employer is liable for [AWB]'s HIPAA violations and the breaches of Plaintiff's privacy—which includes the un-authorized access and disclosure of Plaintiff's private health information to JAB—who disclosed and disseminated the information to 3rd parties for malicious reasons. Among those reasons, was a malicious prosecution in a frivolous "Protection From Abuse" civil action.

(Compl. at p. 15.)

Pennsylvania law recognizes four torts under the umbrella of invasion of privacy: "[1] unreasonable intrusion upon the seclusion of another; [2] appropriation of another's name or likeness; [3] unreasonable publicity given to another's private life; and [4] publicity that unreasonably places the other in a false light before the public." Boring v. Google Inc., 362 F. App'x 273, 278 (3d Cir. 2010) (quoting Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 376–77 (Pa. 2009) (citing Restatement (Second) of Torts §§ 652B–E (1977))). As neither the second nor the fourth tort apply to the facts here, I will treat Plaintiff's claim as arising under either the first tort (intrusion upon seclusion) or the third tort (unreasonable publicity).

A claim for unreasonably publicity requires allegations of "(1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person, and (4) is not of legitimate concern to the public." Id. at 280 (quoting Harris by Harris v. Easton Publ'g. Co., 483 A.2d 1377, 1384 (Pa. Super. 1984) (citing Restatement (Second) of Torts § 652D))). "The

element of 'publicity' requires that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. Disclosure of information to only one person is insufficient." Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 378 (Pa. 2009) (quoting Harris, 483 A.2d at 1384).

In her Complaint, Plaintiff alleges that the sole recipient of Plaintiff's personal health information was JAB. As the element of publicity is not satisfied, this theory cannot survive.

A claim for intrusion upon seclusion, on the other hand, does not have an element of publication. See Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 (3d Cir. 1992). Rather, a plaintiff must allege conduct demonstrating "an intentional intrusion upon the seclusion of [a plaintiff's] private concerns which was substantial and highly offensive to a reasonable person, and aver sufficient facts to establish that the information disclosed would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities." Boring, 362 F. App'x at 278–79 (quoting Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 809 A.2d 243, 247 (Pa. 2002) (citations omitted). "[A]n actor commits an intentional intrusion only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." O'Donnell v. U.S., 891 F.2d 1079, 1083 (3d Cir. 1989).

Although Defendants argue that the Complaint fails to adequately plead that intrusion by AWB was intentional, their argument is misplaced at this stage of the litigation. Plaintiff plausibly alleges that the Coatesville VA had records containing personal health information, that its employee AWB had access to that health information, that the VA Privacy Policy directed that such information was to be kept confidential,[13] and that AWB, presumably acting within the scope

[13] Pursuant to VHA Notice of Privacy Practices IB-10-163:

> The Department of Veterans Affairs' (VA) Veterans Health Administration (VHA) is required by law to maintain the privacy of

of his employment, intentionally disclosed it to his brother, who then used it for malicious purposes. Although the Complaint does not specifically address AWB's intention, it is a reasonable inference from the Complaint's allegations that AWB was substantially certain that he did not have the necessary legal or personal permission to disclose such information to JAB. Such allegations survive a motion to dismiss.[14]

2. Punitive Damages

In count fifteen of the Complaint, Plaintiff seeks punitive damages. The FTCA, however, specifically precludes such damages, stating:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674; see also Provolos v. FBI, 632 F. App'x 58, 59 n.1 (3d Cir. 2015) (holding that punitive damages are not authorized by the FTCA). Accordingly, I will dismiss this Count of the Complaint.

C. **Conclusion as to Defendants' Motion to Dismiss**

In light of the foregoing, Plaintiff's claim for invasion of privacy (count four) survives as against the United States. I find, however, that the Court lacks subject matter jurisdiction over

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> your protected health information and to provide you with notice of its legal duties and privacy practices. VHA is also required to abide by the terms of this Notice and its privacy policies.

Id.

[14] Plaintiff brings this claim against the United States, as well as Coatesville VA Medical Center, and administrators of the Region 4 Veterans Integrated Services Network, including human resources staff, program managers, and policy makers. (Compl. p. 1.) It is well established that "[t]he only proper defendant in an FTCA suit is the United States itself." Feaster v. Fed. Bureau of Prisons, 366 F. App'x 322, 323 (3d Cir. 2010). Neither the agency nor individual employees are proper defendants with respect to claims under the FTCA. See Travis v. Sniezek, No. 10-2653. 2012 WL 2389849, at *2 (M.D. Pa. May 8, 2012). Thus, to the extent count four has been brought against any Defendant other than the United States, that claim will be dismissed.

counts one to three and five to fourteen of the Complaint, and that Plaintiff may not pursue his count fifteen claim for punitive damages against the United States. Because amendment these claims would be futile, I will not grant leave to file an amended complaint.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff has filed a counter-motion for summary judgment which presumably seeks a judgment in her favor on the entirety of her Complaint. As set forth in detail above, however, all of Plaintiff's claims—but for count four—must be dismissed. Although count four survives, Plaintiff has not demonstrated the absence of a genuine issue of material fact on this claim, which would entitle her to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). Indeed, Plaintiff only surmises that AWB disclosed her personal health information to JAB, but offers no evidence to prove that AWB, while acting in the scope of his employment in the Patient Record Office, released the records.

CONCLUSION

In light of the foregoing, I will deny Plaintiff's Motion for Summary Judgment and I will grant Defendants' Motion to Dismiss in part and deny it in part. An appropriate Order follows.

APPENDIX C

Docket: Pag1 Shows Incorrect Designation of Federal Employer Liability Complaint as "Civil Rights" Other (pursuant to 42 USC 1983)

CLOSED,STANDARD

United States District Court
Eastern District of Pennsylvania (Philadelphia)
CIVIL DOCKET FOR CASE #: 2:17-cv-01551-MSG

BROWN v. UNITED STATES et al
Assigned to: HONORABLE MITCHELL S. GOLDBERG
Cause: 42:1983 Civil Rights Act

Date Filed: 04/05/2017
Date Terminated: 02/21/2019
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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