

APPENDIX: A

United States Court of Appeals
for the Fifth Circuit

No. 19-41061
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

February 26, 2021

Lyle W. Cayce
Clerk

ERWIN EUGENE SEMIEN,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
No. 1:18-CV-512

Before KING, SMITH, and WILSON, *Circuit Judges.*

PER CURIAM:*

Erwin Semien, federal prisoner #05695-078, appeals the dismissal, for want of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), of his complaint per the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* Semien maintains that the district court erred in determining that it

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

lacked jurisdiction because he failed to exhaust his administrative claim that a prison employee negligently caused his shoulder injury and the persons responsible for his medical care were not government employees.

We review *de novo* a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). As a jurisdictional prerequisite under the FTCA, a claimant must exhaust his claim administratively before suing by giving notice of the claim to the appropriate federal agency. § 2675(a); *Cook v. United States ex rel. United States Dep't of Labor*, 978 F.2d 164, 165–66 (5th Cir. 1992). An administrative grievance must contain sufficient detail to give prison officials fair notice of the problem that will form the basis of the intended lawsuit plus an opportunity to address the problem. *Johnson v. Johnson*, 385 F.3d 503, 516–17 (5th Cir. 2004).

When making an administrative claim, a plaintiff is not required to enumerate legal theories of recovery specifically. *Life Partners Inc. v. United States*, 650 F.3d 1026, 1030 (5th Cir. 2011). “As long as the Government’s investigation of [the] claim should have revealed theories of liability other than those specifically enumerated therein, those theories can properly be considered part of the claim.” *Id.* (internal quotation marks and citation omitted).

Semien’s complaint alleged that while housed at FCC Beaumont, he suffered a torn rotator cuff when he fell from a broken chair that the Bureau of Prisons (“BOP”) negligently failed to maintain. His administrative claim, however, urged claims concerning injury caused by negligent medical care. The administrative claim failed to provide sufficient facts to alert the BOP of the negligence of a prison employee with regard to the chair or to allow for the investigation of such a claim. *See Johnson v. Johnson*, 385 F.3d 503, 516–17 (5th Cir. 2004). The district court therefore did not err in concluding

that Semien had failed to exhaust his claim that the chair had been negligently maintained.

Semien contends that the district court erred in finding that none of his medical treatment was provided by government employees. The FTCA provides for a waiver of the United States' immunity from suit for those claims regarding "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" § 2679(b)(1). Although the United States has consented to be sued under the FTCA, such consent does not extend to the acts of independent contractors. *See Broussard v. United States*, 989 F.2d 171, 174 (5th Cir. 1993). The critical factor in determining whether an individual is an employee of the government or of an independent contractor is the power of the government to control that person's detailed physical performance. *See Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998).

The government produced affidavit testimony that medical care at FCC Beaumont was provided by an independent contractor, League Medical Concepts, LLC ("LMC"), under a comprehensive managed health care contract; no BOP personnel provided medical care to Semien at FCC Beaumont. *See Den Norske Stats Oljeselskap As v. HeereMac V.O.F.*, 241 F.3d 420, 424 (5th Cir. 2001); *Menchaca v. Chrysler Credit Corp.* 613 F.2d 507, 511 (5th Cir. 1980). Semien has produced no competing evidence that the contract permitted the BOP to control the detailed performance of LMC or its employees such that the district court's finding was erroneous. *See Linkous*, 142 F.3d at 275.

Semien's contention that the district court impermissibly reached the merits of his tort claim is incorrect. The finding regarding the status of LMC as an independent contractor went to the issue of jurisdiction insofar as the

government's immunity from suit does not extend to the acts of independent contractors, *see Broussard*, 989 F.2d at 174, and dismissal for lack of subject matter jurisdiction is not a determination on the merits of the underlying tort claim, *see Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Although Semien posits, for the first time on appeal, that the United States is liable for knowingly and willfully placing him in the substandard care of independent contractors, "[a]rguments not raised before the district court are waived and cannot be raised for the first time on appeal." *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

Semien contends that the district court abused its discretion in denying his two requests for appointment of counsel. We review for abuse of discretion the denial of a motion for appointment of counsel. *See Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir. 1987). An FTCA complainant "has no right to the automatic appointment of counsel." *See Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982). An indigent plaintiff is not entitled to the appointment of counsel unless the case presents exceptional circumstances. *Id.* The existence of exceptional circumstances depends on the type and complexity of the case and the abilities of the person litigating it. *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982). Our review of the pleadings in this routine negligence case establishes that Semien was not unduly hindered in presenting his case without counsel and, therefore, that the district court did not abuse its discretion. *See Ulmer*, 691 F.2d at 213.

AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 19-41061

United States Court of Appeals
Fifth Circuit

FILED

March 30, 2021

Lyle W. Cayce
Clerk

ERWIN EUGENE SEMIEN,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:18-CV-512

ON PETITION FOR REHEARING EN BANC

(Opinion 2021 U.S. App. LEXIS 5809, Feb. 26, 2021)

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35; 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX: B

Defendant's Motion to Dismiss

The United States of America has moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(1). The defendant contends that plaintiff had a pre-existing shoulder injury, and that he re-injured his torn rotator cuff by pulling a lever at work in January of 2017. The defendant contends that the court lacks subject matter jurisdiction over the FTCA action because the Inmate Accident Compensation Act is the exclusive remedy for a federal prisoner injured while working.

Analysis

The district court has the authority to dismiss an action for lack of subject matter based on: (1) the complaint alone, (2) the complaint supplemented by undisputed facts, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). The court generally can decide disputed issues of material fact in order to determine whether or not it has jurisdiction. *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (3rd Cir. 2004). However, in the context of an FTCA action, the court should not resolve disputed facts that are dispositive of both subject matter jurisdiction and the merits of the FTCA claim. *Id.* at 151.

In this case, the cause of plaintiff's injury is in dispute. Plaintiff contends that he injured his shoulder when he fell on a negligently-maintained chair, and the defendant contends that plaintiff aggravated a pre-existing shoulder injury at work. The resolution of the disputed facts is dispositive of both subject matter jurisdiction and the merits of plaintiff's FTCA claim. Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be denied at this stage of the proceedings.

Recommendation

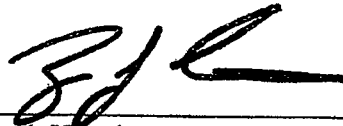
The government's motion to dismiss for lack of jurisdiction should be denied.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 15th day of August, 2019.

A handwritten signature in black ink, appearing to read 'Zack Hawthorn', written over a horizontal line.

Zack Hawthorn
United States Magistrate Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

ERWIN EUGENE SEMIEN,

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendant.

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CIVIL ACTION NO. 1:18-CV-512

**MEMORANDUM ORDER ADOPTING THE MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION**

Plaintiff Erwin Eugene Semien, a prisoner confined at the Federal Correctional Institution in Beaumont, Texas, proceeding *pro se*, brought this civil action pursuant to the Federal Tort Claims Act.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends denying defendant's motion to dismiss for lack of jurisdiction.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties.

ORDER

Accordingly, the findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge (#15) is **ADOPTED**. Defendant's motion to dismiss (#12) is **DENIED**.

SIGNED at Beaumont, Texas, this 10th day of September, 2019.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ERWIN EUGENE SEMIEN

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VS.

§

CIVIL ACTION NO. 1:18-CV-512

UNITED STATES OF AMERICA

§

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Erwin Eugene Semien, a prisoner confined at the Federal Correctional Institution in Beaumont, Texas, proceeding *pro se* and *in forma pauperis*, filed this civil action pursuant to the Federal Tort Claims Act (FTCA) against the United States of America.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Plaintiff alleges employees of the Federal Correctional Institution in Beaumont failed to maintain inmate chairs at the prison facility. On December 17, 2016, plaintiff alleges he unknowingly sat on a broken chair and fell, injuring his shoulder. Plaintiff also claims that he received inadequate medical care for his injured shoulder.

Defendant's Motion to Dismiss

The government has moved to dismiss the action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The government contends that plaintiff's claim of negligently-maintained property is not actionable because the claim was not raised in an administrative tort action. The government contends that plaintiff's claims concerning his medical treatment should also be dismissed for lack of subject matter jurisdiction because all medical care at the prison is provided by an independent contractor, not government employees.

Standard of Review

The district court has the authority to dismiss an action for lack of subject matter jurisdiction based on: (1) the complaint alone, (2) the complaint supplemented by undisputed facts, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). The court generally can decide disputed issues of material fact in order to determine whether or not it has jurisdiction. *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (3rd Cir. 2004). However, in the context of an FTCA action, the court should not resolve disputed facts that are dispositive of both subject matter jurisdiction and the merits of the FTCA claim. *Id.* at 151.

Analysis

The FTCA provides a limited waiver of sovereign immunity. The statute allows the United States to be held liable to the same extent as a private employer for certain common law torts of government employees acting within the scope of their employment. 28 U.S.C. § 1346(b); *Coleman v. United States*, 912 F.3d 824, 835 (5th Cir. 2019).

Negligently Maintaining Chair

A claim is not actionable in federal court unless the claimant has exhausted administrative remedies with the appropriate government agency. 28 U.S.C. § 2675(a). The FTCA bars claimants from filing suit in federal court until they have exhausted administrative remedies. *McNeil v. United States*, 508 U.S. 106, 113 (1993). Although the plaintiff is not required to specifically enumerate legal theories of recovery, the administrative claim must provide the agency with sufficient facts to allow investigation of the claim. *Life Partners Inc. v. United States*, 650 F.3d 1026, 1030 (5th Cir. 2011).

Plaintiff filed an administrative tort claim complaining that he was being denied medical treatment for a shoulder injury. Plaintiff identified the basis of his claim as follows:

INADEQUATE MEDICAL CARE/LACK OF TREATMENT

On or about December 17, 2016 on a Saturday evening at about 6:00 PM I "Unknowingly" sat in a broken chair which caused me to fall. I sustained an Injury to my right shoulder and arm. An MRI revealed I have a "torn rotator cuff." Lack of Medical treatment caused my injury.

Defendant's Second Motion to Dismiss, Dkt Entry 10-1 at 5. Plaintiff attached a typewritten page documenting his attempts to receive medical treatment for his injured shoulder, but there are no allegations that the injury itself was caused by the negligence of a prison employee. Plaintiff did not provide sufficient facts to alert the Bureau of Prisons that a prison employee was negligent with respect to the broken chair or to allow investigation of such a claim. Therefore, plaintiff's claim that the chair was negligently maintained is unexhausted and must be dismissed.

Inadequate Medical Treatment

The FTCA does not waive immunity as to claims against workers who are not government employees. *Peacock v. United States*, 597 F.3d 654, 659 (5th Cir. 2010). Thus, the court lacks subject matter jurisdiction if the alleged wrongdoer is not a government employee. *Broussard v. United States*, 989 F.2d 171, 177 (5th Cir. 1993).

The FTCA defines government employees as officers or employees of federal agencies, members of the military or naval forces, and persons acting on behalf of a federal agency in an official capacity. 28 U.S.C. § 2671. A contractor with the United States is not a government employee for purposes of the FTCA. *Id.* A critical factor in distinguishing a government employee from a contractor is the power of the government to control the detailed physical performance of the work. *United States v. Orleans*, 425 U.S. 807, 814 (1976); *Peacock*, 597 F.3d at 659. Other factors, including the following, may demonstrate an employee relationship: (1) the work does not require a worker who is highly educated or skilled; (2) the work is typically done by an employee in the locale, rather than an independent contractor; (3) the employer supplies the tools, instrumentalities, or place of work; (4) the employment is for a considerable period of time with regular hours; (5) the method of payment is by the hour or month; (6) the work is full-time employment by one employer; (7) the work is part of the employer's regular business; and (8) the parties believe they have created an employment relationship. *Rodriguez v. Sarabyn*, 129 F.3d 760, 765 (5th Cir. 1997).

Plaintiff offers no factual support for his conclusory allegation that some of the individuals who denied him medical treatment were employed by the Bureau of Prisons. Medical care at the prison is provided by an independent contractor, League Medical Concepts. Under the contract, ~~League Medical Concepts is paid a flat rate per day, per inmate. The contract requires League~~

Medical Concepts to provide health services at the prison and to coordinate off-site medical treatment as necessary, and all medical decisions are made by League Medical Concepts. Because the medical staff is employed by League Medical Concepts, not the Bureau of Prisons, the court lacks subject matter jurisdiction over plaintiff's claim that he was denied medical treatment. *See Sampson v. United States*, 73 Fed. Appx. 48, 49 (5th Cir. 2003) (holding that the FTCA waiver of immunity does not extend to negligent acts of independent contractors). Therefore, the court lacks subject matter jurisdiction over the FTCA claims concerning plaintiff's medical care.

Recommendation

The government's motion to dismiss for lack of jurisdiction should be granted.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United*

Services Automobile Association, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 31st day of October, 2019.



Zack Hawthorn
United States Magistrate Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

ERWIN EUGENE SEMIEN,

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendant.

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CIVIL ACTION NO. 1:18-CV-512

**MEMORANDUM ORDER OVERRULING PLAINTIFF'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Plaintiff Erwin Eugene Semien, a prisoner confined at the Federal Correctional Institution in Beaumont, Texas, proceeding *pro se* and *in forma pauperis*, filed this civil action pursuant to the Federal Tort Claims Act.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge. The magistrate judge recommends granting the government's second motion to dismiss for lack of jurisdiction.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings, and all available evidence. Plaintiff filed objections to the magistrate judge's Report and Recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes the objections are without merit. The court lacks subject matter jurisdiction because plaintiff


failed to exhaust his claim that a prison employee negligently caused his shoulder injury and the individuals responsible for his medical treatment were not government employees.

ORDER

Accordingly, plaintiff's objections (#23) are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge (#21) is **ADOPTED**. The government's second motion to dismiss (#17) is **GRANTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

Signed this date

Dec 18, 2019

A handwritten signature in cursive script, reading "Marcia A. Crone", is written over a horizontal line.

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

ERWIN EUGENE SEMIEN,

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendant.

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CIVIL ACTION NO. 1:18-CV-512

FINAL JUDGMENT

This action came on before the Court, Honorable Marcia A. Crone, District Judge, presiding, and, the issues having been considered and a decision having been rendered, it is

ORDERED and **ADJUDGED** that this civil action is **DISMISSED** pursuant to Federal Rule of Civil Procedure 12(b)(1). All motions not previously ruled on are **DENIED**.

Signed this date

Dec 18, 2019



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE