

APPENDIX

**EDWARD JORODGE GLADNEY, Plaintiff-Appellant, v. UNITED STATES OF AMERICA,
Defendant-Appellee, and J. T. SHARTLE, Warden; et al., Defendants.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

2021 U.S. App. LEXIS 13068

No. 19-17443

April 16, 2021, Argued and Submitted, Seattle, Washington

May 3, 2021, Filed

Notice:

**PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING
THE CITATION TO UNPUBLISHED OPINIONS.**

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from the United States District Court for the District of Arizona. D.C.
No. 4:17-cv-00427-DCB. David C. Bury, District Judge, Presiding. Gladney v. JT Shartle, 2019 U.S. Dist.
LEXIS 200362 (D. Ariz., Nov. 18, 2019)

Disposition:

AFFIRMED.

Counsel

For EDWARD JORODGE **GLADNEY**, Plaintiff - Appellant: Gregory C.
Sisk, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW, Minneapolis, MN.

For UNITED STATES OF AMERICA, Defendant - Appellee:
Michael Alexander Ambri, USPX - Office of the US Attorney, Phoenix, AZ.

For CIVIL RIGHTS, HEALTH CARE, & NON-PROFIT
ORGANIZATIONS, Amicus Curiae: Joanna C. Wright, Boies Schiller Flexner LLP, New
York, NY.

Judges: Before: GRABER and CALLAHAN, Circuit Judges, and SELNA, ** District Judge.

Opinion

MEMORANDUM*

Plaintiff Edward **Gladney**, a transgender federal prisoner, appeals the district court's dismissal of her suit under the Federal Tort Claims Act ("FTCA") following her alleged sexual assault at United States Penitentiary ("USP") Tucson. Reviewing de novo, Young v. United States, 769 F.3d 1047, 1052 (9th Cir. 2014), we affirm.

1. The district court properly held that it lacks jurisdiction under the discretionary function doctrine. See Alfrey v. United States, 276 F.3d 557, 561 (9th Cir. 2002) (holding that the FTCA's limited waiver of sovereign immunity does not apply "if the tort claims stem from a federal employee's exercise of a 'discretionary function'"); see also 28 U.S.C. § 2680(a). Neither the Prison Rape Elimination Act ("PREA") {2021 U.S. App. LEXIS 2} nor any implementing regulation imposes a mandatory duty on the Federal Bureau of Prisons ("BOP") to monitor prisoners continuously. Cf. Alfrey, 276 F.3d at 561 (holding that a governmental function is not discretionary "when a federal

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1

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APPENDIX A

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statute, regulation or policy specifically prescribes a course of action for an employee to follow" (citation omitted)).

To the contrary, both sources of law explicitly grant the BOP discretion in how to reduce the sexual assault of people in its charge. See 34 U.S.C. § 30307(a)(1) (providing that "the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape"); 28 C.F.R. § 115.13(a) (providing that each prison "shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse" (emphases added)). The corresponding BOP policy directs the agency's human resources and administration divisions to "consider PREA factors and safety, in general, when allocating overall staffing resources." U.S. Dep't. of Justice, Fed. Bureau of Prisons Program Statement No. 5324.12, {2021 U.S. App. LEXIS 3} Sexually Abusive Behavior Prevention and Intervention Program (June 4, 2015), https://www.bop.gov/policy/progstat/5324_012.pdf. An agency's "ability to consider" several competing factors can "demonstrate[] that no 'course of action' was prescribed." Morales v. United States, 895 F.3d 708, 714 (9th Cir. 2018) (citation omitted).

Plaintiff's argument that the Attorney General's regulations for temporary lockups, which require continuous monitoring of certain people, 28 C.F.R. § 115.113, should also apply to prisons is unpersuasive. Indeed, we must give effect to the Attorney General's choice to promulgate different regulations, which lack any similar provision, for adult prisons. Those regulations "balanced a number of competing considerations" and deliberately crafted different provisions for different facilities "[b]ecause the purposes and operations of various types of confinement facilities differ significantly." National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37107 (June 20, 2012).

2. The district court erred in declining to address Plaintiff's argument that the Eighth Amendment's prohibition of cruel and unusual punishment—as described in Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)—limited the BOP's discretion in how it prevents the rape of prisoners. See Nurse v. United States, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (holding that "the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception {2021 U.S. App. LEXIS 4} will not apply"). But that error is harmless because, following the close of discovery, the record lacks evidence of any individualized risk to Plaintiff of which guards were aware. Plaintiff does not challenge her individualized risk assessment or her placement within the BOP.

3. USP Tucson's choices about how to monitor prisoners "involve[] the type of policy judgment protected by the discretionary-function exception." Alfrey, 276 F.3d at 564. "When a statute or regulation allows a federal agent to act with discretion, there is a 'strong presumption' that the authorized act is based on an underlying policy decision." Nurse, 226 F.3d at 1001 (quoting United States v. Gaubert, 499 U.S. 315, 324, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)). Assuming without deciding that the "negligent guard theory" is valid in our circuit, it would not apply here. See Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 475-76 (2d Cir. 2006) (per curiam) (holding that the discretionary function doctrine does not shield a "BOP employee's failure to perform a diligent inspection out of laziness, hastiness, or inattentiveness"). The record lacks evidence of a similar abdication of duty here.

AFFIRMED.

Footnotes

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This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**EDWARD JORODGE GLADNEY, Plaintiff-Appellant, v. UNITED STATES OF AMERICA,
Defendant-Appellee, and J. T. SHARTLE, Warden; et al., Defendants.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

2021 U.S. App. LEXIS 17706

No. 19-17443

June 14, 2021, Filed

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1} District of Arizona, Tucson. D.C. No. 4:17-cv-00427-DCB. Gladney v. United States, 2021 U.S. App. LEXIS 13068, 2021 WL 1739934 (9th Cir. Ariz., May 3, 2021)

Counsel

For EDWARD JORODGE GLADNEY, Plaintiff - Appellant: Gregory C. Sisk, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW, Minneapolis, MN.

For UNITED STATES OF AMERICA, Defendant - Appellee: Michael Alexander Ambri, USPX - Office of the US Attorney, Phoenix, AZ.

For CIVIL RIGHTS, HEALTH CARE, & NON-PROFIT ORGANIZATIONS, Amicus Curiae: Joanna C. Wright, Boies Schiller Flexner LLP, New York, NY.

Judges: Before: GRABER and CALLAHAN, Circuit Judges, and SELNA, * District Judge.

Opinion

ORDER

Appellant's petition for panel rehearing, Docket Entry No. 62, is DENIED.

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APPENDIX B

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argued in the reply brief. So I will refer to Alfrey as I get into those aspects, but I wanted to make it clear that that's a an important decision for this case. Also, I wanted to also in case I don't get to it. This is an appeal from a rule 12(b)(1) decision. I will be referring to facts in the record. The plaintiff Ms. Gladney's allegations of fact are not entitled to the presumption of truth. It's it's a plaintiff's obligation to provide facts relating to the jurisdictional issues. I will point out where plaintiffs didn't do that, but I want that standard, I want to keep it up, let me get you to the.

Judge Graber: Counsel, let me get you to the Eighth Amendment question. Because that's just speaking for myself seems to be the closest question as to whether there's at least jurisdiction over the case. And it's true that Farmer is law and not fact, but it does seem that the facts there and the facts here are relatively similar. And I'd like you to address why, in your view you think there is not enough for the District Court to have to examine whether there's jurisdiction over these the Eighth Amendment claim.

Mr. Ambri: Certainly, and we're not talking about a claim, I think I think as framed by appellant it's an argument that discretion there's no discretion because --

Judge Graber. Correct, I misstated. But there is no discretion to violate the Eighth Amendment. But, at all events, if you would address that.

Mr. Ambri: Certainly. I think the Court already pointed out that the key issue in appellant's argument is that transgender inmates as a class are entitled to heightened protections. That is not the way the regulatory environment establishes. It's an individualized determination.

Judge Graber: But in Farmer, in Farmer wasn't specifically individualized as I recall, there wasn't anything particular about mapping or that was different, so why isn't it sufficient that this is a very high risk prison for sexual assault and transgender inmates are at greater risks under Farmer, why isn't that enough?

Mr. Ambri: Because there is an evaluation of this particular inmate's risk taking into account a variety of factors. Certainly in a prison is a dangerous environment, it's a very complicated environment, but there is no known risk to this particular inmate that that would make this assault foreseeable. What we have here, there was absolutely no history between these two inmates, there was no complaint from Ms. Gladney about any insecurity

Edward J. Gladney, Plaintiff, v. JT Shartle, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
2020 U.S. Dist. LEXIS 199332
No. CV 17-00427-TUC-DCB
October 18, 2019, Decided
October 26, 2020, Filed

Editorial Information: Subsequent History

Reconsideration denied by Gladney v. JT Shartle, 2019 U.S. Dist. LEXIS 200362 (D. Ariz., Nov. 18, 2019)

Editorial Information: Prior History

Gladney v. Shartle, 2018 U.S. Dist. LEXIS 213353 (D. Ariz., Dec. 19, 2018)

Counsel {2020 U.S. Dist. LEXIS 1} Edward J. Gladney, Plaintiff, Pro se,
COLEMAN, FL.

For United States of America, Defendant: Michael Alexander
Ambri, LEAD ATTORNEY, US Attorneys Office - Tucson, AZ, Tucson, AZ.

Judges: Honorable David C. Bury, United States District Judge.

Opinion

Opinion by: David C. Bury

Opinion

AMENDED1 ORDER

Plaintiff Edward J. Gladney, who is currently confined in United States Penitentiary (USP)-Coleman in Coleman, Florida, brought this civil rights action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346 and 2671-2680. (Doc. 10.) Before the Court are Plaintiff's Motion for Summary Judgment (Doc. 76) and Defendant's Motion to Dismiss/Motion for Summary Judgment (Doc. 109). The Motions are fully briefed and ripe for ruling. (Docs. 114, 115, 122, 126.)²

I. Background

In her Second Amended Complaint, Plaintiff sues the United States of America and raises one claim for relief. (Doc. 10 at 3.) Plaintiff alleges that on May 19, 2016, while she was housed in the USP-Tucson in Tucson, Arizona, she was sexually assaulted by prisoner Tyrell Powell [TEXT REDACTED BY THE COURT] between 9:01 a.m. and 10:05 a.m. (*Id.*) Plaintiff claims Defendant negligently "failed to provide adequate officer monitoring of an out-of-bounds inmate and failed to adequately{2020 U.S. Dist. LEXIS 2} staff [the] housing unit with at least two officers as required." (*Id.*) Plaintiff seeks monetary damages. On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated an FTCA claim and directed Defendant to answer. (Doc. 12.)

Defendant moves for dismissal under Federal Rule of Civil Procedure 12(b)(1) on the grounds that Plaintiff's claim is barred by the FTCA's discretionary function exception and that Plaintiff failed to exhaust her administrative remedies "on any and all claims beyond the alleged claim of failure to

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monitor by the officer on duty in Plaintiff's housing unit." (Doc. 109 at 1.) In the alternative, Defendant moves for summary judgment on the merits of Plaintiff's claim. (*Id.*) Plaintiff also moves for summary judgment. (Doc. 76.)

II. Relevant Facts

A. Sexual Assault

On May 19, 2016, Plaintiff was housed in the USP-Tucson B-2 Housing Unit. (*Id.* ¶ 1.) Prisoner [TEXT REDACTED BY THE COURT] was housed in the D-1 Housing Unit. (*Id.* ¶ 2.) USP-Tucson is a designated Sex Offender Management Program (SOMP) facility, with the goals of assessment, treatment, and management of convicted sex offenders. (Doc. 90 (Pl.'s Supp. Statement of Facts) ¶ 36; Doc. 90-1 at 1-2 (Pl.'s Ex. 10); Doc. 102 (Def.'s Statement of Facts){2020 U.S. Dist. LEXIS 3} ¶ 15.) SOMP facilities generally "maintain a significant proportion of sexual offenders in the population." (Doc. 90-1 at 6 (Pl.'s Ex. 11).)

Plaintiff identifies herself as "transgender/feminine." (Doc. 77 (Pl.'s Statement of Facts) ¶ 18.)³ She asserts that she has "been outwardly homosexual since the year 2001, and [has] been outwardly transgender since July of 2013." (Doc. 80 (Pl.'s Decl. ¶ 46).) Plaintiff states that she has "had feminine mannerisms since grade school" and the staff at USP-Tucson often addressed him as "M[a]am and Ms." (*Id.* ¶ 47.)

On May 19, 2019, between the hours of 9:01 a.m. and 10:05 a.m., Housing Unit Officer (H.U.O.) B. Westling was the only H.U.O. on duty in the B-2 Housing Unit. (Doc. 77 ¶ 3.) Plaintiff alleges that at some point on May 19, 2016, [TEXT REDACTED BY THE COURT] entered the B-2 Unit and sexually assaulted her between the hours of 9:01 a.m. and 10:05 a.m. (Doc. 10 at 3; Doc. 80 (Pl.'s Decl.) ¶ 13.) Plaintiff states that [TEXT REDACTED BY THE COURT] asked for help cleaning his shoes. (*Id.* ¶ 17.) Plaintiff entered cell #107, and cleaned [TEXT REDACTED BY THE COURT]'s shoes. (*Id.* ¶¶ 19-22.) When Plaintiff attempted to leave the cell, [TEXT REDACTED BY THE COURT]{2020 U.S. Dist. LEXIS 4} THE COURT placed a "make-shift knife" to Plaintiff's back, pulled Plaintiff's pants and underwear down, and inserted his finger into Plaintiff's anus while masturbating. (*Id.* ¶¶ 24-30.) Afterwards, [TEXT REDACTED BY THE COURT] put the knife away and threatened Plaintiff not to tell anyone, and Plaintiff pulled up her shorts and underwear and exited the cell. (*Id.* ¶¶ 31-32.)

On May 20, 2016, Plaintiff "reported the incident by sliding a note under the Counselor's door[.]" (Doc. 80 ¶ 35.) In an Inmate Request to Staff dated May 19, 2016, Plaintiff stated:

[TEXT REDACTED BY THE COURT] has been coming in this unit on a regular basis harassing me which was a reason I moved to B-1 a few months back. Today, he came in the unit between 9:00 a.m.-9:15 a.m., and left at the 10 a.m. recall (10:15 a.m.). When he came into the unit, he went in cell #107 and called me in a few minutes later. He asked me to perform oral sex. I refused. At this point he became very hostile and threatened me. He then forced my shorts down and began masturbating to the point of ejaculation. Please keep him away from me. I am in fear of my life with him on this yard.(Doc. 102-4 (Def.'s Ex. 3, Attach. A).)

Plaintiff was{2020 U.S. Dist. LEXIS 5} subsequently called into the Lieutenant's office where she described the sexual assault "in great detail" to Lieutenants R. Reed and J. Van Devender and a prison psychologist. (*Id.* ¶¶ 36-37.) Plaintiff was given "a medical evaluation and psychological services," and an investigation was initiated. (Doc. 102 ¶ 5.) At some point after Plaintiff reported the incident, [TEXT REDACTED BY THE COURT] was placed in the Special Housing Unit (SHU) pending investigation. (Doc. 77 ¶ 4.)⁴

On May 23, 2016, Plaintiff and [TEXT REDACTED BY THE COURT] were interviewed separately.

(Doc. 110 at 6 (Def.'s Ex. 2, Attach. A).) [TEXT REDACTED BY THE COURT] admitted to being in an unauthorized location ("out of bounds"), but he denied sexually assaulting Plaintiff. (*Id.*) Interviews were also conducted with other prisoners; no one witnessed the reported incident. (*Id.* at 7.) Plaintiff reported that [TEXT REDACTED BY THE COURT] had been harassing her for approximately six months, but this was the first time she had reported [TEXT REDACTED BY THE COURT]'s sexual harassment to USP-Tucson staff. (*Id.* at 8.) According to the investigation notes, medical evaluation notes, and psychology services notes, Plaintiff reported that [TEXT REDACTED BY THE COURT] pulled her pants{2020 U.S. Dist. LEXIS 6} down and began to masturbate and that there was no physical contact or penetration during the incident. (Doc. 110 at 6, 8, 12.)

The USP-Tucson staff reviewed video of the B-2 Unit, but there was no footage showing what happened inside cell #107. (Doc. 102 ¶ 10.) There is no video footage showing [TEXT REDACTED BY THE COURT] entering the B-2 Unit the day of the assault. (Doc. 77 ¶ 10.)

The investigation resulted in a determination that the incident was unsubstantiated. (Doc. 102 ¶ 11.) [TEXT REDACTED BY THE COURT] was disciplined for being out of bounds, and he was transferred out of USP-Tucson shortly after Plaintiff reported the sexual assault. (*Id.* ¶¶ 12-13; Doc. 77 ¶ 9.)

B. Administrative Claim

Plaintiff completed an administrative tort claim ("Form 95") on September 15, 2016; it was received by the Bureau of Prisons (BOP) on October 24, 2016. (Doc. 102-4 at 7 (Def.'s Ex. 3, Attach. B).) In the claim, Plaintiff alleged that:

On May 19, 2016, between the hours of 9:01 a.m. and 10:05 a.m., [[TEXT REDACTED BY THE COURT]], who was assigned to be housed on D-1 unit (south side) ventured "out of bounds" to my assigned unit B-2 (north side) and sexually harassed and assaulted me. The officer{2020 U.S. Dist. LEXIS 7} posted in my unit (B-2), Correctional Officer B. Westling, willfully or otherwise negligently failed to monitor inmates who did not belong in the unit (B-2).(*Id.*)

Plaintiff's claim was investigated, and in a response dated March 10, 2017, Plaintiff was informed that the "[i]nvestigation fail[ed] to disclose any evidence of negligence or other conduct for which the United States is liable. You have failed to establish that you sustained a loss or personal injury as a result of staff negligence in this matter. Accordingly, your claim is denied." (*Id.* at 9 (Def.'s Ex. 3, Attach. C).) Plaintiff was also informed that she had six months from the date the response was mailed to bring a lawsuit. (*Id.*)

C. Relevant Policies

1. USP-Tucson Housing Unit Staffing

"Staffing at Bureau of Prisons facilities is based on the security level of the institution, the unique mission and layout of the institution, and the Bureau of Prisons[] allocation of financial and human resources across the 122 prisons it operates." (Doc. 102 ¶ 30.) Between 2013 and 2016, the BOP staffing allocation for HUOs at high security facilities, such as USP-Tucson, provided for one officer on each unit during each of the three shifts: morning (12:00 a.m. to 8:00{2020 U.S. Dist. LEXIS 8} a.m.), day (8:00 a.m. to 4:00 p.m.), and evening (4:00 p.m. to 8:00 a.m.) (*Id.* ¶ 31.) The staffing allocation also allowed for a second HUO to be scheduled in each unit during the evening shift and on weekends. (*Id.*; Doc. 110 at 23.)

In 2006, the BOP sought a budget increase "to provide for a second correctional officer in each unit, on each shift, at High-Security institutions, like USP Tucson." (*Id.* ¶ 32.) Once Congress approved the budget increase, the BOP updated its staffing guidelines to provide for two HUOs on each shift at

all high-security facilities. (*Id.*; Doc. 110 at 21, 23, 27.) The Master Agreement between the BOP and the Council of Prison Locals requires that "quarterly rosters must be posted prior to the upcoming quarter, so [that] bargaining unit staff can bid for assignments and shifts and submit requests for leave." (Doc. 102 ¶ 33.) In compliance with the Master Agreement, "the additional post created by the updated staffing guidelines had to be added to the roster and posted for the bargaining unit staff bidding process." (*Id.*) As such, the updated staffing guidelines did not go into effect at USP-Tucson until the second quarter change on June 15, 2016. (*Id.*)

2. BOP{2020 U.S. Dist. LEXIS 9} Program Statements (PS)

According to PS 5500.14,5 BOP facilities conduct five "official counts" every 24 hours. (*Id.* ¶ 36.) At USP-Tucson, official counts took place at around 12:01 a.m., 3:00 a.m., 5:00 a.m., 10: a.m., 4:00 p.m., and 10:00 p.m. (*Id.*) During official counts, all prisoners are locked in their cells while two staff members check each cell to make sure that the assigned prisoners are present and alive by "positively observing human flesh" when counting each prisoner. (*Id.*; PS 5500.14 § 300(4).)

Under PS 5500.14, "census checks" are conducted to identify prisoners in unauthorized and unassigned areas. (Doc. 102 ¶ 37.) A census check is not an official count or a total head count and must be conducted during each work period, morning and evening. (*Id.*; PS 5500.14 § 304.)

"Institutions will set guidelines and procedures for conducting the census check in an Institutional Supplement." (PS 5500.14 § 304(1).) At the relevant time, USP-Tucson morning census checks occurred after the 7:50 a.m. work call and before the 9:00 a.m. open move. (Doc. 102 ¶ 37.) On the morning of May 19, 2016, the census check took place at 8:40 a.m. and showed no unauthorized prisoners present and no prisoners absent without{2020 U.S. Dist. LEXIS 10} leave. (*Id.*)

With the exception of the official counts and census checks, PS 5500.14 does not contain any further parameters for scheduling or conducting monitoring in BOP housing units.

PS 3420.11(6) states that BOP "[e]mployees are required to remain fully alert and attentive during duty hours."6 Additionally, PS 1210.24(7) provides that "[b]reach of security or safety . . . resulting in escape or serious injury" constitutes a Classification 2 case of employee misconduct, and "[r]efusal to follow instructions or procedures . . . [and] failure to properly supervise or control persons in custody" constitutes a Classification 3 case of employee misconduct.7

3. Federal Statutes and Regulations

Pursuant to 18 U.S.C. § 4042(a)(2), the BOP is generally required to "provide suitable quarters and provide for the safekeeping, care, and subsistence" of prisoners in its custody. However, the statute does not contain any specifications for how BOP is to satisfy this duty. See 18 U.S.C. § 4042(a)(2).

Additionally, under the Prison Rape Elimination Act (PREA) National Standards, an "agency shall ensure that each facility it operates shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides{2020 U.S. Dist. LEXIS 11} for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse." 28 C.F.R. § 115.13. Further, "[i]n calculating adequate staffing levels and determining the need for video monitoring," correctional facilities must consider:

- (1) Generally accepted detention and correctional practices;
- (2) Any judicial findings of inadequacy;
- (3) Any findings of inadequacy from Federal investigative agencies;
- (4) Any findings of inadequacy from internal or external oversight bodies;

- (5) All components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated);
- (6) The composition of the inmate population;
- (7) The number and placement of supervisory staff;
- (8) Institution programs occurring on a particular shift;
- (9) Any applicable State or local laws, regulations, or standards;
- (10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and
- (11) Any other relevant factors.*(Id.)*

III. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (internal citations omitted). Under Federal Rule of Civil Procedure 12(b)(1), a defendant may seek dismissal of **{2020 U.S. Dist. LEXIS 12}** an action for lack of subject matter jurisdiction. A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction can be either a facial or factual attack. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* Dismissal is appropriate if the complaint on its face fails to allege facts sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-985 (9th Cir. 2008). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Meyer*, 373 F.3d at 1039. When addressing a factual attack on jurisdiction, a court may review evidence beyond the complaint. *Id.* The plaintiff has the burden of proving that the court has subject matter jurisdiction. *Tosco Corp. v. Cmty. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001), *overruled on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010).

A. Exhaustion

A plaintiff may not bring an FTCA claim until the plaintiff has exhausted all administrative remedies. *McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993). Courts strictly construe this requirement because "[s]overeign immunity is an important limitation on the subject matter jurisdiction of federal courts. The United States, as sovereign, can only be sued to the extent it has waived its sovereign immunity." **{2020 U.S. Dist. LEXIS 13}** *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250-1251 (9th Cir. 2006). "[Courts] have repeatedly held that the exhaustion requirement [of the FTCA] is jurisdictional in nature and must be interpreted strictly Any such waiver must be strictly construed in favor of the United States." *Id.* As such, § 2675(a) of the FTCA provides that:

An action shall not be instituted upon a claim against the United States . . . 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 and sent by certified or registered mail. 28 U.S.C. § 2675(a).

Here, Defendant argues that "Plaintiff has failed to exhaust her administrative remedies with respect [to] any and all claims other than a failure to monitor by the officer on duty[.]" (Doc. 109 at 11.) The only allegations Plaintiff brought in her Second Amended Complaint are that Defendant (1) "failed to

provide adequate officer monitoring of an out-of-bounds inmate" and (2) "failed to adequately staff [the] housing unit with at least two officers as required." (Doc. 10 at 3.) It is undisputed that in her September 15, 2016 administrative tort claim, Plaintiff only complained that she was sexually assaulted as result of the on-duty officer failing{2020 U.S. Dist. LEXIS 14} to monitor the prisoners in the B-2 Unit. (Doc. 102-4 at 7 (Def.'s Ex. 3, Attach. B).) Plaintiff did not mention inadequate staffing in her administrative tort claim. (See *id.*) Plaintiff's administrative tort claim was denied on March 10, 2017. (*Id.* at 9 (Def.'s Ex. 3, Attach. C).) There is no evidence that Plaintiff filed any other administrative tort claims regarding the May 19, 2016 sexual assault or inadequate staffing or that she exhausted any other claims. On these facts, the Court finds that the only claim Plaintiff exhausted is her claim that she was sexually assaulted due to Defendant's failure to provide adequate monitoring of her housing unit. All other claims will be dismissed for failure to exhaust.

B. FTCA/Discretionary Function Exception

1. Legal Standard

"The FTCA provides a limited waiver of the sovereign immunity of the United States for torts committed by federal employees acting within the scope of their employment." *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000) (citing *Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995)). Under the FTCA, the United States may be held civilly liable for the torts of its employees "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. To state a claim under the FTCA, a plaintiff "must show the government's actions, if committed{2020 U.S. Dist. LEXIS 15} by a private party, would constitute a tort" under state law. *Love v. United States*, 60 F.3d 642, 644 (9th Cir. 1995); 28 U.S.C. § 1346(b) (a plaintiff must allege that the United States "would be liable to the claimant" as "a private person" "in accordance with the law of the place where the act or omission occurred"). In other words, a plaintiff must allege a state law tort claim. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 477-78, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). Certain state law claims, however, are excluded from the FTCA—for example, libel, slander, misrepresentation, false arrest, and malicious prosecution. See 28 U.S.C. § 2680(h).

Also, the FTCA does not apply to claims involving "an act or omission of an employee of the Government . . . [that is] based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Thus, the FTCA may not apply to acts that "involv[e] an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988); *Green v. United States*, 630 F.3d 1245, 1249 (9th Cir. 2010) (if the discretionary function exception applies, sovereign immunity is reinstated).

The government bears the burden of showing that the discretionary function exception applies. *Bear Medicine v. U.S. ex rel. Sec'y of the Dep't of the Interior*, 241 F.3d 1208, 1213 (9th Cir. 2001). To make that showing, the government must prove that each of the allegedly wrongful acts, by each allegedly negligent{2020 U.S. Dist. LEXIS 16} actor, is covered by the discretionary function exception. *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002) ("when determining whether the discretionary function exception is applicable, '[t]he proper question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance'") (quoting *In re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir. 1995)).

For the discretionary function exception to apply, the challenged action must satisfy a two-part test. *Valdez*, 56 F.3d at 1179. First, the court must determine "whether a federal statute, regulation, or policy mandated a specific course of action, or whether the government actor retained an element of

judgment or choice with respect to carrying out the challenged action." *Green*, 630 F.3d at 1250. If so, the court proceeds to determine whether that judgment was based on considerations of public policy. *Id.* (internal citations and quotations omitted). If both prongs are satisfied, then the challenged action "is immune from suit-and federal courts lack subject matter jurisdiction-even if the court thinks the government abused its discretion or made the wrong choice." *Id.*

2. Discussion

Plaintiff's claim against Defendant is grounded on the inadequate monitoring of her housing unit on the day she was sexually assaulted. Defendant{2020 U.S. Dist. LEXIS 17} argues that this claim is barred by the discretionary function exception to the FTCA. (Doc. 109 at 12.)

As mentioned previously, federal law imposes a duty on the BOP to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2). However, courts have held that although § 4042 imposes a general duty to house and care for prisoners, it does not mandate a specific manner in which to carry out that duty. See *Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir.1998); *Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997). Likewise, the PREA National Standards provide a list of several factors for prison officials to consider when adequately staffing BOP facilities and for determining the need for video monitoring, thus giving officials broad discretion when making such decisions. 28 C.F.R. § 115.13. And, BOP PS 5500.14 mandates that official counts and census checks take place at certain times, but outside of those times, the protocols for monitoring housing units are left to the discretion of the facility. Plaintiff points to PS 3420.11 and 1210.24 to argue that monitoring of her housing unit did not involve an element of judgment or choice. (Doc. 122 at 11.) But those Program Statements do not provide any specific{2020 U.S. Dist. LEXIS 18} parameters or protocols for monitoring housing units. Thus, Defendant has satisfied the first prong of the discretionary function analysis, and Plaintiff has failed to present evidence to create a question of fact that the monitoring of her housing unit did not involve a discretionary governmental function. Further, "[w]hen a statute, regulation or agency guideline allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Weissich v. United States*, 4 F.3d 810, 814 (9th Cir.1993) (citing *Gaubert*, 499 U.S. at 324). Plaintiff has not overcome this presumption, thus the second prong of the analysis has been satisfied as well.

Although Plaintiff's allegations of sexual assault are troubling, decisions by governmental officials as to the day-to-day security needs of a prison, including the number of officers to employ to supervise a given area, where to place video cameras if they are to be used at all, and tactical choices made surrounding the movement of prisoners within an institution are judgment calls and choices based on policy determinations that seek to accommodate safety and security goals in addition to finite agency resources.⁸ Thus, such decisions fall within the realm{2020 U.S. Dist. LEXIS 19} of discretionary governmental decisions that Congress intended to protect from exposure to suit by private individuals. See *Cohen*, 151 F.3d at 1345 (discretionary function exception precludes suit based on allegedly improper decisions in classifying prisoners and placing them in institutions, even if result is one prisoner attacking another prisoner); *Calderon*, 123 F.3d at 951 (discretionary function exception precludes FTCA claim by federal prisoner injured in assault by another prisoner). "Balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison involves considerations based upon public policy." *Calderon*, 123 F.3d at 951 (citing *Bell v. Wolfish*, 441 U.S. 520, 547-48, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (holding that prison administrators should be afforded wide-ranging deference in implementing and executing policies because discretion is needed to preserve internal discipline and maintain institutional security)).

Plaintiff argues that she was sexually assaulted by a prisoner who was "out of bounds" and that the on-duty officer should not have allowed the other prisoner to enter Plaintiff's housing unit. But as the Court discussed above, day-to-day security considerations, including monitoring the housing unit for out of bounds inmates, are precisely the type{2020 U.S. Dist. LEXIS 20} of policy decisions that are within the discretion of Defendant. Because the Court finds that the decisions involved here were discretionary and that the discretion was grounded in public policy considerations, the discretionary function exception to the FTCA protects Defendant from suit, even if Defendant abused its discretion or was negligent in the performance of its discretionary function. *See Calderon*, 123 F.3d at 951. Accordingly, because the Court is without subject matter jurisdiction in this case, the Court will dismiss Plaintiff's claim.⁹

Accordingly,

IT IS ORDERED:

(1) Plaintiff's Motion for Summary Judgment (Doc. 76) is **denied**.

(2) Defendant's Motion to Dismiss/Motion for Summary Judgment (Doc. 109) is **granted** as discussed herein, and the Clerk of Court must terminate the action and enter judgment accordingly.

Dated this 18th day of October, 2019.

/s/ David C. Bury

Honorable David C. Bury

United States District Judge