

No. 26-

IN THE
Supreme Court of the United States

GENGSU SCOTT HE, *et al.*,

Petitioners,

v.

MARCO RUBIO, UNITED STATES SECRETARY
OF STATE, IN HIS OFFICIAL CAPACITY AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.* (“FECA”), requires a federal district court to allow the executive branch to decide a claim by a federal government employee who seeks relief against the United States under common law pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (“FTCA”), and who alleges neither “disability,” nor “death,” nor that his common law damages were “sustained while in the performance of his duty,” as those terms are used in Section 8102(a) of FECA?

PARTIES TO THE PROCEEDINGS

Petitioner Gengshu “Scott” He was a plaintiff in the district court and appellant in the court of appeals. Plaintiffs Jun Zhang, and her parents, Wenqing and Rong Zhang, along with Jun Zhang and He’s minor children, were plaintiffs in the district court and appellants in the court of appeals.

Defendant Marco Rubio, in his official capacity, and the United States, were defendants in the district court and in the court of appeals.

There are no corporate parties.

RELATED PROCEEDINGS

He, et al. v. Rubio, et al., Case No. 1:22-cv-01137-DLF (United States District Court for the District of Columbia).

He, et al. v. Rubio, et al., Appeal No. 24-5034 (United States Court of Appeals for the District of Columbia Circuit).

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INTRODUCTION

The Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.* (“FECA”), assigns to the executive branch the exclusive power to decide every claim seeking compensation “for the disability or death of [a federal government] employee resulting from personal injury sustained while in the performance of his duty.” 5 U.S.C.A. § 8102(a). When a federal employee seeks compensation against the United States for common law injury under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (“FTCA”), a question arises whether the claim must be assigned to the executive branch for exclusive administration under FECA. To resolve that question, the federal circuit courts of appeal have applied one form or another of a “substantial question” doctrine.

As formulated by the Court of Appeals for the District of Columbia Circuit, the “substantial question” doctrine requires that “unless plaintiff’s injuries were clearly not compensable” under FECA, the executive branch “must be given the primary opportunity to rule on the applicability” of FECA. *Daniels-Lumley v. United States*, 306 F.2d 769, 771 (D.C. Cir. 1962). The majority of the other federal courts of appeal have adopted that approach, framing the doctrine in similar terms. The Seventh Circuit frames the doctrine in even more deferential terms, holding that “a ‘substantial question’ does not exist if it is certain as a matter of law that the Secretary would find the claim outside the scope of [FECA].” *Fuqua v. United States Postal Serv.*, 956 F.3d 961, 964 (7th Cir. 2020). The Court of Appeals for the Ninth Circuit rejects these approaches. Instead, the Ninth Circuit directs that “a question about the scope of FECA coverage . . . should be resolved by

the district court” without deference to the executive branch. *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993).

In this case, Plaintiff Gengshu He, a federal government employee, and his family allege under the FTCA that the United States is liable to them as a matter of Virginia common law for emotional distress caused by the conduct of U.S. law enforcement agents at He’s home, and in the presence of He’s family, on the eve of Chinese New Year in February 2021. He alleges neither “disability,” nor “death,” nor that his emotional distress was “sustained while in the performance of his duty,” as those terms are used in Section 8102(a) of FECA. Yet the D.C. Circuit affirmed the district court’s order dismissing He’s claim upon He’s election not to seek the Secretary’s determination of FECA coverage over He’s claim (which determination precludes judicial review under 5 U.S.C.A. § 8128(b) as a matter of law). By contrast, had He commenced his case in the Ninth Circuit, the district court’s order dismissing He’s FTCA claim would have been reversed on appeal—not summarily affirmed.

He’s petition seeks to resolve a split among the circuit courts of appeal on the deference, if any, owed to the executive branch in deciding whether FECA precludes judicial adjudication of a claim by a federal government employee seeking relief under the FTCA for the common law torts committed against the employee by federal agents.

OPINIONS BELOW

The opinion of the court of appeals (App, 1) on the FTCA claims by all plaintiffs but He is reported at 179 F.4th 8. The opinion of the court of appeals summarily affirming the district court's order dismissing He's FTCA claim is unreported and attached at App. 17. The opinion of the district court is unreported and attached at App. 22.

JURISDICTION

The judgment of the court of appeals summarily affirming the district court's order dismissing He's FTCA claim and denying the motion by the United States for summary affirmance on the district court's order dismissing the FTCA claims brought by He's family, was entered January 15, 2025. The judgment of the court of appeals on the FTCA claims brought by He's family was entered June 23, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

FECA Section 8102(a): "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. . . ." 5 U.S.C.A. § 8102(a).

FECA Section 8116(c): The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the

employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute." 5 U.S.C.A. § 8116(c).

FECA Section 8128(b): The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C.A. § 8128(b).

FECA Section 8145: "The Secretary of Labor shall administer, and decide all questions arising under, this subchapter." 5 U.S.C.A. § 8145.

FTCA Section 1346(b)(1): "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b)(1).

FTCA 2679(b)(1): “The remedy against the United States provided by sections 1346(b) and 2672 of this title for 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 is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.” 28 U.S.C.A. § 2679(b)(1).

STATEMENT OF THE CASE

He and his wife, on their own behalf and on behalf of their minor children, and her parents, all residents of the same home in Virginia on the evening of Chinese New Year 2021, brought a claim in federal district court under FTCA. He also brought claims against the State Department for unlawful employment discrimination against He based on his race and national origin in violation of 42 U.S.C. § 2000e-16(a) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (“Title VII”).

The district court dismissed all claims by plaintiffs in their second amended complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, except one: The district court allowed He to seek invoke FECA review by the Secretary of Labor of He’s tort claims against the United States. Upon He’s election not to seek review by the Labor Secretary under FECA, the district court dismissed He’s FTCA claim as well.

On appeal, the United States moved for summary affirmance of the district court’s dismissal orders. The court of appeals granted the motion as to He’s Title VII claims and FTCA claims, but denied the motion as to He’s family’s claims under the FTCA. The court of appeals stayed issuance of the mandate on He’s claims pending the outcome of the family’s claims under FTCA. On June 23, 2026, a panel of the U.S. Court of Appeals for the D.C. Circuit reversed the district court’s order dismissing the claims by He’s family under the FTCA.

REASON FOR GRANTING THE PETITION

There is a split among the circuits on the district court’s power to decide, without deference to the Labor Secretary, whether FECA applies to an FTCA claim brought by a federal government employee. The overwhelming majority of circuits—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits—hold that whenever there is a substantial question of FECA coverage, the Secretary of Labor must resolve it before a federal court may entertain an FTCA claim. These circuits do not distinguish between different *types* of coverage questions; all uncertain coverage determinations belong to the Secretary.

The First Circuit rule requires a government employee to first seek and be denied relief under FECA unless it is “certain” that the Secretary of Labor would not find coverage. *Bruni v. United States*, 964 F.2d 76 (1st Cir. 1992). In *Gill v. United States*, 471 F.3d 204 (1st Cir. 2006), the First Circuit rejected any distinction between “scope of coverage” questions and “coverage in and of itself” questions. Under *Gill* the only question is whether

the Secretary would find coverage under FECA. The same or similar “certainty” analysis controls the “substantial question” doctrine under FECA in the Third, Fifth, and Seventh Circuits. *DiPippa v. United States*, 687 F.2d 14 (3d Cir. 1982); *White v. United States*, 143 F.3d 232 (5th Cir. 1998); *Fuqua v. United States Postal Serv.*, 956 F.3d 961, 964 (7th Cir. 2020).

The Tenth Circuit joins the Seventh Circuit in giving the Labor Secretary near plenary authority to decide FECA’s applicability, holding that whether an injury was suffered in the performance of an employee’s duty must be determined by the Labor Secretary as an initial matter. *Tippetts v. United States*, 308 F.3d 1091 (10th Cir. 2002).

The D.C. Circuit gives to the Secretary of Labor the “primary authority” to determine FECA applicability. *Daniels-Lumley v. United States*, 306 F.2d 769 (D.C. Cir. 1962). But because the Secretary’s determination is beyond judicial review, 5 U.S.C.A. § 8128(b), to give “primary authority” is to give all authority to the Secretary.

By contrast, the Ninth Circuit has developed the correct approach to the question of FECA application to a federal government employee’s FTCA claim. *Moe v. United States*, 326 F.3d 1065, 1068 (9th Cir. 2003) (holding that whether an injury is “within the scope of FECA” is a question that “must be answered by the federal courts, because it is one of jurisdiction”).

The federal district courts “have an independent obligation to determine whether subject-matter jurisdiction exists.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The district court in this case, following

Daniels-Lumley and its progeny, determined that it had no authority to decide its own jurisdiction. Instead, it held that whether HE's alleged injury came within FECA was for the Department of Labor to decide; accordingly, and consistent with *Daniels-Lumley* and its progeny, the district court dismissed HE's claim under FTCA.

But no provision of FECA requires the district court to abdicate to the Department of Labor on the jurisdictional question presented whenever the United States interposes FECA as a defense under Rule 12(b)(1). Congress established merely that the liability of the United States under FECA is "exclusive and instead of all other liability." 5 U.S.C. § 8116(c). And Congress established that the "action of the Secretary or his designee in allowing or denying a payment" under FECA is "final and conclusive for all purposes and with respect to all questions of law and fact" and "not subject to review" by a "court by mandamus or otherwise." *Id.* § 8128(b)(1) and (2). But neither Section 8116(c) nor Section 8128(b)(1) and (2) strips the federal district court of jurisdiction to decide whether the injury alleged in the plaintiff's complaint comes within FECA.

Nothing in FECA states or even implies the test imposed by *Daniels-Lumley* and its progeny: "unless it is certain that FECA does not cover the type of claim at issue—the district court may not entertain the FECA claim." *Mathirampuzha*, 548 F.3d at 81. That "certainty" test is untethered to any guiding principle in FECA or elsewhere. There is no "readily administrable bright line," *Arbaugh*, 546 U.S. at 515-16, on which to base the district court's abdication to the Department of Labor on the court's jurisdiction to decide whether it has jurisdiction

to hear a claim to which the United States argues FECA provides the sole basis for relief.

The Ninth Circuit in *Moe* correctly reconciles FECA's exclusivity and preemption provisions with the district court's duty to decide its own jurisdiction.

FECA claims raise two questions: (1) is the injury within the scope of FECA, and (2) is the plaintiff entitled to compensation under the facts of her case. The latter question, if raised, must be deferred to, and answered by, the Secretary of Labor. Scope, on the other hand, is a question that must be answered by the federal courts, because it is one of jurisdiction. If a plaintiff has a colorable claim under FECA, the federal courts should dismiss any action arising under the same facts for lack of subject matter jurisdiction.

In this case, the parties dispute whether Moe's type of claim is covered under FECA. Thus, we must decide if Moe's injury is of the "type" covered by FECA. If it is, FECA preempts Moe's FTCA claims, and her case should be dismissed for lack of jurisdiction.

Moe, 326 F.3d at 1068. FECA does not "clearly state," *Reed Elsevier, Inc., v. Muchnick*, 559 U.S. 154, 162 (2010), that the Labor Department has primary jurisdiction to decide whether FECA may apply to deprive a district court of jurisdiction in a case for which the district court has jurisdiction under the FTCA. Had He filed in the Ninth Circuit, his FTCA claim would not have been stayed or dismissed.

CONCLUSION

For these reasons, He respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT, FILED JUNE 23, 2026**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5034

GENGSU SCOTT HE, *et al.*,

Appellants,

v.

MARCO RUBIO, UNITED STATES SECRETARY
OF STATE, IN HIS OFFICIAL CAPACITY AND
UNITED STATES OF AMERICA,

Appellees.

Argued December 5, 2025
Decided June 23, 2026

Appeal from the United States District Court
for the District of Columbia
(No. 1:22-cv-01137)

Before: HENDERSON, PILLARD and WILKINS, *Circuit
Judges.*

Opinion for the Court filed by *Circuit Judge
HENDERSON.*

Appendix A

KAREN LECRAFT HENDERSON, *Circuit Judge*: Former State Department employee Gengshu He and his family sued the Secretary of the Department of State (State Department) and the United States under the Federal Tort Claims Act, claiming that two law enforcement officers with the State Department came to their home in Virginia; beat on their front door; threatened, cursed and shouted at He; and grabbed him by the wrist in front of the family. Before leaving the Hes' home, one of the officers pointed his fingers in the shape of a gun at He's minor son, pretended to shoot the boy and called him a racial slur. In this appeal, we consider whether it is plausible that the officers' alleged conduct meets the requirements for common law assault against He's family members. We conclude that it is plausible. We therefore reverse the district court's dismissal of the He family's claim and remand for further proceedings.

I

The following facts come from the operative complaint. Gengshu He is a naturalized American citizen who was born in China. He immigrated to this country with his mother when he was approximately ten years old. Raised in Philadelphia, He went to public school, graduated with high marks and went on to earn his bachelor's degree in computer science at Penn State University. In 2006, He joined the federal workforce, working IT positions at several government agencies before joining the State Department in 2014. Apart from a brief stint at the Department of Agriculture, He remained at the State Department until July 2021. He has a wife, Jun Zhang

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(also an American citizen of Chinese descent) and two sons, both of “elementary school age.” App. 13 (citation modified). They live together in Annandale, Virginia, along with Zhang’s parents, Wenqing and Rong Zhang.

This case arises out of a tense encounter at the He residence. On the late Friday afternoon of February 12, 2021, He and his family were at their home preparing celebrations for the Chinese New Year. They were also self-quarantining to protect themselves from COVID-19 and had posted signs outside their residence excluding visitors. At around 4:00 p.m., the family heard a “loud banging” at the front door that “continu[ed] for more than thirty seconds.” App. 24. With his “wife and two children . . . huddled behind” him and his in-laws standing close by, He opened the door. *Id.* Standing on the Hes’ front patio were two men in “dark clothing.” *Id.* He recognized one of the men as Michael Peart, a law enforcement officer with the Bureau of Diplomatic Security at the State Department where He worked.

This was not He’s first encounter with Peart. He claims that while he was employed at the State Department, Peart targeted him for harassment based on his status as a Chinese immigrant. By He’s telling, the problems began as early as March 2019. While He was at his workstation one day, Peart approached him, “slapped him on the shoulder and back” and said “[t]here you are, the troublemaker.” App. 18. Peart then ordered He to follow him to a room where another law enforcement officer was waiting. For the next two hours, Peart and his colleague questioned He about his status as a Chinese immigrant and pressured He

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“to admit to some wrongdoing that Peart never defined.” App. 19. After the encounter, Peart continued to harass He by phone and email, demanding that He agree to a follow-up meeting and “confess” to misconduct. App. 21. The last of these communications He received from Peart was on February 9, 2021. Peart’s email stated that He was under administrative investigation for undisclosed misconduct and insisted that He attend an “official interview.” App. 23.

Three days after He received Peart’s email, Peart was standing at He’s front door, unannounced and uninvited, in the company of another man who “identified himself only as ‘Ken.’” App. 24.¹ In front of He’s wife, children, and in-laws, Peart said that he had given He “enough time to come clean” and had come to “ambush” him at his home. App. 25. When He claimed “not [to] know what Peart was referencing,” Peart “cursed” and “shouted” at He, reached across the threshold and grabbed He by the wrist. *Id.* He’s two children then began to cry and He felt his wife “trembling” behind him. App. 26. He pulled away from Peart’s grip and “told [him] to keep his distance.” App. 25. Peart then stated that he wanted to give He his business card. When He instructed Peart to put it on the patio, Peart “cursed again and threw the card on the ground.” App. 25. Peart turned his attention to one of He’s young sons. Peart then “made a pretend gun using his forefinger and thumb,” pointed it at the child, “pressed his thumb down as if to shoot,” laughed and called the child a “little chink.” App. 26. Before leaving, Peart repeated his

1. The man was later identified as Kenneth Velez, another law enforcement officer with the State Department’s Diplomatic Security Bureau.

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demand that He agree to an “in-person” interview at the State Department. *Id.* Peart and his associate departed shortly thereafter.

He claims the confrontation with Peart traumatized his family. After the incident, He’s in-laws “experienced insomnia and depression.” App. 27. He’s sons could not sleep alone and suffered from nightmares. One of the boys, four years old at the time, wet his bed on multiple nights.

In April 2022, He and his family sued the Secretary of the State Department and the United States (collectively, the Secretary) in district court. He asserted claims of employment discrimination and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and claims of common law assault, battery and false imprisonment under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.* The complaint also asserted, on behalf of He’s wife, two children and in-laws (He’s family or the He family) a single claim of common law assault under the FTCA based on Peart’s actions at the He residence on February 12.

The district court granted in part and denied in part the Secretary’s motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court held that He’s Title VII claims failed to state a plausible claim of retaliation or discrimination. As for He’s FTCA claims, the court concluded that the Secretary had raised a “non-frivolous” argument that a separate statute—the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101, *et seq.*—divested the court of

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jurisdiction of the claims. App. 88–89. The court therefore stayed adjudication of He’s FTCA claims “pending a . . . determination by the [Secretary of the] Department of Labor” regarding whether FECA covered He’s claims. App. 89.

Lastly, the district court dismissed the He family’s FTCA claim for common law assault arising from the February 12 incident with Peart. Because the incident occurred at the Hes’ home in Annandale, the district court applied Virginia law. In the court’s view, the He family’s assault claim was implausible on its face because Peart’s alleged misconduct—although “threatening” and “deplorable”—did not place any of He’s family members in reasonable apprehension of imminent physical harm. App. 90–91.

He could proceed with his FTCA claims in federal court only if the Secretary of Labor first determined that FECA did not cover his injuries. *See Daniels-Lumley v. United States*, 306 F.2d 769, 771 n.3 (D.C. Cir. 1962). Once the Secretary filed a joint status report with the district court representing that He did not intend to file the FECA claim with the Department of Labor to allow for the requisite ruling on whether FECA applied, the district court lifted its stay of He’s FTCA claims—the only remaining claims—and dismissed them for lack of jurisdiction. He and his family appealed and the Secretary moved for summary affirmance. We granted the Secretary’s motion as to He’s claims under Title VII and the FTCA. But we denied the motion as to the He

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family’s assault claim under the FTCA because the merits were “not so clear as to warrant” summary affirmance on their claim. App. 100.

II

We have jurisdiction under 28 U.S.C. § 1291 and our review of the district court’s dismissal of the He family’s FTCA claim under Rule 12(b)(6) is *de novo*. *Pub. Citizen v. U.S. Dist. Ct. for D.C.*, 486 F.3d 1342, 1345 (D.C. Cir. 2007). The FTCA permits private individuals to sue the United States for money damages “for certain torts committed by federal employees acting within the scope of their employment.” *Martin v. United States*, 605 U.S. 395, 400, 145 S.Ct. 1689, 222 L.Ed.2d 54 (2025) (citation modified); *accord* 28 U.S.C. §§ 1346(b)(1), 2674. To state a claim under the FTCA, the plaintiff must plausibly allege that “the United States, if a private person, would be liable to the claimant” under “the law of the place” where the government employee’s wrongful “act or omission occurred.” 28 U.S.C. § 1346(b)(1); *accord Brownback v. King*, 592 U.S. 209, 218, 141 S.Ct. 740, 209 L.Ed.2d 33 (2021). As their sole FTCA claim, the He family asserts that the Secretary is liable under Virginia law for the common law tort of assault based on Peart’s actions at the Hes’ Annandale residence. We therefore begin our analysis by “tak[ing] note of the elements [the He family] must plead” under Virginia law to state a claim of common law assault against the Secretary. *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S.Ct.

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1937, 173 L.Ed.2d 868 (2009)); *see Harris v. U.S. Dep't of Veterans Affs.*, 776 F.3d 907, 911 (D.C. Cir. 2015).²

Virginia follows the Second Restatement of Torts for the elements of common law assault. *Koffman v. Garnett*, 265 Va. 12, 574 S.E.2d 258, 261 (2003); *see Shoemaker v. Funkhouser*, 299 Va. 471, 856 S.E.2d 174, 178 n.2 (2021) (“We have often accepted the Second Restatement of Torts as authoritative.”). And “[l]ike many jurisdictions, Virginia has merged the common law crime [of assault] with the common law tort of assault.” *Clark v. Commonwealth*, 279 Va. 636, 691 S.E.2d 786, 789 (2010). We therefore rely on Virginia’s criminal assault cases to aid our analysis.

Common law assault in Virginia consists of three elements. First, there must be at least one “overt act” by the defendant; “words alone are never sufficient to constitute an assault.” *Id.* Obvious examples of overt acts include “aiming and gunning a speeding vehicle” at a person, *Zimmerman v. Commonwealth*, 266 Va. 384, 585 S.E.2d 538, 540 (2003), or “striking at [another] with a stick or other weapon,” *Harper v. Commonwealth*, 196 Va. 723, 85 S.E.2d 249, 255 (1955). But the act itself “does not require the present ability to inflict harm.” *Carter v. Commonwealth*, 269 Va. 44, 606 S.E.2d 839, 842 (Va. 2005). It can be as simple as “moving towards” someone

2. The FTCA also requires a plaintiff asserting an assault claim to allege that the tortfeasor was an “investigative or law enforcement officer[]” at the time of the misconduct. 28 U.S.C. § 2680(h); *accord Martin*, 605 U.S. at 401, 145 S.Ct. 1689. The He family has plausibly alleged that Peart and his associate were law enforcement officers at the time of the alleged assault.

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in a threatening manner. *Blankenship v. Commonwealth*, 71 Va.App. 608, 838 S.E.2d 568, 575 (2020).

Second, the defendant must intend that the overt act “cause either harmful or offensive contact with another person *or* apprehension of such contact.” *Koffman*, 574 S.E.2d at 261 (emphasis added). The defendant’s “intent may be inferred from the nature of the overt act and the surrounding circumstances.” *Clark*, 691 S.E.2d at 789. His “[w]ords and prior conduct are highly relevant” as well. *Id.* And to show the defendant acted with the required intent, it is not always necessary to prove that the defendant specifically intended to place the plaintiff in fear of harm. If the defendant acts “with the intention of affecting a third person . . . but puts [the plaintiff] in apprehension of a harmful or offensive contact,” that is sufficient. Restatement (Second) of Torts § 32(2) (A.L.I. 1965 Sept. 2025 update). This result obtains because common law assault in Virginia follows the doctrine of transferred intent—the principle “that if one person intends to harm a second person but instead unintentionally harms a third, the first person’s criminal or tortious intent toward the second applies to the third as well.” *Transferred-Intent Doctrine*, Black’s Law Dictionary (12th ed. 2024); see *Blow v. Commonwealth*, 52 Va.App. 533, 665 S.E.2d 254, 258 (2008) (“[I]t is clear that the [transferred-intent] doctrine is a viable part of our law.”).

Third, the overt act or acts must in fact create a “reasonable apprehension” of offensive or harmful contact that is “imminent.” *Koffman*, 574 S.E.2d at 261. As with the intent requirement, the defendant’s “previous

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statements and actions,” *Clark*, 691 S.E.2d at 789, help determine whether the overt “act [was] sufficient to create a reasonable apprehension on the part of” the plaintiff, *id.* at 790. The plaintiff’s own actions can also “demonstrate that [he] reasonably feared a threat of bodily injury.” *Blankenship*, 838 S.E.2d at 574. “Imminent” bodily harm or contact, moreover, “does not mean immediate, in the sense of instantaneous contact,” Restatement (Second) of Torts § 29(1) cmt. b, although that is plainly sufficient. The plaintiff need only have the reasonable fear that the harmful or offensive contact will occur “in a very short interval of time” or without “significant delay.” *Id.*

III

Our task at the Rule 12(b)(6) motion-to-dismiss stage is to “determine[] whether the [He family] has pleaded th[e] elements” of assault with enough “factual support to ‘state a claim that is plausible on its face.’” *Sanchez*, 45 F.4th at 395 (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). Facial plausibility “requires ‘more than a sheer possibility that a defendant has acted unlawfully,’ but it is not a ‘probability requirement.’” *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). A claim is facially plausible if “the plaintiff pleads factual content that allows [us] to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. In applying that standard, courts “do[] not resolve contests surrounding the facts [or] the merits of a claim.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (citation modified); *accord* 5B *Wright*

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& *Miller's Federal Practice and Procedure* § 1356 (4th ed. Apr. 2026 update). The time for that comes later in the proceedings. At this early stage, we “accept the operative complaint’s well-pleaded factual allegations as true and draw all reasonable inferences” in the He family’s favor, *N. Am. Butterfly Ass’n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020).

The He family’s complaint paints a vivid picture of what happened at their residence on that late Friday afternoon in February 2021. While the Hes were at home, Peart and his associate approached their front door and “loud[ly] bang[ed]” on it for more than thirty seconds. App. 24. The men “had no explained reason for being” there. *Clark*, 691 S.E.2d at 789. They were not welcome guests; the Hes had posted signs outside of their home declining visitors. With his family directly behind him, He opened the door to confront the visitors. Standing before them were “[t]wo men, wearing dark clothing” with no “identifying marks or uniform[s].” App. 24. “The men did not identify themselves” until He recognized one of them to be Peart. *Id.* Once identified, Peart stated that this was an “ambush” and He’s family watched as Peart “cursed” and “shouted” at He, “reached . . . inside the threshold” and “grabbed” He by the wrist. App. 25. After He had pulled away, Peart noticed one of the He’s children “huddled” behind their father. App. 24. Peart then pointed his thumb and forefinger in the shape of a gun at the young boy, pressed his thumb down “as if to shoot” the child, laughed and called the boy a “little chink.” App. 26.

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We think these facts are sufficient to state a plausible claim of assault under Virginia law. Based on the allegations in the complaint, Peart's act of grabbing He by the wrist easily satisfied the first two elements of assault; it was an overt act "intended to cause either harmful or offensive contact with another person or apprehension of such contact." *Koffman*, 574 S.E.2d at 261. The Secretary's suggestion that Peart grabbed He merely to "give [him] a business card," Sec'y's Br. 21, is implausible on its face given the aggressive "nature of the overt act," *Clark*, 691 S.E.2d at 789. Nor is the Secretary correct that Peart's grabbing of He cannot establish an assault against He's family members because they were not "the focus of that alleged act." Sec'y's Br. 21. As noted earlier, to prevail on a claim of assault it is not necessary that the plaintiff be the intended target of the overt act. If the defendant commits the act "with the intention of affecting a third party" but "puts [the plaintiff] in [reasonable] apprehension of a harmful or offensive contact," that is an assault. Restatement (Second) of Torts § 32(2). In this case, Peart's deliberate act of grabbing He could amount to an assault against the rest of the He family if Peart's act, viewed "in the context of [his] previous statements and actions," *Clark*, 691 S.E.2d at 789, caused He's family to reasonably fear imminent bodily harm—satisfying the third element of assault.

On the third element, it is plausible that Peart's conduct caused He's family to reasonably fear imminent harm to themselves. As an initial matter, the family has pleaded sufficient facts demonstrating that Peart's conduct "caused [them] to actually . . . fear bodily harm."

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Blankenship, 838 S.E.2d at 574. When they saw Peart reach into their home and grab their family member, He's two children started crying and He's wife was "trembling." App. 26. He's in-laws were also "frightened" during the incident. App. 25. That He's family members "felt threatened by [Peart's] behavior" is clear from the face of their complaint. *Blankenship*, 838 S.E.2d at 574; cf. *Etherton v. Doe*, 268 Va. 209, 597 S.E.2d 87, 89 (2004) ("The plaintiff testified unequivocally that she was 'really, really frightened'" by the defendant's conduct).

In our view, it is also plausible that a reasonable person in the He family's position would fear for his safety. Peart's behavior towards the Hes was aggressive from the moment he arrived on their doorstep. Peart and his associate came to the Hes' home even though they were "not welcome on [the] property." *Blankenship*, 838 S.E.2d at 575. They "loud[ly] bang[ed]" on the Hes' front door. App. 24. In front of the entire group, Peart announced that he had come to "ambush" one of their family members. App. 25. The family then watched as Peart became belligerent, "curs[ing]" and "shout[ing]" at He, and physically aggressive as he reached into their home and seized He by the wrist. *Id.* We will not attempt to pin down the definite point in time when the family's fear of imminent harm ripened into a reasonable one. But it is plausible the moment came when the family witnessed Peart reach inside and physically grab one of their family members. Because of their proximity to Peart's conduct, Peart's inexplicable behavior in the moments prior and especially his sudden escalation to battery, it is plausible that He's family members reasonably feared Peart was going to harm them as well.

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The Secretary argues the allegations do not plausibly show the He family was in reasonable fear of “imminent” harm because the family does not allege they were “within Peart’s reach” when Peart grabbed He. Sec’y’s Br. 22. The district court similarly faulted the family members for not “alleg[ing] that Peart advanced beyond the doorway to within striking distance of” them. App. 90. We think this asks too much of the He family. As a general matter, “we do not require [such] detailed factual allegations” at the Rule 12(b)(6) motion-to-dismiss stage. *Banneker Ventures, LLC*, 798 F.3d at 1129 (citation modified). And in any event, “[i]t is not necessary that [the plaintiff] be within striking distance of the” defendant for the feared harm to be sufficiently “imminent” to cross the line into assault. Restatement (Second) of Torts § 29(1) cmt. b; *see, e.g., Blankenship*, 838 S.E.2d at 575 (defendant assaulted victim by “moving towards” him from “about twenty feet away” while threatening to do bodily harm). The He family’s allegations indicate they were within a few feet of Peart as he physically grabbed their family member. That is a close enough distance for us to infer that Peart could have done them harm without “significant delay.” Restatement (Second) of Torts § 29(1) cmt. b.

Peart’s subsequent act of making his fingers into the shape of a gun and pointing at He’s young son also plausibly satisfied the elements of assault. There is no serious dispute that Peart’s “threatening gesture,” *Bowie v. Murphy*, 271 Va. 127, 624 S.E.2d 74, 80 (2006), was an overt act, *see Carter*, 606 S.E.2d at 842–43. Whether Peart “inten[ded]” the act “to cause a fear of bodily harm,” *Blankenship*, 838 S.E.2d at 574, “the nature of the

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overt act” and the defendant’s surrounding “statements and actions” can reveal whether the defendant’s purpose was to instill fear, *Clark*, 691 S.E.2d at 789. Here, Peart pantomiming the act of shooting He’s child—in front of the child—was an inherently threatening act. And the Secretary’s suggestion that Peart’s act was merely intended as a joke (Peart laughed afterwards) is belied by everything Peart allegedly did and said immediately before and after the act. We have already covered Peart’s threatening “[w]ords and prior conduct” but their outrageousness bears repeating—his unexpected “[a]pppearance at [the family’s home] where [h]e had no explained reason for being,” his “unconditional threat,” *Clark*, 691 S.E.2d at 789, to “ambush” the child’s father, App. 25, his “curs[ing]” and “shout[ing]” at the father and his physical force against the father. App. 25. That is all “highly relevant” evidence, *Clark*, 691 S.E.2d at 789, supporting the reasonable inference that Peart “intended to place [He’s child] in fear or apprehension of bodily harm” by imitating the act of shooting him, *id.* at 790. That Peart called the child a racial slur afterward is further proof that Peart’s purpose behind his act was to instill fear.

As for the last element, it is plausible that Peart’s act “caused [He’s son] to actually and reasonably fear [imminent] bodily harm.” *Blankenship*, 838 S.E.2d at 574. We can easily infer that Peart’s act put fear into him—Peart’s conduct on February 12 caused the child to have “nightmares” for “several weeks.” App. 26. On whether Peart’s act was “sufficient to create a reasonable apprehension” in He’s son, *Clark*, 691 S.E.2d at 790, “[w]e

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must interpret” Peart’s act in the context of everything the child saw Peart do immediately before, *id.* at 789. He’s son had just witnessed Peart threaten, curse, shout at and manhandle his father. Under the circumstances, he could have reasonably believed that Peart’s threatening gun gesture was a prelude to the use of more physical force—this time against him.

The Secretary contends that Peart’s hand-gun gesture is not an actionable assault because it was apparent that Peart was not pointing an “actual gun” at He’s son. Sec’y’s Br. 24. We think the Secretary’s observation misses the point. That Peart’s act may not have caused He’s son to reasonably fear being shot does not mean the act did not create a reasonable fear of imminent bodily harm—however carried out. And as we have explained, it is plausible that Peart’s act did create such a fear in the boy. That is all the He family was required to allege at the dismissal stage.

* * *

For the foregoing reasons, the judgment of the district court is reversed.

So ordered.

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**APPENDIX B — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT, FILED JANUARY 15, 2025**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5034

September Term, 2024
1:22-cv-01137-DLF

GENGSU SCOTT HE, *et al.*,

Appellants,

v.

MARCO RUBIO, UNITED STATES SECRETARY
OF STATE, IN HIS OFFICIAL CAPACITY AND
UNITED STATES OF AMERICA,

Appellees.

Filed January 15, 2025

BEFORE: Millett, Wilkins, and Rao, Circuit Judges

ORDER

Upon consideration of the motion for summary
affirmance, the opposition thereto, and the reply, it is

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ORDERED that the motion for summary affirmance be granted in part and denied in part. Summary affirmance is granted as to the district court's dismissal of appellant Gengshu He's discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the district court's dismissal of his tort claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. The merits of the parties' positions are so clear as to warrant summary action as to these claims. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (*per curiam*). As to the discrimination claim, the district court did not err in concluding that He failed to sufficiently plead that the alleged harasser was a supervisor for whose conduct the employer could be liable. *See Vance v. Ball State Univ.*, 570 U.S. 421, 427-31 (2013). And He disclaims any reliance on a theory of liability based on the alleged harasser's status as his co-worker. The district court also did not err in dismissing the retaliation claim. He failed to plausibly allege that the conduct that occurred after he engaged in protected activity in March 2021, was taken in retaliation for that protected activity, or that the conduct was "severe and pervasive enough to constitute a hostile work environment." *Menoken v. Dhillon*, 975 F.3d 1, 6 (D.C. Cir. 2020).

The district court also did not err in staying and ultimately dismissing He's claims under the Federal Tort Claims Act. The court did not err in concluding that those claims were potentially compensable under the Federal Employees' Compensation Act and thus that they needed to be presented to the Department of Labor in the first

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instance for a ruling on the applicability of the Act. *See Daniels-Lumley v. United States*, 306 F.2d 769, 770-72 & n.3 (D.C. Cir. 1962).

The motion for summary affirmance is denied as to the claim brought by the remaining appellants for assault under the Federal Tort Claims Act. As to that claim, the merits of the parties' positions are not so clear as to warrant summary action. *See Taxpayers Watchdog*, 819 F.2d at 297; *see also Carter v. Commonwealth*, 606 S.E.2d 839, 841-43 (Va. 2005).

Because the court has determined that summary disposition is not in order as to a portion of the appeal, the Clerk is instructed to calendar this case for presentation to a merits panel.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

**APPENDIX C — ORDER OF THE DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA,
FILED FEBRUARY 13, 2024**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 22-cv-1137 (DLF)

GENGSU SCOTT HE, *et al.*,

Plaintiffs,

v.

ANTONY BLINKEN, IN HIS
OFFICIAL CAPACITY, AND THE
UNITED STATES OF AMERICA,

Defendants.

ORDER

Upon consideration of the parties' Joint Status Report, Dkt. 35, and for the reasons given in the Court's prior Memorandum Opinion, Dkt. 34, it is

ORDERED that the stay entered on November 13, 2023 as to Counts III, IV, and V of the plaintiffs' complaint, Dkt. 33, is **LIFTED**. It is further

ORDERED that Counts III, IV, and V of the plaintiffs' complaint are **DISMISSED** without prejudice. It is further

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ORDERED that this action is **DISMISSED** without prejudice.

SO ORDERED.

February 13, 2024

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

**APPENDIX D — MEMORANDUM OPINION
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
FILED NOVEMBER 13, 2023**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 22-cv-1137 (DLF)

GENGSU SCOTT HE, *et al.*,

Plaintiffs,

v.

ANTONY BLINKEN, IN HIS
OFFICIAL CAPACITY, AND THE
UNITED STATES OF AMERICA,

Defendants.

Signed November 13, 2023

MEMORANDUM OPINION

Gengshu He and his family bring this action against Antony Blinken, in his official capacity, and the United States (together, the United States) for various wrongs He says he suffered as an employee of the State Department. The United States moves to dismiss He's Second Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, the Court will grant the motion in part and deny it in part.

*Appendix D***I. BACKGROUND¹**

He is a former State Department employee and an American citizen of Chinese descent. Second Am. Compl. ¶ 5, Dkt. 21 (Compl.). He is married to Jun Zhang, also a Chinese American and American citizen. *Id.* ¶ 6. The couple lives with Zhang’s parents, Wenqing and Rong Zhang, and two minor children in Virginia. *Id.* ¶¶ 6-8.

He’s problems began in March 2019, when Michael Thomas Peart, a law enforcement officer employed by the State Department’s Bureau of Diplomatic Security, “slapped him on the shoulder and back . . . while [he] was working at his workstation in the State Department.” *Id.* ¶¶ 10, 39-40. Peart called him a “troublemaker” and an “immigrant” and then “ordered [He] to follow” him to a conference room. *Id.* ¶¶ 41, 43, 45. In the meeting that followed, Peart and another officer, Brian Otrowski, accused He of misconduct and threatened to prosecute and arrest him. *Id.* ¶¶ 55-56. Both referenced He’s “immigrant background” and “status as a former immigrant from China.” *Id.* at 51-52; *see id.* at ¶¶ 57-58. Later in March, Peart “followed up with calls and emails to [He]” and “demanded that [He] confess” to wrongdoing. *Id.* ¶¶ 71-74.

He left the State Department for the Department of Agriculture in May 2020, only to return to the State Department in a more senior role in November 2020. *Id.*

1. For purposes of this opinion, consistent with the applicable legal standard, the Court assumes that the material factual allegations in He’s operative complaint are true. *See Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

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¶¶ 78-84. In February 2021, however, Peart accused He of improprieties again. This time, Peart sent He an email alleging “MISCONDUCT RELATED TO EVENTS ON THE EVENING OF 11/3.” *Id.* ¶ 86 (capitalization in original). And at “around 4:00 p.m.” on “the afternoon of Friday, February 12, 2021,” with He and his family “quarantined in their home, preparing to celebrate [the] Chinese New Year,” Peart arrived on He’s doorstep with another Diplomatic Security officer, Kenneth Velez, Jr. *Id.* ¶¶ 88, 91, 98-99; *see id.* ¶ 1.

An altercation ensued on the doorstep. In He’s telling, after a verbal confrontation, “Peart . . . reached and grabbed He’s wrist while He was inside the threshold of his home.” *Id.* ¶ 107. “He pulled back and told Peart to keep his distance. . . . [b]ut He did not believe that he was free to close the door to his home, ignore Peart and Velez, or otherwise leave the scene.” *Id.* ¶¶ 108-09. After that, “[o]ne of He’s sons was visible to Peart, and Peart made a pretend gun using his forefinger and thumb and, pointing it at He’s son, pressed his thumb down as if to shoot He’s son. Peart laughed, and then muttered ‘little chink.’” *Id.* ¶ 114. “For several weeks” after, “both” of He’s children “had nightmares.” *Id.* ¶¶ 121.

February turned into March. He contracted COVID-19 and quarantined, as did his children. *Id.* ¶¶ 127-30. During that period, “upon advice from” his supervisor, He “filed a harassment complaint with the State Department’s Office of Civil Rights” against Peart. *Id.* ¶ 130. The next day, “Peart emailed” He’s supervisor and “published . . . school and health information” relating to He’s son. *Id.*

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Peart also requested information on He's own "medical situation" and told He's supervisor that, "without that information, Peart would be forced to conduct a 'welfare check' on He at He's home." *Id.* ¶¶ 132-33.

He resigned from the State Department in 2021 and then filed this action. *Id.* ¶ 135. His Second Amended Complaint seeks relief against the United States (1) for employment discrimination under Title VII, (2) for retaliation under Title VII, for (3) battery on He, (4) assault on He, and (5) false imprisonment of He under the Federal Tort Claims Act, and (6) for assault on He's family under the Federal Tort Claims Act.² *Id.* ¶¶ 140-203. The complaint demands injunctive relief, compensatory and consequential damages, and "any other relief as allowed by law." *Id.* ¶¶ 153, 167, 175, 182, 196, 203.

The United States moves to dismiss. Dkt. 22.

2. He's initial complaint asserted claims against the Department of State for discrimination (race and national origin) under Title VII, a claim of disability discrimination under the Rehabilitation Act, and claims against Peart and Velez for common law torts and under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *See generally* Complaint, Dkt. 1. Subsequently, the plaintiffs added claims against the United States under the Federal Tort Claims Act and removed the Rehabilitation Act and individual claims. *See generally* Amended Complaint, Dkt. 17.

*Appendix D***II. LEGAL STANDARD**

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain factual matter sufficient to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A facially plausible claim “allows [a] court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

In the context of the Federal Tort Claims Act, “all elements of a meritorious claim are also jurisdictional.” *Brownback v. King*, ___ U.S. ___, 141 S. Ct. 740, 749, 209 L.Ed.2d 33 (2021). “Because ‘a federal court always has jurisdiction to determine its own jurisdiction,’” it “can decide an element of an FTCA claim on the merits if that element is also jurisdictional.” *Id.* at 750 (quoting *United States v. Ruiz*, 536 U.S. 628 (2002)). The court “may ‘undertake an independent investigation’” that examines “facts developed in the record beyond the complaint” to “‘assure itself of its own subject matter jurisdiction.’” *Settles v. U.S. Parole Comm’n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (quoting *Haase v. Sessions*, 825 F.2d 902, 908 (D.C. Cir. 1987)).

*Appendix D***III. DISCUSSION**

For the reasons given below, the Court will dismiss He's Title VII employment discrimination and retaliation claims, along with his claim for assault on his family members, for failure to state a claim. It will stay further proceedings on He's remaining tort claims pending administrative proceedings under the Federal Employees' Compensation Act (FECA), 42 U.S.C. § 8101 *et seq.*, by the Department of Labor.

A. Employment Discrimination

Under Title VII, “[a]ll personnel actions affecting employees . . . in executive agencies . . . [must] be made free from any discrimination based on race . . . or national origin.” 42 U.S.C. § 2000e-16(a). “Although this language differs from that of [Title VII’s] provision governing private employers,” the D.C. Circuit has held that both “contain identical prohibitions.” *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007).

He does not contend, and his complaint does not suggest, that the State Department took official “personnel actions” against him or altered the formal “terms, conditions, or privileges of [his] employment.” 42 U.S.C. §§ 2000e-16(a), 2000e-2; *see Chambers v. District of Columbia*, 35 F.4th 870, 873-74 (D.C. Cir. 2022) (*en banc*). Instead, he argues that Peart and Velez made his working conditions so intolerable that he had no choice but to quit. Compl. ¶¶ 145, 147. In other words, He seeks relief for workplace harassment or a “hostile work

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environment.” *See* Pls.’ Mem. of L. in Opp. to Defs.’ Mot. to Dismiss at 2-6, Dkt. 24 (proceeding only on a hostile work environment theory); Compl. ¶ 15 (explaining that the EEOC characterized He’s charge, at the administrative level, as one for a “hostile work and living environment”).

“Under Title VII, an employer’s liability for [workplace] harassment may depend on the status of the harasser.” *Vance v. Ball State Univ.*, 570 U.S. 421, 424, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013). “If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions.” *Id.* “In cases in which the harasser is a ‘supervisor,’ however,” the employer is vicariously liable subject to certain affirmative defenses. *Id.*

“An employee is a ‘supervisor’ . . . if he or she is empowered by the employer to take tangible employment actions against the victim.” *Id.* “Tangible employment actions” involve “a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’” *Id.* at 431, 133 S.Ct. 2434 (quoting *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)); *see Lyles v. Dist. of Columbia*, 17 F. Supp. 3d 59, 69 n.5 (D.D.C. 2014).

Against this backdrop, He has not pled a plausible workplace harassment claim. At the outset, He has not adequately pled that Peart, Velez, or Otrowski supervised him. Nothing in his complaint suggests that those officers

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could hire him, fire him, promote him, reassign him, or adjust his benefits. At most, it suggests that they could investigate He and make recommendations to his superiors as a result of their investigation. *See* Compl. ¶¶ 10-11 (describing Peart and Velez’s investigative authority). That is not enough to make them supervisors. *See Vance*, 570 U.S. at 432, 133 S.Ct. 2434 (explaining that “ability to direct a co-worker’s labor to some ill-defined degree” is not enough); *cf. Joyner v. Morrison & Foerster LLP*, No. 20-cv-1440, 2023 WL 6313194, *7-8 (holding that a law firm associate, who trained the plaintiff, “otherwise oversaw [the plaintiff’s] work,” and later communicated about the plaintiff’s firing with coworkers, did not “supervise” or exercise “authority” over plaintiff).

As a result, He’s complaint must plausibly plead that the State Department negligently supervised Peart, Velez, and Otrowski—that it “knew or should have known of [their] harassment and failed to implement prompt and appropriate corrective action.” *Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1990). But his complaint does nothing of the sort. It does not allege that the Department ignored cries for help from He or that Peart’s conduct was so out of line that the Department should have learned about it on its own. Indeed, when He reported harassment, “the [Department] responded quickly and reasonably.” *Id.* at 661. He’s supervisor advised him to file a complaint with the Department, and he did so.³ Compl. ¶ 130; *see Curry*, 195 F.3d at 661 (finding

3. In addition, He’s opposition to the Department’s Motion to Dismiss does not contend that his complaint states a claim for negligence against the Department, only that Peart and

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absence of negligence as a matter of law when employer “established an effective complaint procedure,” “reli[ed] on its employees to bring problems with their co-workers to its attention,” and “responded quickly and reasonably” to complaints).

That “Peart was a law enforcement official of the State Department” who “threatened [He] with arrest and prosecution . . . [along] with adverse employment consequences,” Pl.’s Mem. in Opp. at 4, does not mean that Peart supervised He. The key question is whether Peart could take tangible employment actions against He, not whether Peart could influence his career more broadly. *Vance*, 570 U.S. at 424, 133 S.Ct. 2434. After all, *every* U.S. Marshal, inspector general, or other law-enforcement official can investigate federal employees within their jurisdiction. Sometimes those investigations carry significant adverse career consequences. Federal law enforcement officials do not thereby “supervise” every federal employee inside their area of authority.

The Court also recognizes that “fact question[s]” are “not amenable to resolution upon a motion to dismiss.” Pl.’s Mem. in Opp. at 4. Still, to survive the Department’s motion to dismiss, He’s complaint must plausibly allege that Peart, Velez, or Otrowski supervised him and/or that the Department negligently failed to halt their abuse. *Joyner*, 2023 WL 6313194 at *8 (“conclusory allegation[s]” are not enough). His complaint does neither.

others were He’s supervisors. *See* Pl.’s Mem. in Opp. at 4-5. As a consequence, He has forfeited any argument that the Department negligently supervised Peart, Velez, and Otrowski.

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For these reasons, the Court will dismiss Count I of He's complaint without prejudice for failure to state a claim.

B. Retaliation

Independently, Title VII “prohibits the federal government from retaliating against employees who engage in protected activity, including complaining of employment discrimination.” *Mount v. Johnson*, 174 F. Supp. 3d 553, 560 (D.D.C. 2016) (Brown-Jackson, J.). “To prove unlawful retaliation” in this Circuit, a plaintiff must show: (1) that she opposed a practice she reasonably thought violated Title VII; (2) that her employer took adverse action against the employee; and (3) that the employer acted “because” of the employee’s opposition to the practice. *See McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012). Actions count as “adverse” in the retaliation context when they might “dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

He's complaint does not state a claim for retaliation because it does not plausibly allege that the State Department took adverse action against him. *See McGrath*, 666 F.3d at 1380 (requiring retaliation by *employer*). Although Peart may have continued to harass He after he complained to the Department, the Court cannot attribute Peart's conduct to the Department for the reasons stated. *See Gordon v. Beers*, 972 F. Supp. 2d

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28, 35 (D.D.C. 2013) (applying hostile-work-environment principles “equally” to retaliation claims). Accordingly, the Court will dismiss Count II of He’s complaint without prejudice for failure to state a claim.

C. Torts on He

Counts III, IV, and V of He’s complaint seek relief under the Federal Tort Claims Act for alleged torts against He. The United States contends that the Court cannot adjudicate these claims until the Department of Labor determines whether they fall within the perimeter of the Federal Employees Compensation Act (FECA). Defs.’ Reply in Supp. of Mot. to Dismiss at 9-10 & n.4, Dkt. 26. The Court agrees and will stay adjudication of these claims pending a FECA determination.

Under FECA, “[t]he United States shall pay compensation . . . for the disability or death of [a federal] employee resulting from personal injury sustained while in the performance of his duty.” 5 U.S.C. § 8102(a). “The liability of the United States . . . under [FECA] is exclusive . . . of all other liability of the United States,” including liability under the FTCA. *Id.* § 8116(c). Because FECA’s exclusive-liability provision “carves out certain suits . . . from the FTCA’s sovereign-immunity waiver,” it limits this Court’s jurisdiction. *Jones v. United States*, 318 F. Supp. 3d 15, 19-20 (D.D.C. 2018).

“The Secretary of Labor shall determine” whether compensation is available under FECA, 5 U.S.C. § 8124(a), and her decisions are “final and conclusive for all purposes

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and with respect to all questions . . . and not subject to review . . . by a court by mandamus or otherwise,” *id.* § 8128(b). Consistent with this statutory scheme, “the Secretary of Labor must be given the primary opportunity to rule on the applicability of the Act” to particular cases unless a “plaintiff’s injuries [are] clearly not compensable under [FECA].” *Daniels-Lumley v. United States*, 306 F.2d 769, 771 (D.C. Cir. 1962); *accord Jones*, 318 F. Supp. 3d at 20-21.

In this case, it is not true that He’s “injuries [are] clearly not compensable under [FECA],” meaning the Court may not adjudicate his FTCA claims before the Department of Labor does so. *Daniels-Lumley*, 306 F.2d at 771. The Department has previously entertained FECA claims in cases, like this one, where a claimant alleges that job-related matters caused her emotional distress. *See, e.g., In re Tina D. Francis*, No. 4-965, 2004 ECAB LEXIS 2731, *3-4 (Dec. 16, 2004) (considering claim in which claimant “reported experiencing stress at work”). Indeed, in this very case, the Department informs the Court that “there is a substantial likelihood of coverage under . . . FECA” for He’s injuries “resulting from [the] alleged assault, battery, and false imprisonment at his home.” Mem. from Adam Calendrillo to Matthew M. Graves (Jun. 29, 2023), Dkt. 26-1.⁴ Because the Department has

4. Even though the Department’s memorandum is not contained in or incorporated into He’s complaint, the Court may consider it because the presence or absence of FECA coverage raises jurisdictional issues. *Doe v. Wash. Metro. Area Transit Auth.*, 453 F. Supp. 3d 354, 361 (D.D.C. 2020) (The court “may look to documents outside of the complaint in order to evaluate whether or not it has jurisdiction to entertain a claim.”).

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presented non-frivolous arguments that FECA will cover He's claims, the Court concludes that He's injuries are not "clearly [un]compensable under [FECA]." *Daniels-Lumley*, 306 F.2d at 771.

It is true that FECA deals with "the *disability* or *death* of an employee resulting from personal injury" and that He does not obviously allege injuries leading to death or disability. Pl.'s Sur-Reply Mem. of L. at 3, Dkt. 29 (quoting 5 U.S.C. § 8102(a)) (emphasis added). All the same, the Department has the final say over FECA determinations, and the Department has applied FECA in circumstances arguably similar to He's. *See Tina D. Francis*, 2004 ECAB LEXIS 2731 at *3-4. That is enough to raise "a 'substantial question' as to whether FECA" applies. *Kalil v. Johanns*, 407 F. Supp. 2d 94, 100 (D.D.C. 2005). Nor will the Court order "an evidentiary hearing to test" the Department of Labor's "memo." Pl.'s Sur-Reply Mem. of L. at 5. The Department is entitled to a presumption that it issued its memorandum in good faith, and He has not offered evidence to rebut that presumption. *United States v. Chem. Found.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). To the extent that He contends that discovery might undermine the facts on which the Department's position is based, the proper venue for such contentions—at least in the first instance—is the Department's own administrative process. *Daniels-Lumley*, 306 F.2d at 771.

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The Court will stay proceedings on Counts III through V of He's complaint pending a FECA determination by the Department of Labor. *See Reep v. United States*, 557 F.2d 204, 208 (9th Cir. 1977) (“[I]f there is a substantial question as to FECA coverage, the district court will generally stay the FTCA action pending a determination by the Secretary of Labor.”).

D. Assault on He's Family

Finally, the Court will dismiss Count VI of He's complaint, alleging assault on He's family, for failure to state a claim.

Under the FTCA, “[t]he United States shall be liable” for certain torts of its employees “in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. §§ 2671, 1346(b)(1). Because He alleges that Peart assaulted his family in Virginia, his complaint must plead a plausible case for assault under Virginia law.

In Virginia, “the tort of assault consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in the other person's mind a reasonable apprehension of an imminent battery.” *Koffman v. Garnett*, 265 Va. 12, 574 S.E.2d 258, 261 (Va. 2003). “‘Imminent’ does not mean immediate,” but it does mean “that there will be no significant delay” between the apprehension and the contact. Restatement (Second) of Torts § 29 cmt. b (1965). For example, “menacing[ly] point[ing] at another with a gun” threatens imminent

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injury if “the gun [is] within shooting distance” or “seems to be so to the person assaulted,” but not otherwise. *Carter v. Commonwealth*, 269 Va. 44, 606 S.E.2d 839, 841 (Va. 2005) (quoting *Lynch v. Commonwealth*, 131 Va. 769, 109 S.E. 418, 420 (Va. 1921)).

He’s complaint does not plead a plausible case that Peart assaulted any member of his family. In relevant part, it alleges that Peart (1) knocked loudly on He’s door, (2) cursed at him, (3) grabbed his wrist, (4) used his hands to make a gun-like gesture at He’s son, and (5) called his son a “chink.” Compl. ¶¶ 91, 104-05, 107, 114. It does not allege that Peart advanced beyond the doorway to within striking distance of He’s family, that he verbally threatened to harm them, or that he brandished a firearm in their direction. Although these acts may have created a threatening environment and certainly reflect deplorable conduct by a law enforcement officer, they did not plausibly suggest that Peart was poised to injure anyone in He’s family without “significant delay.” Restatement (Second) of Torts § 29 cmt. b; *cf. Bowles v. May*, 159 Va. 419, 166 S.E. 550, 553 (Va. 1932) (holding that no jury could find assault based on “testimony that [defendant] shook his finger at plaintiff” after an angry conversation “while the parties were seated and the plaintiff was some eight feet or more [away] from where [the] defendant was sitting”); *Berkley v. Commonwealth*, 88 Va. 1017, 14 S.E. 916, 916 (Va. 1892) (finding no assault when defendant threatened victim with violence, then approached victim while “gesticulating,” but “did not strike” and “did not attempt to strike” him) (cited favorably in *Carter*, 606 S.E.2d at 841).

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The Court recognizes that detailed fact pleading is not required to state a claim for relief under the Federal Rules. *Cf.* Pl.'s Mem. of L. in Opp. at 10. Even so, a complaint must state plausible claims to survive a motion to dismiss. He's does not.

CONCLUSION

For these reasons, the Court will dismiss Counts I, II, and VI of He's Second Amended Complaint without prejudice and stay action on the remaining counts pending a FELA determination by the Secretary of Labor. A separate order accompanies this memorandum opinion.

November 13, 2023

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge