UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KAREN ESTEFFANY MADRIGALES VASQUEZ, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C23-5397 BHS

ORDER

THIS MATTER is before the Court on defendant United States's motion to dismiss, Dkt. 6. The plaintiffs are a Guatemalan family[1] of four who travelled to the United States and sought asylum at the Texas/Mexico border in February 2021. They were detained for about 40 hours at U.S. Customs and Border Protection (CBP)'s Temporary Outdoor Processing Site (TOPS), under the Anzalduas International Bridge near Granjeno, Texas.

[1] The plaintiffs are Karen Esteffany Madrigales Vasquez, her husband, Jonathan Hidelberto Zetino Aguirre, and their children, S.Z.M., and T.Z.M. For clarity and ease of reference, this Order will refer to the plaintiffs collectively as "Madrigales Vasquez" in the feminine singular, unless the context requires otherwise.

Madrigales Vasquez now lives in Tacoma,[2] Washington. She sued the United States, alleging her family suffered severe physical, mental, and psychological harms when they were unlawfully mistreated while detained at TOPS. Dkt. 1 at 2. She asserts negligence and intentional infliction of emotional distress claims[3] under the Federal Tort Claims Act (FTCA). She seeks $400,000 in damages. Dkt. 1.

The United States does not dispute that conditions at TOPS were overcrowded, cold, and otherwise inhospitable. It concedes that like most TOPS detainees in February 2021, Madrigales Vasquez's family suffered while it was detained. It explains that CBP's temporary, auxiliary facility was created in response to an unprecedented wave of immigrants seeking to enter the country without authorization, and that it was set up outdoors to combat then-rampant COVID-19. *See generally* Dkt. 7. It asserts that TOPS sought to process detainees within eight hours. But, due to the historic surge of immigrants and detainees in that area at that time, TOPS was "overwhelmed," and poor conditions and longer stays were unavoidable. Dkt. 6 at 3–4. It denies that its employees negligently mistreated Madrigales Vasquez or any other detainee.

Madrigales Vasquez does not dispute that TOPS was overwhelmed; her own evidentiary submittal, Dkt. 13, confirms the chaotic scene at the border. It includes

[2] In a suit against the United States, venue is proper where the plaintiff resides. 28 U.S.C. § 1402(a)(1).

[3] Madrigales Vasquez also alleges that CBP violated her constitutional Due Process rights, but she does not name any "person" as a defendant and she does not assert a § 1983 claim. Dkt. 1.

numerous references to "hundreds, if not thousands"[4] of immigrants who were apprehended for entering the country without authorization during that time. Madrigales Vasquez's claim is largely based on her contention that she, like "hundreds of migrants," was "forced to live and sleep on the bare dirt ground for multiple days, without adequate food, shelter, or protection from temperatures cold enough to cause hypothermia, and without access to medical care or basic hygiene items." Dkt. 12 at 14 (citing Dkt. 13).

The government argues that because CBP made a policy decision to establish TOPS, and to transfer apprehended immigrants there for processing, Madrigales Vasquez's claims are barred by the FTCA's discretionary function exception (DFE). *Id.* at 2. It argues that when an exception to FTCA's waiver of sovereign immunity applies, the district court does not have subject matter over the claim. *Id.* at 6 (citing 28 U.S.C. § 2680; *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000)).

Madrigales Vasquez responds that the government bears the burden of demonstrating that the DFE applies, even though she bears the burden of establishing subject matter jurisdiction. Dkt. 12 at 3 (citing *Prescott v. United States*, 973 F.3d 696, 702 9th Cir. 2015) (placing the burden on the government is appropriate "because the exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense")). She argues that written standards and policies

[4] The government asserts without rebuttal that TOPS was created in February 2021 in response to the increased immigration activity in the area, the resulting processing wait times, and COVID-19. Dkt. 7 at 2. TOPS was meant to house families with small children. The government similarly contends that the CBP's Rio Grande Valley (RGV) Sector (of which TOPS was a part) apprehended and detained 28,500 migrants in February 2021, including 1,310 on the day Madrigales Vasquez was apprehended. *Id.* at 3.

required CBP employees to meet detainees' basic needs including food, shelter, and medical care. She asserts that CBP employees violated these standards when they detained her family in unsafe and inhumane conditions. She argues that CBP employees did not have discretion to violate her constitutional rights. Dkt. 12 at 13.

I. DISCUSSION

The government argues that Madrigales Vasquez cannot state a plausible claim for relief because the incident of which she complains was the result of discretionary conduct as a matter of law. It argues that Madrigales Vasquez's claims are not viable because the FTCA's waiver of sovereign immunity does not apply to discretionary conduct, and that, because sovereign immunity applies, the Court does not have subject matter jurisdiction over her claims.

A. Rule 12 Standards.

Under Fed. R. Civ. P. 12(b)(1), a court must dismiss for lack of subject matter jurisdiction if, construing the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *United Transp. Union v. Burlington N. Santa Fe R. Co.*, No. C06-5441 RBL, 2007 WL 26761, at *2 (W.D. Wash. Jan. 2, 2007), *aff'd*, 528 F.3d 674 (9th Cir. 2008). The plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be either "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack on the court's subject-matter jurisdiction, the court resolves the motion as it would a motion to dismiss under Rule 12(b)(6). *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). The court must determine "whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite*, 749 F.3d at 1121. If the court "determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

When the Rule 12(b)(1) jurisdictional attack is factual, the district court can generally resolve factual disputes. It should refrain from doing so, however, where the jurisdictional issue and the substantive merits of the case are "inextricably intertwined." *See Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1196-97 (9th Cir. 2008). The United States's attack is primarily factual. The Court has considered the evidence in the record, Dkts. 7, 8, and 13. The facts are not strenuously disputed.

Dismissal under Federal Rule of Civil Procedure 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff's complaint must allege facts to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Although

courts must accept as true the complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion to dismiss. *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

B. The DFE bars Madrigales Vasquez's FTCA claims.

The FTCA is a limited waiver of the United States' sovereign immunity. The federal government is liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment, in accordance with the law of the place (here, Texas) where the act or omission occurred.

The DFE, 28 U.S.C. § 2860(a), is an exception to this waiver. Sovereign immunity is not waived where the claim "based upon the exercise or performance of a discretionary function or duty . . . whether or not the discretion involved be abused." *Id*. Madrigales Vasquez acknowledges that the DFE bars claims based on actions that involve (1) an element of judgment or choice, and (2) public-policy considerations. Dkt. 12 at 3 (citing *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991)).

Madrigales Vasquez concedes (as she must) that her claims are *not* based on the United States's underlying decision to create and utilize TOPS, or its broader decision to adopt, implement, and enforce a policy of apprehending and then processing immigrants who enter the country without authorization. Dkt. 12 at 12 ("Plaintiffs do not challenge the creation of TOPS per se."); *see also id*. at 2 n.1, 23. The government correctly contends that any claim based on those decisions fails as a matter of law; among other reasons, these choices were purely discretionary matters of public policy, and they were not made by CBP's employees in any event. Dkt. 16 at 5.

Madrigales Vasquez's arguments nevertheless rely heavily on her assertion that the conditions at TOPS violated all detainees' constitutional rights and their "basic human dignity." Dkt 12 at 12. She asserts that her evidence, Dkt. 13, supports her claim that TOPS was "an unsafe and inhumane outdoor detention site, where hundreds of migrants were forced to live and sleep on the bare dirt ground for multiple days, without adequate food, shelter, or protection from temperatures cold enough to cause hypothermia, and without access to medical care or basic hygiene items." Dkt. 12 at 14.

Madrigales Vasquez asserts that, under the Fifth Amendment, civil detainees enjoy "constitutionally protected interests in conditions of reasonable care and safety." Dkt. 12 at 13 (citing *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982)). She contends, accurately, that the *government* is obligated to provide her reasonable care, including

> adequate food, shelter, clothing, and medical care. . . . And whenever ***the government*** "restrains an individual's liberty" by detaining them "and at the same time fails to provide for [their] basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—***it*** transgresses the substantive limits on state action set by . . . the Due Process Clause."

Dkt. 12 at 13–14 (emphasis added) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)). But Madrigales Vasquez does not assert a constitutional claim against anyone. She does not contend that any individual CBP employee violated her constitutional rights; she has named no "person" as a defendant, and she has not asserted a § 1983 claim. Instead, she asserts that *DeShaney* is authority for the proposition that the Fifth Amendment imposes on CBP employees collectively an "affirmative duty" "to provide for [plaintiffs'] basic human needs." *Id.* at 14.

Unable to sue the government itself for apprehending and detaining her, Madrigales Vasquez aims instead at CBP employees generally, contending they did not have discretion to violate her constitutional rights. *Id*. To succeed on her argument that the DFE does not bar her FTCA negligence claim, Madrigales Vasquez must point to some act or omission that was *not* the result of a choice or the exercise of judgment, undertaken for policy reasons. *Gaubert*, 499 U.S. at 322–323.

Madrigales Vasquez asserts that during her 40 hours at TOPS, CBP employees negligently violated internal CBP policies—the Hold Rooms and Short Term Custody policy (Dkt. 1-2), and the National Standards on Transport, Escort, Detention, and Search (NSTEDS) (Dkt. 1-3)—regarding the housing and treatment of detained immigrants. Dkt. 1 at 6; Dkt. 12 at 3. The Hold Rooms policy requires CBP to provide juvenile detainees clean bedding, and to provide all detainees access to food "at regularly scheduled mealtimes." Dkt. 12 at 4–5 (citing Dkt. 1-2 at 8–12). Madrigales Vasquez asserts that her

children were not given clean bedding and that her family waited eight and a half hours for a meal. Dkt. 12 at 4–6.

Madrigales Vasquez asserts that CBP employees at TOPS negligently[5] breached their duty under the NSTEDS when they failed to provide her family shelter and protection from the elements, including the 48-degree outdoor nighttime temperature.[6] *Id*. at 7. She complains that the NSTEDS imposed on CBP employees a duty to provide her family basic hygiene items, like soap, *id*. at 9, and that they breached that duty, causing her harm. She also asserts that CBP employees negligently failed to comply with the NSTEDS' medical care requirements. *Id*. at 10. She asserts that she experienced cold or flu symptoms, but she does not articulate what care was denied.

The government argues that, despite Madrigales Vasquez's efforts to distance herself from her often-express claim that the creation and utilization of TOPS was itself the cause of her harm, she has not and cannot point to any negligent, non-discretionary conduct on the part of all CBP employees (or any CBP employee) there. Dkt. 16 at 2. It argues, persuasively, that Madrigales Vasquez's complaints are at bottom about the creation and use of TOPS. She has not alleged any act or omission by any specific

[5] Madrigales Vasquez's Texas law IIED claim is addressed below, but she has not plausibly articulated how any specific employee *intentionally* inflicted emotional distress upon her. She has alleged at most that her harm resulted from CBP employees' general "callousness, laziness, or negligence." Dkt. 12 at 12.

[6] Madrigales Vasquez concedes that the NSTEDS' "comfortable room temperature" requirement applies only when room temperature is "within CBP control." Dkt. 12 at 6–7. She does not allege, and could not plausibly allege, that CBP employees had control over the outdoor temperature at TOPS; her complaint is really that the government made a policy decision to create and use an outdoor immigration processing center.

person, or any mistreatment or failing specific to her or her family. The government argues, for example, that even in Madrigales Vasquez's telling, no individual employee denied any detainee a mattress, because TOPS was not designed for sleeping. That is fundamentally a complaint about the government's decision to create TOPS as a temporary, auxiliary facility not meant to house immigrants overnight; it is not a plausible allegation that a CBP employee breached a duty to provide a mattress that was not available. The government accurately asserts that Madrigales Vasquez complains not of any act or omission by an individual CBP employee, but instead that the harm she suffered at TOPS was the "result of systemic non-compliance with applicable federal policies." Dkt. 16 at 2 (citing Dkt. 12 at 10). The government persuasively contends that that is really a claim that the facility itself was deficient, constitutionally, and as measured against CBP's own written policies.

The government argues that Madrigales Vasquez cannot separate the conditions that she alleges were the result of CBP employees' collective negligence from the concept of TOPS itself. But to successfully invoke the court's FTCA subject matter jurisdiction, it claims, she must "identify which specific actions or omissions were negligent or wrongful." Dkt. 16 at 5 (citing *Nanouk v. United States*, 974 F.3d 941, 945 (9th Cir. 2020)). It asserts that she has not done so; the only distinct action she actually challenges is the creation and utilization of TOPS as a temporary, outdoor processing center in the face of an historic increase in immigration at the Texas border, during a pandemic.

The government asserts that in this context, there is no CBP employee that could have done anything differently to avoid this lawsuit; Madrigales Vasquez asserts that she and the other detainees were entitled to a bigger, better equipped, heated, and adequately staffed indoor facility, under the Constitution and under CBP's own policies. Dkt. 16 at 6. It argues that the government's policy decision to instead create TOPS is not actionable, and the employee's inability to provide the care required was caused by that decision, not their own negligence.

Madrigales Vasquez argues that the DFE does not apply to bar her FTCA claims because the government has not provided evidence that its employees made decisions that are "susceptible to policy analysis." Dkt. 12 at 13 (citing *Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir. 2008)). She argues that for the DFE to apply, the government must identify "competing policy considerations" underlying its employees' "challenged conduct." *Id*. (citing *Nanouk*, 974 F.3d at 950). She argues that the government's relies instead on a "general appeal to limited resources," which is disfavored under these authorities. *Id*.

Terbush involved a plaintiff's FTCA claim based on National Park Service employees' failure to properly maintain a park trail, for years, leading to a death. The government claimed the DFE applied based solely on its claim that the failure was due to limited resources. 516 F.3d at 1134. The Ninth Circuit confirmed that it is "not sufficient for the government merely to waive the flag of policy as a cover for anything and everything it does that is discretionary in nature." *Id*.

Nanouk involved a property owner's FTCA claim based on the long-term contamination of her property by a nearby, abandoned Air Force station. The Ninth Circuit held that the plaintiff's claims based on the government's 13-year delay in discovering and remediating the pollution survived the DFE, because the court could not conclude as a matter of law that the delay was grounded in social economic and political policy. *Nanouk*, 974 F.3d at 950. Indeed, it concluded that the "failure to conduct the clean-up in a timely manner thereafter was 'not the result of a policy choice,' but 'simply a failure to effectuate policy choices already made.'" *Id*. (quoting *Camozzi v. Roland/Miller & Hope Consulting Grp.*, 866 F.2d 287, 290 (9th Cir. 1989)).

The Court does not agree that either of these authorities support Madrigales Vasquez's claim that the DFE does not apply to the undisputed facts here. The government has identified a specific "competing policy consideration," and the specific basis for its employees' inability to strictly comply with the policies governing the detention of unauthorized entrants: the admittedly unprecedented wave of people seeking to enter the United States without authorization, in the winter, during a pandemic.

The United States elected to construct a temporary facility to process the increased flow of immigrants it apprehended. The situation on the ground—the undisputable context of the employees' conduct—was chaotic and evolving swiftly; the employees are not alleged to have allowed a condition to persist for years, as in *Terbush* and *Nanouk*.

Instead, CBP's employees were forced to conduct a sort of triage; faced with far more humans than TOPS was equipped or prepared to handle, in winter weather they could not control, during a pandemic. They admittedly failed to strictly adhere to the

federal policies describing how detainees should be treated. There is no claim and no evidence that any specific CBP employee failed to do something she was equipped to do, or that any employee affirmatively imposed some harm on any detainee, much less Madrigales Vasquez.

The employees' decisions about how to house, care for, and process the immigrants in their custody, using the facilities and resources and manpower at their disposal necessarily involved elements of judgment and choice, made in the furtherance of policy decisions made elsewhere. Their choices were discretionary, and grounded in policy, as a matter of law. The DFE is designed to protect exactly this sort of conduct—even if, as Madrigales Vasquez implicitly claims, they abused their discretion by failing follow the letter of the governing policies in the overall circumstances they faced in February 2021.

Madrigales Vasquez claims that the Constitution and the NSTEDS required certain levels of care, notwithstanding the actual conditions on the ground. Federal policies require bedding for detained minors, and her children did not receive bedding. The policies require meals every six hours, and her family waited eight and a half. Thus, she claims, the CBP employees charged with running TOPS were not exercising discretion; they were negligent. She contends that she has plausibly alleged that the employees breached their collective duties to her, causing her harm. This is effectively a claim that CBP employees are strictly liable for failing to provide the required care, notwithstanding the undisputed fact that they did not have the resources, ability, or time to do so, due to conditions well beyond their control.

The Court agrees that the DFE applies, and that it does not have subject matter over the claims before it. Madrigales Vasquez does not and cannot articulate any specific negligent act or omission on the part of any CBP employee. In February 2021, there was an unprecedented influx of people seeking to enter the country without authorization, and the government adopted, implemented, and executed a policy of apprehending and processing them at a temporary, outdoor processing center. These facts are not disputed; they are not debatable on this record. The government's Rule 12(b)(1) motion is **GRANTED**.

C. Madrigales Vasquez's FTCA claims are not viable under Texas law.

Because the Court concludes that the DFE bars Madrigales Vasquez's claims, the plausibility of her Texas law negligence and IIED claims is not at issue. But the Court agrees that Madrigales Vasquez's negligence claim is more rhetorical than factual. She has not plausibly pled, and cannot plausibly plead, that any CBP employee negligently caused her actionable harm under Texas law. Texas does not recognize temporary discomfort as a physical injury supporting a negligence claim. Dkt. 6 at 16–17 (citing, among others, *Temple-Inland Forest Prod. Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999) ("Absent physical injury, the common law has not allowed recovery for negligent infliction of emotional distress except in certain specific, limited instances.")).

Nor is Madrigales Vasquez's IIED claim viable. The government correctly asserts that in Texas, such a claim is a "gap filler" tort, applicable only where extraordinarily egregious conduct would otherwise go unremedied. It is not to be used to sidestep the implausibility of another pled claim, like negligence. Dkt. 6 at 18 (citing *Hoffmann-La*

Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004) ("Where the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available.")).

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The DFE applies to each of Madrigales Vasquez's claims, and the United States's Rule 12(b)(1) motion to dismiss is **GRANTED**. Madrigales Vasquez's claims are **DISMISSED**, without prejudice and without leave to amend**,** for lack of subject matter jurisdiction.

The Clerk shall enter a **JUDGMENT** and close the case.

IT IS SO ORDERED.

Dated this 28th day of March, 2024.

BENJAMIN H. SETTLE
United States District Judge