

AFRIKA HICKS,  
Plaintiff,  
v.  
OFFICE OF THE SERGEANT AT  
ARMS FOR THE UNITED STATES  
SENATE, et al.,  
Defendants.

Plaintiff Afrika Hicks, a former employee of the Office of the Sergeant at Arms for the United States Senate, brings assault, wrongful imprisonment, and intentional infliction of emotional distress claims against defendants Kimball Winn and Rick Kaufman, her former supervisors. Hicks also brings religious discrimination and retaliation claims against the Senate. Winn and Kaufman filed a government certification stating that they were acting within the scope of their employment during the alleged incidents and move to substitute the United States and to dismiss the tort claims against them for lack of subject matter jurisdiction. Because Hicks has met her burden of challenging the government's certification as to the intentional infliction of emotional distress claim, but not the assault and wrongful imprisonment claims, the motion to substitute and to dismiss will be granted in part and denied in

part. The United States will be substituted for Winn and Kaufman as to the assault and wrongful imprisonment claims, and these two claims will be dismissed for lack of subject matter jurisdiction because sovereign immunity has not been waived under the Federal Tort Claims Act ("FTCA"). Limited discovery will be allowed on the defendants' scope of employment regarding the intentional infliction of emotional distress claim.

#### BACKGROUND

The complaint and materials to which it refers set forth the following facts relevant to the pending motion. Hicks worked as a Telecommunications Operation Specialist at the Office of the Sergeant at Arms for the United States Senate. (Compl. ¶ 10.) In a meeting, Winn and Kaufman, Hicks' supervisors, "issued . . . Hicks a termination notice with an immediate effective date." (Id. ¶ 22.) The termination notice was signed by Winn and stated that Hicks "[was] to turn in [her] Senate identification badge, keys, and any Senate equipment issued to [her] immediately" and "may take [her] personal belongings with [her] today." (Pl.'s Opp'n to Defs.' Mot. to Substitute the United States & Dismiss Count IV ("Pl.'s Opp'n"), Ex. 1 at 1.) Hicks left the meeting room to retrieve her personal possessions and returned "to turn over her Agency equipment, keys and identification badge to her supervisors." (Compl. ¶ 23.) Hicks requested a receipt, but Winn refused to

provide one. (Id.) Hicks then decided to return her Senate property to the Senate's human resources department in order to obtain a receipt. (Id.) Winn and Kaufman "attempted to physically restrict" Hicks from leaving the office by "pushing [her] against the wall and physically grabbing and restraining her." (Id.) Hicks' husband, Nikkol Hicks, an officer with the Capitol Police, witnessed the defendants restraining Hicks. (Id. ¶ 24.) Later, Winn and Kaufman allegedly misused the Capitol Police internal complaint procedures to prompt an internal affairs investigation of Officer Hicks. (Id. ¶ 36.) This alleged misuse included Winn falsifying a report against Officer Hicks. (Id. ¶ 24.)

Count IV of Hicks' complaint alleges assault, false imprisonment, and intentional infliction of emotional distress claims against Winn and Kaufman. Winn and Kaufman move to substitute the United States as the defendant in Count IV and have filed a certification by the then-Chief of the Civil Division, United States Attorney's Office for the District of Columbia, stating that Winn and Kaufman were acting within the scope of their employment. Winn and Kaufman also move to dismiss Count IV for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because Hicks has not exhausted her FTCA administrative remedies and because sovereign immunity has not been waived for these alleged torts. Hicks

acknowledges that sovereign immunity has not been waived under the FTCA. (Pl.'s Opp'n at 3 (stating that Hicks would "be left without recourse" if the United States is substituted for Winn and Kaufman because "as the Defendants correctly argue, the United States has not waived immunity for claims of, or arising from, torts such as assault and wrongful imprisonment").) However, Hicks maintains that Kaufman and Winn's actions were not within the scope of their employment, rendering the United States' substitution improper and the FTCA inapplicable.<sup>1</sup>

#### DISCUSSION

"On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction." Shuler v. United States, 448 F. Supp. 2d 13, 17 (D.D.C. 2006) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). In reviewing the motion, a court accepts as true all of the factual allegations contained in the complaint, Artis v. Greenspan, 158 F.3d 1301, 1306 (D.C. Cir. 1998), and may also consider "undisputed facts evidenced in the record." Coal. for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003); see also Tootle v. Sec'y of the Navy, 446 F.3d

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<sup>1</sup> Thus, resolving the defendants' argument that Hicks failed to exhaust her administrative remedies as is required by the FTCA must await resolution of whether the FTCA even applies to Hicks' intentional infliction of emotional distress claim.

167, 174 (D.C. Cir. 2006) (explaining that a court may look beyond the pleadings to resolve disputed jurisdictional facts when considering a motion to dismiss under Rule 12(b)(1)). The "nonmoving party is entitled to all reasonable inferences that can be drawn in her favor." Artis, 158 F.3d at 1306 (emphasis omitted).

"The United States is immune from suit unless it waives its sovereign immunity through an act of Congress." Hayes v. United States, 539 F. Supp. 2d 393, 397 (D.D.C. 2008) (citing FDIC v. Meyer, 510 U.S. 471, 475 (1994)). In a suit against the United States, the plaintiff "bears the burden of proving that the government has unequivocally waived its immunity for the type of claim involved." Hayes, 539 F. Supp. 2d at 397 (citation omitted). "The [FTCA] provides . . . a waiver in civil damages actions based on '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[.]'" Id. (quoting 28 U.S.C. § 1346(b)). However, the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h).

## I. WESTFALL CERTIFICATION

Courts must "independently determine whether the United States is a proper defendant" in a tort suit against federal employees. Koch v. United States, 209 F. Supp. 2d 89, 91 (D.D.C. 2002). "The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U.S.C. § 2679(d), provides that a federal employee is immune from tort liability when he is 'acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" Healy v. United States, 435 F. Supp. 2d 157, 161 (D.D.C. 2006) (quoting 28 U.S.C. § 2679(d)). Under the Act, "when the Attorney General or his designee believes that a federal employee was acting within the scope of employment, he may issue a certification to that effect." Id. at 161 (citation omitted). The certification "requires the substitution of the United States for the federal employee as the defendant in the lawsuit[] and it converts the lawsuit into an action against the United States under the Federal Tort Claims Act." Id. (internal quotations and citations omitted). The Attorney General's certification is prima facie evidence that the employees' conduct was within the scope of their employment. Hill v. United States, 562 F. Supp. 2d 131, 135 (D.D.C. 2008).

Rule 8 requires that a complaint contain a short and plain statement of the claim showing that the plaintiff is entitled to

relief. Under that liberal pleading standard, the complaint of a plaintiff challenging the certification "need only have alleged sufficient facts that, taken as true, would establish that the defendants' actions exceeded the scope of their employment." Stokes v. Cross, 327 F.3d 1210, 1215 (D.C. Cir. 2003). The D.C. Circuit "has made it clear that '[n]ot every complaint will warrant further inquiry into the scope-of-employment issue.' . . . Consequently, where a plaintiff fails to allege sufficient facts to rebut the certification, the United States must be substituted as the defendant because the federal employee is absolutely immune from suit." Wuterich v. Murtha, 562 F.3d 375, 381 (D.C. Cir. 2009) (quoting Stokes, 327 F.3d at 1216).

The scope of employment inquiry is governed by the law of agency as applied in the District of Columbia, where the tort allegedly occurred. See Wilson v. Libby, 498 F. Supp. 2d 74, 97 (D.D.C. 2007). In the District of Columbia, the Restatement (Second) of Agency provides the governing framework for determining whether an employee acted within the scope of employment. Id. "Under the Restatement, an employee's conduct falls within the scope of employment if: 1) it is of the kind of conduct he is employed to perform; 2) it occurs substantially

within the authorized time and space limits;<sup>2</sup> 3) it is actuated, at least in part, by a purpose to serve the master; and 4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master." Id. (citing Restatement (Second) of Agency § 228 (1957)).

A. Nature of conduct

"[C]onduct will be of the kind the servant is employed to perform if it is 'of the same general nature as that authorized' or is 'incidental to the conduct authorized.'" Kalil v. Johannis, 407 F. Supp. 2d 94, 97 (D.D.C. 2005) (quoting Haddon v. United States, 68 F.3d 1420, 1423-24 (D.C. Cir. 1995), abrogated on other grounds by Osborn v. Haley, 549 U.S. 225 (2007)). Conduct is incidental if it is foreseeable. Haddon, 68 F.3d at 1424.

Foreseeable in this context does not carry the same meaning as it does in negligence cases; rather, it requires the court to determine whether it is fair to charge employers with responsibility for the intentional torts of their employees. To be foreseeable, the torts must be a direct outgrowth of the employee's instructions or job assignment. It is not enough that an employee's job provides an opportunity to commit an intentional tort.

Id. (internal citations and quotation marks omitted). The foreseeability inquiry requires courts "to look beyond alleged

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<sup>2</sup> The complaint alleges that the conduct occurred at Hicks' workplace while the defendants were on duty. The defendants do not dispute this fact. Therefore, the defendants' conduct satisfies the time and space requirement.



intentional torts" and "focus[] on the underlying dispute or controversy, not on the nature of the tort." Wilson, 498 F. Supp. 2d at 97-98 (internal quotation marks omitted). The inquiry thus "is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." Id.

Courts have drawn a distinction between actions that are a direct outgrowth of the job and those that do not arise directly from an employee's performance of authorized duties. For example, in Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976), a deliveryman assaulted a customer immediately following a dispute over whether the mattress should be carried into the apartment and whether a check was an acceptable form of payment. The Lyon court concluded that the assault "arose naturally and immediately between [the deliveryman] and the [customer] about two items of great significance in connection with [the deliveryman's] job[:] the request of the [customer] . . . to inspect the mattress and springs before payment . . . and [the deliveryman's] insistence on getting cash rather than a check. . . . The dispute arose out of the very transaction which had brought [the deliveryman] to the premises." Id. at 652. Moreover, in Johnson v. Weinberg, 434 A.2d 404 (D.C. 1981), the D.C. Court of Appeals found that a "laundromat could be liable for injuries inflicted when an employee responsible

for removing clothes from washing machines shot a customer during a dispute over missing shirts . . . [b]ecause [t]he assault arose out of the transaction which initially brought [the customer] to the premises . . . and was triggered by a dispute over the conduct of the employer's business[.]” Haddon, 68 F.3d at 1425 (internal quotation marks omitted). Lyon and Johnson “mark the outer limits of scope of employment.” Id. at 1425.

However, if the employee's tort did not arise directly from performance of an authorized duty and the job merely provided an opportunity to act, courts have found such conduct to be outside the scope of employment. In Penn Cent. Transp. Co. v. Reddick, 398 A.2d 27 (D.C. 1979), a railroad employee assaulted a taxi driver while traveling off duty from one worksite to another and the court concluded that the employee's conduct “‘was neither a direct outgrowth of [his] instructions or job assignment, nor an integral part of the employer's business activity.’” Haddon, 68 F.3d at 1425 (quoting Reddick, 398 A.2d at 32). Furthermore, in Haddon, where an electrician threatened to harm a chef unless the chef withdrew his administrative complaint against another co-worker, the court found that the electrician was not acting within the scope of his employment because the electrician's threat did not stem from a dispute over the performance of his work, it was completely unrelated to his responsibilities as an

electrician, it did not occur while performing assigned duties, and the chef's administrative complaint did not involve him.

Id.

Hicks asserts that her case is similar to Mosely v. Second New St. Paul Baptist Church, 534 A.2d 346 (D.C. 1987), where a night janitor did not act within the scope of his employment when he sexually assaulted two trespassers because there was no evidence that security duties were within the janitor's job responsibilities. Similarly, the D.C. Court of Appeals in Boykin v. District of Columbia, 484 A.2d 560, 562 (D.C. 1984), found that an employee whose duties included training blind students to walk was not acting within the scope of his employment when he sexually assaulted a student. In Boykin, the connection between the conduct and the employee's duties were too attenuated because the attack was unprovoked, did not serve the school's interests in any way, and was not a direct outgrowth of the school's authorization that the employee guide a student throughout the building.

Hicks argues that it was not foreseeable that Winn and Kaufman would assault her, wrongfully imprison her, and misuse the internal complaint system by making false statements to the Capitol Police. (Pl.'s Opp'n at 16.) However, Kaufman and Winn acted in their supervisory roles when they terminated Hicks and their attempt to detain Hicks and secure Senate property was

directly connected to their employment. Evidence that Winn and Kaufman may have been unauthorized to collect Senate property would not change the fact that the defendants were acting incidental to their authorized job function of terminating Hicks. Unlike in Penn Central or Mosely where the link between the tort and the employment was attenuated, the alleged assault and wrongful imprisonment arose directly from Winn and Kaufman terminating Hicks. This case therefore is more comparable to Caesar v. United States, 258 F. Supp. 2d 1 (D.D.C. 2003). There, the court found that an intentional tort that occurred during or immediately following a dispute over how a business project would be handled by the plaintiff "was 'triggered by a dispute over the conduct of the employer's business' and 'arose naturally and immediately between [a coworker] and [the] plaintiff . . . in connection with [the coworker's] job.'" Id. at 4 (internal quotation marks omitted). Likewise, in Koch v. United States, 209 F. Supp. 2d 89, 93 (D.D.C. 2002), the court also found that the alleged intentional tort was the "direct outgrowth" of the plaintiff's criticism of a coworker's work performance and was within the scope of employment because the incident "arose solely because of a dispute about the work performances of [the plaintiff and his co-worker]." Here, the defendants' employment status did not "merely provide an opportunity for the [assault and detention] to occur." Adams v.

Vertex, Inc., Civil Action No. 04-1026 (HHK), 2007 WL 1020788, at \*7 (D.D.C. Mar. 29, 2007). Kaufman and Winn's assault and detention of Hicks were foreseeable and therefore incidental to authorized conduct.

However, Hicks alleges that the defendants<sup>3</sup> caused a Capitol Police internal affairs investigation to be launched against Officer Hicks by falsifying a report against him, conduct she alleges was a misuse of the police complaint procedures and inflicted emotional distress upon her. (Compl. ¶¶ 24, 36.) It is not apparent that the defendants' job duties as telecommunications operations supervisors would contemplate launching internal affairs investigations with law enforcement agencies targeting non-supervisees, much less by use of false reports. Hicks maintains that the defendants' jobs merely provided the opportunity for them to commit the tort of intentional infliction of emotional distress for reasons independent of their employment. The defendants dispute that they had any aim to launch any Capitol Police investigation with any falsified report at all. They claim that the Senate's human resources department asked Winn to document Hicks' termination, that he did so, that the Capitol Police asked him for a copy of

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<sup>3</sup> The defendants argue that the complaint "alleges only that Winn, not Kaufman, gave a false report to the USCP." (Defs.' Reply at 8 n.3.) While paragraph 24 mentions that only Winn falsified the report, paragraph 36 alleges that Winn and Kaufman misused the internal complaint procedures.

that report, and that he provided it as requested. (Defs.' Stmt. of P. & A. in Supp. of Their Mot. to Substit. & Dismiss ("Defs.' Mem.") at 6-7.)

Whether there was one benign report for the human resources department as the defendants say, or some different sinister report as Hicks alleges, cannot be determined from the pleadings. At this stage in the litigation, Hicks is "merely required to plead sufficient facts that, if true, would rebut the certification" and all allegations are read in Hicks' favor. Stokes, 327 F.3d at 1216 (noting that a court would not err "in dismissing the claim without a hearing where the plaintiff did not allege any facts in his complaint or in any subsequent filing . . . that, if true, would demonstrate that [the defendant] had been acting outside the scope of his employment") (internal quotation marks omitted and brackets in original). Hicks' allegations, if true, would allow a reasonable juror to conclude that the defendants' actions did not stem from their job assignments and were not incidental to conduct authorized by their employer. However, this factual dispute, central to determining the court's jurisdiction, will have to be resolved after some limited discovery.

B. Use of force

To determine whether the use of force was within the scope of employment, "[t]he inquiry is necessarily whether the

intentional tort was foreseeable, or whether it was 'unexpectedable in view of the duties of the servant.'" Majano v. Kim ("Majano I"), Civil Action No. 04-201 (RMC), 2005 WL 839546, at \*8 (D.D.C. Apr. 11, 2005), reversed on other grounds by Majano v. United States ("Majano II"), 469 F.3d 138 (D.C. Cir. 2006) (quoting Restatement (Second) of Agency § 245). "[A] broad range of intentional tortious conduct has been found to be within the scope of employment despite the violence by which injury was inflicted. In fact, employers may be held liable for foreseeable altercations [that] may precipitate violence . . . even though the particular type of violence was not in itself anticipated or foreseeable." Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 36 (D.D.C. 2006), vacated on other grounds, Rasul v. Myers, 555 U.S. 1083 (2008) (internal quotation marks and citations omitted).

For example, the D.C. Court of Appeals in Johnson concluded that the actions of the laundromat employee who shot a customer during a dispute over missing shirts were not "unexpectedable" because his job required removing clothes from dryers and this function "placed [the employee] in a position where it would be anticipated that problems of the nature described here could arise." Johnson, 434 A.2d at 408-09 (noting that "[i]f a patron was unable to locate his or her laundry, once having deposited it, it seems likely that [the employee] would be confronted in

an effort to resolve the matter"). Johnson was applied in Majano I. There, an employee was attempting to enter her workplace when she was stopped at the entrance by a co-worker, Mary Majano. Majano asked to see the employee's identification, but the employee pushed Majano out of the doorway and forced her way into the building. After both individuals walked down a thirty-foot hallway, the employee allegedly assaulted Majano by grabbing and repeatedly pulling a lanyard that was around Majano's neck. The court concluded that where Majano was warned not to allow unauthorized people to enter the building, a "physical or verbal altercation between fellow employees over the manner of entrance to a . . . building . . . is unfortunate -- and may be administratively-sanctionable -- but nonetheless expectable." Majano I, 2005 WL 839546, at \*9.

Hicks appears to argue that the use of force was not expected because human resources, not the defendants, was responsible for collecting agency property and that human resources has internal procedures for using Capitol Police if force becomes necessary in termination situations. (Pl.'s Opp'n at 16-17.) The defendants assert that the Senate would expect force to be used because "[t]erminations are often difficult, and it is not unusual for an employee who is being terminated to become upset and confrontational," and that therefore it was not unexpected for Hicks and her supervisors "to have a



confrontation as a result of her immediate termination and her refusal to return office property." (Defs.' Mem. at 7.)

Both Majano I and Johnson found force to be foreseeable based on the duties assigned to the individual defendants and the possibility of confrontation. Winn and Kaufman terminated Hicks as part of their job duties and the termination letter told Hicks that "[she was] to turn in [her] Senate identification badge, keys, and any Senate equipment issued to [her] immediately." (Pl.'s Opp'n, Ex. 1 at 1 (emphasis added).) Although Hicks argues that the Senate had procedures for human resources to collect property, the focus is not on whether Winn and Kaufman followed Senate policy, but whether the act was "unexpected in view of the duties of the servant." Majano I, 2005 WL 839546, at \*8 (internal quotation marks omitted). While the resulting torts may not have been expected, it was not "unexpected" that Winn and Kaufman's duties of informing Hicks that she was terminated and required to return Senate property could result in a confrontation over the manner in which Hicks was to return that property. The use of force therefore was foreseeable.

C. Intent to serve the master

Much like the "nature of conduct" prong above, "[t]he intent criterion focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough

to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." Stokes, 327 F.3d at 1216 (internal quotation marks omitted). The intent prong is satisfied by "even a partial desire to serve the master." Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 665 (D.C. Cir. 2006) (emphasis omitted). "[W]here the employee is in the course of performing job duties, the employee is presumed to be intending, at least in part, to further the employer's interests." Harbury v. Hayden, 444 F. Supp. 2d 19, 34 (D.D.C. 2006) (internal quotation marks omitted). For example, in Council on American Islamic Relations, the D.C. Circuit concluded that a congressman's allegedly defamatory statement made during a press interview was within the scope of his employment because "[s]peaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's authorized duties." Id. at 664 (internal quotation marks omitted). The court found a clear nexus between speaking to the press and the congressman's ability to do his job as a legislator since that ability was tied in part to his relationship with the public, and the statement to the press "was incidental to the kind of conduct he was employed to perform." Id. at 664-65. The fact that an act may be illegal or unauthorized does not automatically prevent it

from serving the master at least in some part. Wilson v. Libby, 535 F.3d 697, 712 (D.C. Cir. 2008).

Whether the agent is acting on behalf of his employer or acting in furtherance of his own ends depends on the employee's intent at the moment a tort occurs and the nature of the attack. Majano II, 469 F.3d at 142. An employee who is acting only for his own "independent malicious or mischievous purpose" is not intending to serve the employer. Adams, 2007 WL 1020788, at \*8. Majano II illustrates this inquiry. The Majano II court concluded that the nature of the alleged tort could allow a reasonable jury to impute a purely personal motivation, because "[t]he assault was violent and unprovoked and took place" after the employee had walked thirty-feet from the doorway.

Majano II, 469 F.3d at 142. Unlike the employee's forcible entry into the building, which was "motivated, at least in part, by her desire to fulfill [her] duty [to report to work]," the employee repeatedly pulling the lanyard could allow a jury to conclude that she was acting solely for her own purposes. Id.

Hicks argues that "[s]ince Winn and Kaufman's actions were both violent and designed to thwart Ms. Hicks from returning the [agency's] property to Human Resources, it should be assumed that they had some ulterior, and solely personal, motive for their tortious conduct." (Pl.'s Opp'n at 13.) Hicks states that through discovery she would show that Kaufman and Winn

violated the Sergeant at Arms's policy by using force against her and that human resources had the responsibility to collect agency property from employees and issue receipts to former employees when property was returned. (Pl.'s Opp'n, Ex. 2, Rule 56(f) Declaration ("Rule 56(f) Decl.") at 1, 2 ¶¶ 1-9.)

Kaufman and Winn may have acted violently or not followed the Senate's policy, but violent or unauthorized acts can still be within the scope of employment. See Wilson, 498 F. Supp. 2d at 97-98 (noting that an employer can be liable for an employee's illegal acts). Winn and Kaufman's attempt to restrain Hicks arose out of a dispute undertaken at least in some part on the employer's behalf. The defendants had just notified Hicks of her termination and Hicks was in the process of returning Senate property until she was denied a receipt. Winn and Kaufman's efforts to detain Hicks and collect the property arose from a dispute originally undertaken at least in some part to serve the Senate. The defendants' actions are similar to the employee's act of pushing a co-worker at the building's entrance in Majano II, an act which was prompted by at least some desire of the employee to fulfill her duty to report to work. See also Caesar, 258 F. Supp. 2d at 5 (concluding that because the tortfeasor was angered over the plaintiff's criticism of her work on a project, the tortfeasor's conduct of slamming a door into the plaintiff immediately

following the dispute "was actuated, at least in part to serve her employer"). The timing of the assault further informs the intent analysis. The physical conduct here occurred soon after Hicks was terminated, refused to return the agency property, and attempted to leave the room. Hicks does not make sufficient allegations to allow a reasonable jury to conclude that Winn and Kaufman's detention of Hicks did not arise out of their employment duties and was not intended at least in part to serve the Senate.

However, the allegations that Winn and Kaufman misused the Capitol Police internal complaint procedures by having an internal affairs investigation launched against Officer Hicks via a false report are sufficient to warrant limited discovery.<sup>4</sup> Hicks asserts that if discovery is conducted, the evidence would show that Winn and Kaufman gave false reports to Capitol Police in order to harm Hicks and not out of any desire to serve the Senate. (Rule 56(f) Decl. at 1, 3 ¶ 14.)

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<sup>4</sup> Winn argues that the plaintiff "has not explained what cause of action she is asserting" in her allegations about submitting a memorandum with false statements. (Defs.' Reply at 8 n.4.) However, the complaint expressly alleges that "[t]hese actions, alone and/or in combinations [sic] with their misuse of the Capitol Police internal complaint procedures (by which, on information and belief, they had an internal affairs investigation launched against Officer Hicks), resulted in the intentional infliction of emotional distress upon the Plaintiff." (Compl. ¶ 36.)

Misusing internal complaint procedures and submitting a report containing false statements are actions that could "permit[] the imputation of a purely personal motivation[,]" Majano II, 469 F.3d at 142, and could be viewed as an act not intended to serve the master. In Stokes v. Cross, the plaintiff alleged that the defendants "destroy[ed] critical evidence, prepar[ed] and submitt[ed] false affidavits by use of threat and coercion, and engag[ed] in other criminal acts." Stokes, 327 F.3d at 1216. Despite the defendants' arguments that their conduct was "incidental to their duty to investigate and report other officers who fail to render assistance [to another officer]," the court ordered limited discovery on the scope of employment issue because the plaintiff made sufficient allegations that the defendants' illegal and unauthorized actions were orchestrated to prevent his promotion, which, if true, would rebut the Westfall certification. Id.; see also Hosey v. Jacobik, 966 F. Supp. 12, 15 (D.D.C. 1997) (stating that where the plaintiff alleged that the individual defendant gave materially false information to a background investigator, if "the Court concluded that [the individual defendant] gave information to the [investigator] with the sole intent of protecting his own interests, not those of the Government, then Plaintiff would carry his burden on the third prong" in rebutting the certification).

The D.C. Circuit has cautioned that limited discovery should not be conducted in the absence of sufficient allegations to rebut the certification because discovery is not a "fishing expedition for facts that *might* give rise to a viable scope-of-employment claim." Wuterich, 385 F.3d at 386 (emphasis in original). However, given Rule 8's liberal pleading standards, Hicks' allegations that Winn and Kaufman misused internal complaint procedures and that Winn knowingly submitted a report with false information, if true, could demonstrate that the defendants were acting outside the scope of their employment by engaging in unauthorized acts not intended to serve the Senate. Therefore, limited discovery on these issues is warranted.

## II. SOVEREIGN IMMUNITY

With the United States substituted for Kaufman and Winn for the assault and false imprisonment claims, Hicks acknowledges that the United States has not waived sovereign immunity for her assault and false imprisonment torts and that she is left without recourse. (Pl.'s Opp'n at 3). See also 28 U.S.C. § 2680(h)); Majano v. United States, 545 F. Supp. 2d 136, 147 (D.D.C. 2008) (stating that "no claim may be brought against the United States that arises out of an assault and battery unless the tort was committed by a federal investigative or law enforcement officer"). Because the FTCA's waiver of sovereign

immunity does not apply to Hicks' assault and false imprisonment claims, these claims will be dismissed for lack of subject matter jurisdiction.

CONCLUSION AND ORDER

Because Hicks has not made sufficient allegations to allow a reasonable juror to conclude that the defendants' assault and restraint of her were outside the scope of their employment, the United States will be substituted for Winn and Kaufman as to the assault and false imprisonment claims. Because, as Hicks concedes, the FTCA does not waive sovereign immunity with respect to assault and false imprisonment, the defendants' motion to dismiss will be granted as to those claims. However, because Hicks has alleged sufficient facts disputing that Winn and Kaufman acted within the scope of their employment when they allegedly misused the Capitol Police internal complaint process, Hicks will be allowed limited discovery as to the intentional infliction of emotional distress claim. Accordingly, it is hereby

ORDERED that defendants' motion [12] to substitute the United States and dismiss Count IV for lack of subject matter jurisdiction will be GRANTED IN PART and DENIED IN PART. The United States is substituted for Winn and Kaufman as to the assault and false imprisonment claims, and these claims are dismissed. The requests to substitute the United States as to



the intentional infliction of emotional distress claim and to dismiss that claim are denied without prejudice. It is further

ORDERED that the parties confer and file by August 6, 2012 a joint status report and proposed order reflecting a schedule governing limited discovery on the issue of whether Winn and Kaufman took actions incidental to conduct authorized by their employer and whether they acted with intent to serve the Senate when they participated in the Capitol Police's internal complaint process.

SIGNED this 6<sup>th</sup> day of July, 2012.

\_\_\_\_\_/s/  
RICHARD W. ROBERTS  
United States District Judge