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

ALAN TROJCAK, et al,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO. 1:08CV593**
v.	§	
	§	**JUDGE MARCIA A. CRONE**
UNITED STATES OF AMERICA,	§	**MAGISTRATE KEITH F. GIBLIN**
	§	
Defendant.	§	
	§	

DEFENDANT'S MOTION TO DISMISS UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6) AND IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Defendant, United States of America, by and through Rebecca A. Gregory, United States Attorney for the Eastern District of Texas, and Andrea L. Parker, Assistant United States Attorney for the Eastern District of Texas, files this Defendant's Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) or, in the Alternative, Motion for Summary Judgment, and for the reasons set forth in the incorporated Memorandum of Law, respectfully moves this honorable Court to dismiss the complaint, or, in the alternative, grant summary judgment in favor of the defendant.

MEMORANDUM OF LAW

I. INTRODUCTION AND LEGAL STANDARDS

A. Background.

This case concerns an action filed by forty-seven federal inmates under the Federal Tort Claims Act (FTCA), 28 U.S.C § 2674. Plaintiffs generally complain about conditions at the Federal Correctional Complex in Beaumont, Texas, resulting from the aftermath from Hurricane

Rita in 2005. Plaintiffs allege the United States is liable because the Federal Bureau of Prisons (BOP) breached its duty of care under 18 U.S.C. 4042(a)(2) by failing to provide *suitable quarters*, *safekeeping*, *care* and *subsistence* at the Federal Correctional Complex - Medium Security Institution in Beaumont, Texas (FCC Beaumont Medium). *See generally Compl*. Plaintiffs claim the United States is liable under Texas law for: (1) negligence; (2) coercion (Walsh-Healey Act violations); (3) reckless disregard for another's welfare or deliberate indifference; (4) malice; and (5) cruel and unusual punishment as a constitutional tort. *Id.* at 6.

Plaintiffs have filed administrative claims as required by 28 U.S.C. § 2675. According to Plaintiffs' suit, the time frame of material events to this suit and the actionable span of time for their claims is from November 8, 2005 through the end of February 2006. *Id.* ¶¶ 10 & 49. Each claimant seeks $250,000.000 in damages. *Id.* at 37. Plaintiffs also request an award for attorney's fees. *Id*.

B. Summary Judgment Standard.

As a procedural vehicle for disposing of deficient claims, summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)(quoting FED.R.CIV.P. 1). Summary Judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). While the party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case, this burden does not require the movant to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 325. The moving party

satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). The nonmovant must also articulate the precise manner in which the evidence he sets forth supports his claims. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994)(citation omitted). Moreover, in designating specific facts, the nonmovant must "'go beyond the pleadings'" and use "'his own affidavits, . . . deposition[s], answers to interrogatories, and admissions on file.'" *Jones v. Sheehan & Young Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996)(citation omitted). If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex*, 477 U.S. at 323. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)(citations omitted). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id*.

C. Applicable Standard for Federal Rule of Civil Procedure 12(b)(1).

A motion to dismiss filed under Rule 12(b)(1) challenges the federal district court's subject matter jurisdiction. FED.R.CIV.P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182 (2d. Cir. 1996)).

Federal courts are courts of limited jurisdiction and lack the power to adjudicate claims absent jurisdiction conferred by the Constitution or legislation. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996); *see also Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). Subject matter jurisdiction cannot be waived or conferred by agreement of the parties. *Id.* "In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Den Norske Stats Oljeselskap As v. HeereMack V.O.F.*, 241 F.3d 420, 424 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)(citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

Furthermore, the party seeking to invoke the court's jurisdiction bears the burden of establishing the basis for such jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 1991); *see also Harvey Constr. Co. v. Robertson-Ceco Corp.*, 10 F.3d 300, 303 (5th Cir. 1994). Thus, when a challenge is made to the exercise of jurisdiction, the burden falls on the plaintiff to demonstrate that such jurisdiction is proper. *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). Upon a motion to dismiss for lack of subject matter jurisdiction, the district court is entitled to consider disputed facts as well as undisputed facts in the record. *Ramming*, 281 F.3d at 161. In resolving the question of subject matter jurisdiction, the district court can refer to evidence outside the pleadings. *Luckett v. Bure*, 290 F.3d 493, 496-97(2d Cir.2002); *see also Rosemound Sand & Gravel Co., v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 417-18 (5th Cir.1972); *O'Rourke v. U.S.*, 298 F.Supp.2d 531, 534. Unlike with a motion for failure to state a claim under FED.R.CIV.P. 12(b)(6), the attachment of exhibits to an FED.R.CIV.P. 12(b)(1)

motion does not convert it to an FRCP motion for summary judgment. *Gonzales, v. U.S.*, 284 F.3d 281, 288 (1st Cir.2002). As set forth below, the Court lacks subject matter jurisdiction on certain of Plaintiffs' claims.

D. Applicable Standard for Federal Rule of Civil Procedure 12(b)(6).

Motions to dismiss for failure to state a claim are appropriate where the defendant attacks the complaint because it fails to state a cognizable claim. FED.R.CIV.P. 12(b)(6). A complaint may be dismissed for failure to state a claim where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir 1997). Such dismissal is also appropriate where a plaintiff's allegations are conclusory or where the complaint shows relief is barred by an affirmative defense. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). As set forth below, Plaintiffs' fail to state a claim on certain of their claims.

II. ARGUMENT AND ANALYSIS

The United States is immune from suit unless it has waived its immunity and consented to suit. *Price v. United States*, 69 F.3d 46, 49 (5th Cir. 1995). The FTCA constitutes the federal government's waiver of its immunity to a variety of suits and sets forth the specific conditions of that waiver. *McNeil v. United States*, 897 F.Supp. 309, 311-312 (E.D. Tex. 1995)(Cobb, J.). As a waiver of sovereign immunity, the FTCA must be construed narrowly. *Id.* Any ambiguity in construction must be resolved in favor of the government. *Leleux v. United States*. 178 F.3d 750, 754 (5th Cir. 1999). The FTCA permits suits "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. § 1346(b). The FTCA applies to negligent torts as well as to certain specifically enumerated intentional torts. *See* 28 U.S.C. § 2680(h).

Claim 1 - Negligence.

Plaintiffs claim the United States was negligent and breached its duty of care under 18 U.S.C. § 4042(a)(2) by failing to provide *suitable quarters*, *safekeeping*, *care* and s*ubsistence*. *Compl*. ¶ 84. Plaintiffs also claim the Government violated American Correctional Association standards 3-4317 and 3-4134. Specifically, Plaintiffs claim Unit K/A and the medical department at FCC Beaumont Medium was not suitable as they were allegedly infested with mold. *Id*. ¶ 85. Plaintiffs further allege the United States violated the duty of *care* and *safekeeping* by compelling Plaintiffs to "drink contaminated water with brown matter floating" in it. *Id.*

"Under Texas law, the elements of a negligence claim are (1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach." *Sport Supply Group, Inc. v. Columbia Cas. Co.,* 335 F.3d 453, 466 (5th Cir.2003)(citing *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex.1998);and *Praesel v. Johnson,* 967 S.W.2d 391, 394 (Tex.1998)).

The United States does not dispute that it has a duty of care under 18 U.S.C. § 4042 to provide *suitable quarters* or to provide for the *safekeeping*, *care* and *subsistence* of inmates in its custody. The United States does contest, however, that it breached that duty or that Plaintiffs suffered any damages as a result of their assignment to Unit K/A and work in the UNICOR factory at FCC Beaumont Medium.

A. Mold Claims.

Unit K/A at FCC Beaumont Medium was suitable to house Plaintiffs in November 2005. Prior to Plaintiffs' assignment to Unit K/A, it was cleaned. *See Exh*. 1 ¶ 3, Declaration of Jessica Cline, Counselor at FCC Beaumont Medium. The cleaning was done by FCC Beaumont Camp inmates and supervised by FCC Beaumont Medium staff. *Id.* Cleaning the unit included removing wax from the floors, scrubbing the walls, wiping the mattresses, and scrubbing and disinfecting the toilets, sinks and showers. *Id*. Supplies to clean the unit included QD-64, which is a germicidal cleaner, disinfectant, and deodorizer effective against HIV, staphylocidal, fungus, etc.; Ajax, with oxygenated bleach; and a mold and mildew remover. *See Exh*. 2 ¶ 3, Declaration of Rebecca Kays, Safety Specialist at FCC Beaumont Medium. There was no mold in Unit K/A. *Exh*. 1 ¶ 7; *Exh*. 2 ¶ 4. Further, Counselor Cline never received any verbal or written complaints about mold from any Plaintiff. *Exh* 1 ¶ 7. In fact, Counselor Cline's office is in Unit K/A and neither the current inmates assigned to the Unit nor other Unit staff have complained or commented about mold in Unit K/A. *Id*. If anyone would have been concerned about mold in Unit K/A it would have been the staff that worked there everyday like Counselor Cline. The fact that neither staff nor inmates expressed concern about mold is strong evidence that Unit K/A was not infested with black mold.

Likewise, Plaintiffs allegations that the medical department at FCC Beaumont Medium was infested with mold is not true. Health Systems Specialist David Miller is assigned to medical at FCC Beaumont Medium. *Exh*. 4 ¶ 5. When Plaintiffs returned to FCC Beaumont Medium the medical department was fully functional and operational. *Id*. Mr. Miller had an office in the medical department and never heard any complaints from inmates or staff that the department

was infested with mold. *Id.* In fact, if medical staff had suspected mold, because of their specialized knowledge, they would have immediately informed the warden that the area was a health hazard. *Id.* That did not happen because the medical department was not infested with black mold.

There was, however, some mold at the FCC Beaumont after Hurricane Rita in 2005. *Exh*. 2 at ¶ 4. This mold, however, was restricted to the records room at the Central Administration Building and the outside Warehouse. *Id.* These buildings are not within the secure perimeter of FCC Beaumont Medium where Plaintiffs were assigned. *Id.* The mold was remediated by a contract firm. *Id.* There was no mold in Unit K/A nor the medical department at FCC Beaumont Medium. *Id.*

It is undisputed that current staff and inmates assigned to Unit K/A and staff assigned to the medical department have not complained about black mold. It is undisputed that there has never been any mold remediation of Unit K/A or the medical department at FCC Beaumont Medium. If Plaintiffs' claims are true, Unit K/A and the medical department would be condemned buildings as it has been over three years since both places, without remediation, were allegedly infested with black mold. The medical department and Unit K/A are still used today at FCC Beaumont Medium. Inmates currently live in Unit K/A and staff such as Counselor Cline still work and have an office there. Further, the medical Department is still treating inmates at FCC Beaumont Medium and Health Systems Specialist Miller still has an office there. The United States did provide *suitable quarters* for Plaintiffs and did not breach its duty under 18 U.S.C. § 4042.

B. Contaminated Water Claims.

Next, Plaintiffs cannot prove the United States breached its duty to provide *care* and *safekeeping* by compelling them to drink contaminated water. According to Exhibit 3, declaration of Steven McBride, Utilities System Repairer Operator Foreman at FCC Beaumont, water received by FCC Beaumont from the City of Beaumont must be sampled and independently tested by the State of Texas. *Exh.* 3 ¶ 2. These samples are tested for Coliform and Escherichia Coli. *Id*. Water samples were taken and tested on the following dates: August 24, 2005, September 21, 2005, October 20, 2005, November 21, 2005, December 28, 2005, January 25, 2006, February 16, 2006, and March 30, 2006. *Id*. Not a single one of these test results demonstrate that the water at FCC Beaumont contained Coliform and Escherichia Coli. *Id*. ¶ 3. The results demonstrate the water at FCC Beaumont was within state requirements and safe to drink.

Assuming *arguendo* that the United States did breach its duty to provide *suitable quarters* and provide *care* and *safekeeping*, Plaintiffs cannot produce one shred of independent, non-secondary-gain, non-malingering medical evidence that they suffered any harm or damages that were proximately caused by the breach of the duty to provide *suitable quarters* and provide *care* and *safekeeping*.

Accordingly, because there was no mold present in Unit K/A nor the medical department at FCC Beaumont Medium, the United states did not breach its duty to provide *suitable quarters* to Plaintiffs. Further, because independent water quality analysis demonstrates that the water at FCC Beaumont was safe to drink, the United States did not breach its duty to provide for the *care* and *safekeeping* of Plaintiffs. Finally, because Plaintiffs cannot produce any independent medical

evidence of injury or damages from the alleged breach of duty, Plaintiffs' negligence claim fails. The United States is entitled to summary judgment on Plaintiffs' negligence claim that it failed to provide *suitable quarters*, *care* and *safekeeping*.

Claim 2 - Walsh- Healey Act Violations.

A. Plaintiffs' Walsh-Healey claims.

Plaintiffs allege that they are entitled to better wages, hours, and benefits, based upon the Walsh-Healey Act, 41 U.S.C. § 35, et seq. Because the provisions of the Walsh-Healey Act clearly do not apply, however, Claim 2 of the Complaint must be dismissed.

1. Inmates are not FPI employees.

Federal Prison Industries, Inc. (FPI or trade name UNICOR) is a statutorily-created, wholly-owned government corporation of the District of Columbia, created by Act of Congress in 1934. It is charged with "determining in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions." 18 U.S.C. § 4121; *see* 28 C.F.R. § 345.11 (2001). FPI's mission is to provide "work simulation programs and training opportunities for inmates confined in Federal correctional facilities." 28 C.F.R. § 345.11. In order to achieve this goal, FPI operates factories in over 100 Federal prisons across the country. It manufactures products and services in eight different business groups: Electronics, Clothing & Textiles, Fleet Management & Vehicular Components, Services, Office Furniture, Recycling, Industrial Products, and Graphics.

Typically, each prison (with the exception of minimum security and administrative/pretrial facilities) in the Federal system contains one UNICOR factory which is a division of one of the

above referenced business groups. USP Lompoc, for example, has a factory which is affiliated with the electronics business group.[1]

The issue of whether an inmate is an employee of FPI may have been a novel question in 1934, when FPI was created by President Roosevelt. However, any such question has long since been resolved, in numerous contexts, most importantly the FLSA, which is closely analogous to the Walsh-Healey Act. In that context, the Fifth Circuit held:

> We have held that prisoners not sentenced to hard labor, who worked outside the jail for a private firm, were FLSA employees of the private firm. *Watson v. Graves*, 909 F.2d 1549, 1556 (5th Cir.1990). In a similar situation, we held that a jailer was not the FLSA employer of an inmate working in a work-release program for a private employer outside the jail. *Reimonenq v. Foti*, 72 F.3d 472, 475-76 (5th Cir.1996). We have also held that inmates who work inside a prison for a private enterprise are not FLSA employees of the private company. *Alexander v. Sara, Inc*., 721 F.2d 149, 150 (5th Cir.1983). However, until today we have not expressly stated whether there is any FLSA employment relationship between the prison and its inmates working in and for the prison.
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> ...
>
> We join these other circuits and hold that a prisoner doing work in or for the prison is not an employee" under the FLSA and is thus not entitled to the federal minimum wage.

Loving v. Johnson, 455 F.3d 562, 563 (5th Cir. 2006). *See also Coupar v. U.S. Department of Labor*, 105 F.3d 1263 (9th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387 (9th Cir.); *cert. denied* 510 U.S. 946 (1993). As in those previous cases, the Plaintiffs in the present case do not have a pecuniary relationship with FPI. Their relationship with the government is purely penological

[1] Although participation in the FPI program is voluntary, all medically eligible sentence inmates in the Bureau of Prisons are required to have a prison work assignment *Coupar v. United States Department of Labor*, 105 F.3d 1265 (9th Cir. 1997); 18 U.S.C. § 4121 note; 28 C.F.R. § 545.20(a).

in nature and, therefore, they cannot be considered an employee of FPI. *Coupar*, 105 F.3d at 1264-65; *Hale*, 993 F.2d at 1392-94.[2]

Although the present case involves the Walsh-Healey Act, not the FLSA, the relationship between the inmate-worker and FPI under both statutes is identical: penal not pecuniary. As such, while these inmates can be said to be working at, assigned to, or in the service of FPI, they clearly are not employees. *Id. See also Nicastro v. Reno*, 84 F. 3d 1446, 1446-47 (D.C. Cir. 1996);*Walton v. United States*, 551 F.3d 1367, 1369 (Fed. Cir. 2009). As such, it is clear that where, as in the present case, inmates have been assigned to work for FPI, and all work was performed within the prison walls, there is absolutely no basis upon which to find that inmate are employees of FPI or the United States. As such, the provisions of the Walsh-Healey Act do not apply, and Plaintiffs' second claim must be dismissed with prejudice.[3]

2. <u>This Court lacks jurisdiction over Walsh-Healey claims</u>.

Even assuming *arguendo* that inmates were somehow employees of FPI or the United States, this court is without jurisdiction over the Walsh-Healey Act claims. First, by its own terms, the Walsh-Healey Act specifically exempts inmates assigned to FPI from its provisions. In Section 8, which is codified at 41 U.S.C. § 42, the statute reads:

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[2] To be sure, incarceration with no work assignment at all would be well within the bounds of the sentence imposed. *James v. Quinlan*, 866 F.2d 627, 629-30 (3rd Cir.), *cert. denied* 493 U.S. 870 (1989)(Prisoners have no Constitutionally protected liberty or property interest in their prison work assignments); *Bulger v. BOP*, 65 F.3d 48, 50 (5th cir 1995)(Prisoner has no legitimate claim of entitlement to continuing UNICOR employment).

[3] Plaintiffs' reliance on the criminal statute for the transportation or importation of prison-made goods, 18 U.S.C. § 1761, as the basis for their claim of entitlement to the protections of the Walsh-Healey Act is nonsensical and wholly without merit.

> sections 35 to 45 of this title shall not be construed to modify or amend Title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act) [41 U.S.C.A. § 10a et seq.], nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend sections 3141 to 3144, 3146, 3147 of Title 40, nor the labor provisions of Title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend chapter 307 and section 4162 of Title 18.

Of course, Chapter 307 of Title 18 includes FPI's statute, which is found at 18 U.S.C. § 4121-4129. So, it is clear on its face that the Walsh-Healey Act is not intended to apply to inmates assigned to FPI (or any other inmate work assignment within the institution.)

Furthermore, Section 1 of the Walsh-Healey Act makes it clear that the Act applies to, "persons employed by contractors of the United States." 41 U.S.C. § 35. FPI, however, is not a contractor of the United States. It is a government corporation, created by Congress in 1934, and is a component of the Federal Bureau of Prisons. Sales by FPI to other government agencies, including DoD, are considered intragovernmental transfers, not contracts. 18 U.S.C. § 4124(c); *Nicastro v. Clinton*, 882 F. Supp. 1128, 1129 n. 2 (D. D.C.), *aff'd* 84 F.3d 1446 (D.C. Cir. 1996). There is no basis upon which to apply the Walsh-Healey Act to intragovernmental transfers. *Id.*

Finally, as a procedural matter, the Walsh-Healey Act does not create an independent right of action in the Federal District Court against the United States. Instead, it specifically lays out an administrative procedure in which such claims must be adjudicated before the Secretary of Labor. 41 U.S.C. §§ 37-38. Plaintiffs provide no evidence to indicate that they participated in this procedure in any way, or otherwise involved the Secretary of Labor, as required by the

statute. As such, this Court is without jurisdiction to hear this claim pursuant to the explicit provisions of the Walsh-Healey Act.

Based upon the above discussion, it is abundantly clear that there is absolutely no basis upon which the Walsh-Healey Act (or, for that matter the FLSA) could be applied to Federal inmates assigned to FPI. As such, Claim 2 of the Complaint is without merit and should be dismissed in its entirety with prejudice.

B. Plaintiffs' on-the-job claims of injury.

It is well settled that the exclusive remedy for any injury suffered by an inmate during the course of his work assignment is the Inmate Accident Compensation system, 18 U.S.C. § 4126(c)(4). *United States v. Demko*, 385 U.S. 149, 151-52, 87 S.Ct. 382, 384 (1966); *Aston v. United States*, 625 F.2d 1210, 1211 (5th Cir. 1980)(citing *Demko*); *Joyce v. United States*, 474 F.2d 215, 219 (3rd Cir. 1973)(discussing the same issue with respect to the analogous FECA statute); *Vaccaro v. Dobre*, 81 F.3d 854, 857 (9th Cir. 1996)(*Demko* establishes that 18 U.S.C. § 4126 is the exclusive remedy against the government); *Granade v. United States*, 356 F.2d 837, 840-41 (2d Cir.), *cert. denied* 385 U.S. 1012, 87 S.Ct. 720 (1967). Thus, the FTCA's waiver of sovereign immunity does not and cannot extend to actions relating to an injury suffered by an inmate during the course of performing his institution work assignment. *Demko*, 385 U.S. at 151-52, 87 S.Ct. at 384.

Therefore, if Plaintiffs' allegations indicate that his injury was incurred while working, then this Court must dismiss the Complaint for lack of Subject Matter Jurisdiction. *Demko*, 385 U.S. at 153, 87 S.Ct. at 385; *Aston*, 625 F.2d at 1211 (where an inmate was injured "on the job," the district court lacks jurisdiction to hear a cause of action grounded on the Federal Tort

Claims Act); *Premachandra v. United States*, 739 F.2d 392, 394 (8th Cir. 1984)(a precisely drawn, detailed statute pre-empts more general remedies);*Wooten v. United States*, 825 F.2d 1039, 1044 (6th Cir. 1987)(whether Plaintiff's injuries were caused by the performance of work is irrelevant; as long as the injury occurred while the inmate was on the job, section 4126 is the exclusive remedy.)

In the present complaint, Plaintiffs make several allegations regarding the UNICOR factory, primarily relating to hazardous materials which were allegedly released into the air while manufacturing Kevlar helmets. *Compl*. ¶¶ 50-59. Because these allegations relate specifically to the conditions within the UNICOR factory, they are precluded by the Prison Industries Fund, 18 U.S.C. § 4126(c)(4). Accordingly, Plaintiffs' claim of injury as a result of hazardous chemical vapors must be dismissed under Federal Rule of Civil Procedure 12(b)(1), as the Court lacks subject matter jurisdiction over this claim.

Claim 3 - Reckless Disregard for Welfare / Deliberate Indifference.

Plaintiffs allege the United States acted recklessly and with deliberate indifference by compelling them to work from 7:30 a.m. to 9:00 p.m. in a building that contained hazardous vapors; failing to provide safety apparel; housing them in a condemned building; making them drink contaminated water and take cold showers; and allowing them less than an hour for their personal needs. *Compl* ¶ 96.

"There is no precise statutory or case law definition for 'reckless disregard for the safety of others.'" *City of San Antonio v. Schneider*, 787 S.W.2d 459, 465 (Tex.App.- San Antonio 1990). "It appears that the breach of such duty lies between 'ordinary' and 'gross' negligence." *Id*. "[R]eckless disregard includes essential characteristic of gross negligence, and indicates an entire

want of care sufficient to raise the belief or presumption that the act or omission complained of was the result to conscious indifference to the rights, welfare, or safety of the person or persons affected by it." *Id*. "[R]eckless disregard means more than momentary thoughtlessness, inadvertence or error of judgment." Thus, "reckless disregard and gross negligence are synonymous terms." *Id*.; *see also Western Guaranty Loan Co. v. Dean*, 309 S.W.2d 857, 860 (Tex. Civ.App. 1957).

In Texas "gross negligence involves two components: (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree or risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001)(citing *Transportation Insurance C. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)). "The first element, 'extreme risk,' means not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Id*. (citations omitted). "The second element, 'actual awareness,' means that the defendant knew about the peril, but its acts or omissions demonstrated that it did not care." *Id*. (citations omitted).

Here, Plaintiffs cannot prove gross negligence. Certainly, there is no **extreme degree or risk of harm** from working 7:30am to 9:00pm, taking a cold shower, or allowing less than an hour of time for their personal needs. As to the allegations of being forced to work in a building that contained hazardous vapors, not being provided safety apparel, being housed in a condemned building and drinking contaminated water, it is impossible for Plaintiffs to prove the

second element of gross negligence. Plaintiffs must prove that there was **actual awareness** of the peril, but the United States took no action because it did not care.

Plaintiffs will find it insurmountable to prove "actual awareness" that housing Unit K/A was condemned. According to Counselor Cline and Safety Specialist Kays, there was no black mold in Unit K/A. *Exh*. 1 ¶ 7, *Exh*. 2 ¶ 4. The Unit was operational and inspected and cleaned before inmates were returned to the Unit in November 2005. *Exh*. 1 ¶ 6. Because these staff members indicate no mold was present in Unit K/A, actual awareness is impossible for Plaintiffs to prove.

Plaintiffs will find it impossible to prove that the United States was actually aware that the water at FCC Beaumont Medium was contaminated. As set forth *supra*, according Steven McBride, Utilities System Repairer Operator Foreman at FCC Beaumont, water received at FCC Beaumont is sampled and independently tested by the State of Texas. *Exh.* 3 ¶ 3. These samples are tested for Coliform and Escherichia Coli. *Id.* Water samples taken and tested from November 2005 through March 2006 indicate the water at FCC Beaumont was within state requirements and safe to drink. *Id*.

In addition, as demonstrated *supra*, the claims of working hazards in UNICOR are precluded by *United States v. Demko*, 385 U.S. 149, 151-52, 87 S.Ct. 382, 384 (1966). The United States did not waive sovereign immunity for those claims. Accordingly, Plaintiffs' claims of being forced to work in a building that contained hazardous vapors and not being provided safety apparel should be dismissed under Federal Rule of Civil Procedure 12(b)(1).

Finally, as discussed *infra* in Defendant's response to Claim 4, Plaintiffs' deliberate indifference claims are constitutional claims which are not cognizable under the FTCA.

Accordingly, Defendant should be granted summary judgment on Plaintiffs' gross negligence claim, and their deliberate indifference claim should be dismissed under Federal Rule of Civil Procedure 12(b)(1).

Claim 4 - Cruel and Unusual Punishment (as a Constitutional Tort).

Plaintiffs claim the United States violated the Eighth Amendment by "denying [them] the minimal civilized measures of life's necessities."[4] *Compl*. ¶¶ 99-104. They claim they were forced to drink contaminated water and were exposed to toxic fumes that were spawned by the presence of black mold in Unit K/A. *Id*. They further claim that the Eighth Amendment was violated because there was an absence of hygiene and sanitation in Unit K/A and that there was a lack of medical care. *Id*.

The FTCA waives sovereign immunity "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. § 1346(b); *see also* 28 U.S.C. § 2674. Accordingly, there is no waiver of sovereign immunity to suits predicated on tort causes of action cognizable under state law and the waiver is inapplicable to constitutional torts. *Brown v. United States*, 653 F.2d 196, 201-02 (5th Cir. 1981); *see also Keene Corp v. United States,* 700 F.2d 836, 845 n. 13 (2d Cir. 1983)(no waiver of sovereign immunity for constitutional torts.); *Allen v. Travis*, 2008 WL 1849171, *4 (N.D. Tex. 2008)(Constitutional torts are excepted from the FTCA.); *Reed v. Hadden*, 473 F.Supp. 658, 660 n.2 (D. Colo. 1979)(A private individual could not violate another

[4] Plaintiffs have not identified a cause of action in tort recognized by Texas that can be asserted alleging the same constitutional theory of recovery.

individual's constitutional rights, thus, the United States could not be liable under the FTCA for violation of constitutional rights.).

Plaintiffs' claim of constitutional tort violations against the United States fails and must be dismissed. The United States has not waived sovereign immunity to be sued for the individual actions of FCC Beaumont Medium staff for violations of the Constitution. To be successful, Plaintiffs' constitutional tort claims must be brought against federal officials in their individual capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Here, only the United States is a defendant.

Plaintiffs' claim is barred by sovereign immunity. "The United States must consent to be sued, and that consent is a prerequisite to federal jurisdiction." *Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Management Council,* 364 F.3d 269, 273 (5th Cir. 2004)(citing *United States v. Navajo Nation,* 537 U.S. 488, 502, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003)). Accordingly, Plaintiffs' claim of an Eighth Amendment violation against the United States should be dismissed under Federal Rule of Civil Procedure 12(b)(1).

Claim 5 - Malice.

Plaintiffs claim the prison employees acted with malice by failing to give them access to the law. *Compl*. ¶¶ 105-108. Defendant presumes this claim refers to Plaintiffs' access to courts allegations as mentioned in paragraphs 79-82 of the complaint. There, Plaintiffs complain that staff threatened and retaliated against them for filing tort claims.

While Plaintiffs' allege malice, the gravamen of the allegations is one of retaliation. A retaliation claim in this context is essentially an access to courts claim under the First Amendment. *Morris v. Powell*, 449 F.3d 682, 686 (5th Cir. 2006). As discussed *supra*, a constitutional claim

against the United States should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for failure to state a claim.

If Plaintiffs truly intend to assert a claim for malice under Texas law, that claim wholly lacks merit. In Texas, malice means:

> (A) a specific intent by the defendant to cause substantial injury to the claimant; or
>
> (B) and act or omission: (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with the conscious indifference to the rights, safety, or welfare of others.

V.T.C.A., Civ. Prac. & Rem. Code § 41.001. Malice in Texas is an element of and related to an exemplary (punitive) damages claim. *Hartford Cas. Ins. v. Powell*, 19 F.Supp.2d 678, 696 (N.D.Tex.1998); *see also* V.T.C.A., Civ. Prac. & Rem. Code § 41.003. Defendant can find no Texas case law where a private person was sued for malice as a cause of action in tort, nor do Plaintiffs cite to any cases. Further, under the FTCA, the United States is not liable for punitive damages. 28 U.S.C. § 2674. Accordingly, Plaintiffs' malice claim should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

III. CONCLUSION

Plaintiffs suit should be dismissed. Defendant is entitled to summary judgment on the negligence claim as it did not breach its duty of care. Further, even if Defendant was negligent, Plaintiffs can prove no damages proximately caused by that negligence. Further, Plaintiffs' Walsh-Healey Act claims fail because the United States did not waive sovereign immunity for that type of claim. Plaintiffs' reckless disregard / deliberate indifference / cruel and

unusual punishment (as a Constitutional tort) claims fail for the same reason. Finally, Plaintiffs malice claim fails because Texas does not recognize a cause of action in tort for malice.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that its Motion to Dismiss be granted under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and in the alternative that its motion for summary judgment be granted and that the above-styled and numbered case be dismissed in its entirety with Plaintiff taking nothing by this suit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 17th day of February, 2009, a true and correct copy of the foregoing documents was delivered by electronic mail to plaintiffs' counsel of record.

/s/ Andrea L. Parker
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