

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JOSEPH P. WASHINGTON :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 01-617-JJF  
 :  
 ROBERT B. CURRY, and THE :  
 UNITED STATES OF AMERICA, :  
 :  
 Defendants. :

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Joseph P. Washington, Pro Se Plaintiff.

Rosamaria Tassone, Esquire of The Wilmington Law Department,  
Wilmington, Delaware.  
Attorney for Robert B. Curry.

Judith M. Kinney, Esquire, Assistant United States Attorney,  
Wilmington, Delaware. Of Counsel: John C. Flynn, Esquire of  
The Department Of The Treasury, United States Customs Service,  
Baltimore, Maryland.  
Attorney for The United States Of America.

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**MEMORANDUM OPINION**

February 14, 2002  
Wilmington, Delaware

**FARNAN, District Judge**

Presently before the Court is a Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(1), Or In The Alternative, Motion For Summary Judgment (D.I. 7) filed by Defendant the United States of America (hereinafter "the United States")<sup>1</sup> and a Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(6), Or In The Alternative, Motion For Summary Judgment Pursuant To Federal Rule Of Civil Procedure 56(b) (D.I. 17) filed by Defendant Robert B. Curry. For the reasons discussed below, the Motions (D.I. 7; D.I. 17) filed by the United States and Robert B. Curry will be granted.

**I. BACKGROUND**

Plaintiff Joseph P. Washington (hereinafter "Plaintiff") is proceeding in this matter pro se. On August 21, 2001, Plaintiff filed this action in the Superior Court of the State of Delaware, New Castle County, naming Robert B. Curry (hereinafter "Curry") and Kevin A. Megetrick (actually spelled McGetrick)(hereinafter "McGetrick") as defendants. (See D.I. 1; D.I. 5).

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<sup>1</sup> The United States' Motion To Dismiss (D.I. 7) corrects its former Motion To Dismiss (D.I. 4). However, the United States relies upon its original Memorandum Of Points And Authorities (D.I. 5) in support of its corrected Motion To Dismiss (D.I. 7).

By his Complaint, Plaintiff alleges that he was working on the dock of the port of Wilmington on August 16, 1999. (D.I. 5, Ex. A). Plaintiff alleges that Curry, of the Wilmington Police Department's Drug Organized Crime and Vice Unit, informed him that he would be arrested if he did not submit to a search of his person. (D.I. 5, Ex. A). Plaintiff alleges that he was subsequently assaulted "by at least three officers," had a stun weapon used on him, was pushed to the ground, arrested, strip searched, and spent the night in jail. (D.I. 5, Ex. A). Plaintiff further alleges that Curry and McGetrick, a special agent of the United States Customs Service, "lied on a complaint" about him. (D.I. 5, Ex. A).

On September 12, 2001, this matter was removed to this Court pursuant to 28 U.S.C. § 1442(a)(1), as an action against an officer of a United States agency. (See D.I. 1). On September 19, 2001, the United States filed a Notice Of Substitution (D.I. 3) pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1998 (hereinafter "FTCA")(codified at 28 U.S.C. § 2671-2680), to amend the caption of this matter to reflect the substitution of the United States for McGetrick.<sup>2</sup> (D.I. 3). Because the

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<sup>2</sup> Specifically, 28 U.S.C. § 2679(d)(1) provides:

Upon certification by the Attorney General that the

Court concluded that McGetrick was acting within the scope of his employment at the time of the alleged incident, the Court granted the United States' Notice Of Substitution (D.I. 3) on September 25, 2001.

Although Plaintiff's Complaint is a bit unclear, the Court construes Plaintiff's Complaint to allege six causes of action arising under Delaware State tort law. (See D.I. 5, Ex. A). Specifically, Plaintiff's Complaint appears to allege claims of assault, battery, false arrest, false imprisonment, abuse of process, and malicious prosecution. (See D.I. 5, Ex. A).

On September 20, 2001, the United States, as substituted for McGetrick, filed a Motion To Dismiss Plaintiff's Complaint (D.I. 7) for lack of subject matter jurisdiction, or in the alternative, for summary judgment. Additionally, on December 7, 2001, Curry filed a Motion To Dismiss Plaintiff's Complaint (D.I. 17) for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment.

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defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

## II. DISCUSSION

### A. Whether The United States' Motion To Dismiss Should Be Granted

By its Motion, the United States contends that Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction for failure to comply with the FTCA. (D.I. 5). Specifically, the United States contends that Plaintiff failed to file an administrative claim with the United States Customs Service prior to filing his Complaint in this action, in violation of 28 U.S.C. § 2675(a). (D.I. 5 at 2-5). In support of its contention, the United States has submitted the affidavit of David Callahan, the Resident Agent in Charge of the United States Customs Service's Office of Investigations in Philadelphia, Pennsylvania. (D.I. 5, Ex. B). Because Mr. Callahan has declared that Plaintiff has presented no administrative action to the United States Custom Service relating to the incident alleged in Plaintiff's Complaint, the United States contends that Plaintiff's Complaint must be dismissed for lack of subject matter jurisdiction. (D.I. 5 at 5).

The FTCA contains an administrative exhaustion requirement, which provides:

An action shall not be instituted upon a claim against the United States for money damages for injury . . . or

personal injury . . . 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a). Fulfillment of the administrative exhaustion requirement is essential to a court's subject matter jurisdiction over a claim under the FTCA. See McNeil v. United States, 508 U.S. 106, 113 (1993)(holding that "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies"); Livera v. First National State Bank of New Jersey, 879 F.2d 1186, 1194 (3<sup>rd</sup> Cir. 1989), cert. denied 493 U.S. 937 (1989)(explaining that exhaustion "is a jurisdictional requirement not subject to waiver by the government").

After reviewing the record and the applicable law on this issue, the Court concludes that Plaintiff's Complaint against the United States lacks subject matter jurisdiction because Plaintiff has failed to present his claim to the appropriate Federal agency in violation of the FTCA. See 28 U.S.C. § 2675(a). Because McGetick was acting within the scope of his employment when this alleged incident occurred, the appropriate Federal agency in this case is the United States Customs Service. See 28 U.S.C. § 2671 (providing that the

"appropriate Federal agency" is the agency whose activities gave rise to the claim). In light of Mr. Callahan's sworn affidavit, the record is clear that Plaintiff has failed to present his claim to the United States Customs Service.<sup>3</sup> (See D.I. 5, Ex. B). Accordingly, Plaintiff's Complaint against the United States will be dismissed for lack of subject matter jurisdiction. See McNeil, 508 U.S. at 113; Livera, 879 F.2d at 1194.

B. Whether Curry's Motion To Dismiss Should Be Granted

By his Motion, Curry contends that Plaintiff's Complaint should be dismissed because he is immune from civil liability pursuant 19 U.S.C. §507(b). (D.I. 17). Curry contends that, on August 16, 1999, he was assigned to assist the United States Customs Service in conducting border searches for narcotics at the Port of Wilmington. (D.I. 17 at 1). In a briefing held prior to the commencement of the operation, Curry contends that McGetrick directed the Wilmington Police Officers to conduct a brief pat down search of all individuals handling cargo from a foreign port. (D.I. 17 at 5). Pursuant to McGetrick's direction, Curry contends that he approached Plaintiff, who was handling cargo from a foreign vessel, and

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<sup>3</sup> In his Answering Brief (D.I. 18) to the United States' Motion To Dismiss (D.I. 7), Plaintiff fails to address the United States' jurisdictional argument. (See D.I. 18).

requested that Plaintiff submit to a brief pat down search. (D.I. 17 at 5). Curry further contends that he explained to Plaintiff the necessity for the search, and informed Plaintiff that Plaintiff could be subject to arrest in the event Plaintiff failed to comply. (D.I. 17 at 5). Because Curry contends that at all relevant times he was acting at the request and direction of United States Customs Agent McGetrick in an ordinary, reasonably prudent manner, Curry contends that he is immune from civil liability pursuant to 19 U.S.C. §507(b) and Plaintiff's Complaint should be dismissed. (D.I. 17 at 5).

After reviewing Plaintiff's Complaint and the applicable law on this issue, the Court concludes that Curry is immune from civil liability. Pursuant to 19 U.S.C. §507(b):

[a]ny person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of the rendering of such assistance if the assisting person acts as an ordinary, reasonably prudent person would have acted under the same or similar circumstances.

Plaintiff's Complaint seems to confirm that Curry was working with the United States Customs Service on the date of the alleged incident, and Plaintiff fails to address Curry's immunity argument in his Answering Brief. (See D.I. 5, Ex. A; D.I. 18). Additionally, Plaintiff's Complaint fails to allege



that Curry's conduct was unreasonable. (See D.I. 5, Ex. A). With respect to Curry's conduct at the time of the alleged search, Plaintiff alleges only that Curry "told me I would be arrested if I did not su[b]mit to a search of my person." (See D.I. 5, Ex. A). Because the Court concludes that this allegation does not constitute unreasonable conduct, and because Plaintiff's Complaint seems to confirm that Curry was working with the United States Customs Service, the Court concludes that Curry is immune from liability pursuant to 19 U.S.C. §507(b).<sup>4</sup> Accordingly, Plaintiff's Complaint against Curry will be dismissed.

### **III. CONCLUSION**

For the reasons discussed, the Motions To Dismiss (D.I. 7; D.I. 17) filed by the United States and Curry will be granted.

An appropriate Order will be entered.

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<sup>4</sup> Curry also contends that he is immune from suit under the Municipal Tort Claims Act, 10 Del.C. §4011, et seq., because Plaintiff has failed to allege that Curry acted outside the scope of his employment as an officer of the Wilmington Police Department, or acted with wanton negligence or willful and malicious intent. (D.I. 17 at 5). However, because the Court has concluded that Curry is immune from civil liability pursuant to 19 U.S.C. §507(b), the Court will not address Curry's additional argument.

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 UNITED STATES OF AMERICA, :  
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 Defendants. :

**ORDER**

At Wilmington this 14<sup>th</sup> day of February, 2002, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

- 1) The United States' Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(1), Or In The Alternative, Motion For Summary Judgment (D.I. 7) is **GRANTED**;
- 2) Curry's Motion To Dismiss Pursuant To Federal Rule Of Civil Procedure 12(b)(6), Or In The Alternative, Motion For Summary Judgment Pursuant To Federal Rule Of Civil Procedure 56(b) (D.I. 17) is **GRANTED**.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE