IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JANICE P. CREIGHTON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 98-755-JJF
	:	
UNITED STATES OF AMERICA, Department of the Air Force,	:	
	:	
	:	
Defendant.	:	

Suzanne Macpherson-Johnson, Esquire, Dover, Delaware.
Attorney for Plaintiff.

Paulette K. Nash, Esquire, Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

May 31, 2001
Wilmington, Delaware

FARNAN, District Judge.

Plaintiff Janice P. Creighton filed this action pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., on December 23, 1998 against Defendant United States of America, Department of the Air Force. (D.I. 1). In her Complaint, Plaintiff claims to have suffered injuries from a slip and fall that occurred at the Commissary on the Dover, Delaware Air Force Base ("the Commissary") on December 24, 1996. The matter was tried to the Court without a jury on April 24, 2001. The following constitutes the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

A. Plaintiff's Slip and Fall

1. On December 24, 1996, after completing her work day as a seamstress at the dry cleaners located on the Dover Air Force Base, Plaintiff went to the Commissary to pick up some dip and some sour cream. (D.I. 49 at 6-10).

2. Once inside the Commissary, Plaintiff picked up a basket and walked down one of the aisles. (D.I. 49 at 9). Plaintiff was careful to watch where she was going because she had noticed that many customers in the Commissary place their baskets on the floor when reaching for items on the shelves. (D.I. 49 at 11).

3. Plaintiff arrived at the end of the aisle and started to turn to her right to walk down the aisle in which the dip was located, all the while looking at the shelves. (D.I. 49 at 10). The produce department was on the left side of the aisle and there were no signs in or near the aisle warning customers of a slippery floor. (D.I. 49 at 20). Plaintiff was aware that debris sometimes

falls on the floor in the produce aisle, and Plaintiff usually looked out for such debris when walking in the Commissary. (D.I. 49 at 61-62). As Plaintiff tried to turn to her right, she slipped, causing her right leg to fly straight out to the side and her left leg to double-up underneath her. (D.I. 49 at 10-11). Plaintiff lost her balance and fell to the floor, landing on her buttocks. (D.I. 49 at 10-11).

4. Plaintiff looked down on the floor and saw that she had slipped on some mashed grapes, which she had not previously noticed. (D.I. 49 at 12, 56). A couple of customers came to help her up off of the floor; however, no Commissary employees assisted her because none had witnessed Plaintiff's fall. (D.I. 49 at 12-13).

5. After Plaintiff got up off of the floor, Mr. James Gowen, the Commissary manager, arrived and, according to Plaintiff, angrily stated: "[w]e always have this problem with the grapes on the floor, and I've told them about this." (D.I. 49 at 15-16). Mr. Gowen then asked Plaintiff if she was injured, but Plaintiff assured Mr. Gowen that she thought that she was alright and that she did not need to go to a hospital. (D.I. 49 at 16).

6. Mr. Gowen assisted Plaintiff to an office located around the corner of the produce section. (D.I. 49 at 17). Athena Harris, the Commissary's produce manager, was inside the office, and she also asked Plaintiff if she wanted to go to the hospital. (D.I. 49 at 18-19, 87). Ms. Harris also obtained Plaintiff's name, address, and phone number. (D.I. 49 at 18-19). After approximately five minutes, Plaintiff exited the office and went to check out at the cashier, at which time she noticed that a Commissary employee was mopping the floor in the area in which Plaintiff had fallen, and that a "wet floor" warning sign had been placed in the aisle. (D.I. 49 at

19-20).

7. After leaving the Commissary, Plaintiff returned to the dry cleaners at which she worked in order to punch in her time card. (D.I. 49 at 21-22). Plaintiff then left the dry cleaners and got inside her husband's car, who was waiting for her in the parking lot. (D.I. 49 at 22). Plaintiff told her husband that she had fallen and was feeling a little "numb," but that she did not think she had suffered any injuries as a result of her fall. (D.I. 49 at 22).

8. Over the next few days, Plaintiff experienced pain in her lower back. (D.I. 49 at 23-28). In early January 1997, Plaintiff began seeking medical treatment for this pain. (D.I. 49 at 28). Despite receiving this medical treatment, Plaintiff suffered permanent injuries to her lower back as a result of this incident.[1]

B. Customary Practices at the Commissary

9. Ms. Harris inspects the floor in the produce area every morning before the store opens. (D.I. 49 at 88). However, she never finds produce on the floor in the morning because the Commissary is cleaned every night. (D.I. 49 at 92). Ms. Harris periodically checks the floor in the produce aisle for fallen debris throughout the day. (D.I. 49 at 97). Ms. Harris had also trained the six produce department employees to patrol the produce area throughout the day to check for and pick up fallen debris. (D.I. 49 at 91, 96-98).

10. It is unclear if the grapes in the Commissary's produce area were packaged in bags or

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[1] The parties presented conflicting evidence as to the extent of Plaintiff's injuries and as to whether Plaintiff's fall at the Commissary was the proximate cause of her injuries. However, due to the Court's conclusion below that Plaintiff failed to prove Defendant breached its duty to Plaintiff, it is unnecessary to examine the evidence pertaining to Plaintiff's injuries in detail.

whether they were "loose," but Ms. Harris testified that the grapes usually come from Chile in the winter, and the grapes that come from Chile are bagged. (D.I. 49 at 91-92).

11. Ms. Harris has previously seen grapes fall on the floor when customers pick them up and carry them over to the scale to be weighed. (D.I. 49 at 93). When she sees this happen, which on average is about twice a week, Ms. Harris picks the grapes up off of the floor. (D.I. 49 at 93, 95). Ms. Harris testified that it is very difficult to keep the floor clear of produce at all times because customers sometimes pick items up and just "throw [the items they do not want] everywhere," and that customers sometimes pick up items in one area and drop them on the floor in another area. (D.I. 49 at 100-01). Signs are never placed in the produce area to warn about produce on the floor, because, according to Ms. Harris, produce is picked up from the floor as soon as it is discovered, and that it would be impractical to place permanent warning signs. (D.I. 49 at 95-96 & 104-05).

12. In fifteen years as the produce manager, Ms. Harris is aware of only one person who has fallen in the produce aisle, and that was because the customer suffered an aneurism. (D.I. 49 at 89 & 98-99). Ms. Harris would have been informed of any other instance where a customer fell in the produce section. (D.I. 49 at 98-99). Mr. Gowen also testified that, other than Plaintiff, he has no knowledge of any customers falling and hurting themselves in the Commissary. (Gowen Dep. at 39).

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the instant dispute pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80 because Plaintiff is asserting an action in tort

against the United States for alleged negligent conduct by federal employees serving within their capacities while working at the Commissary. The FTCA serves as a limited waiver of the United States' sovereign immunity. Emerson v. United States, 1998 U.S. District LEXIS 6461, at *12 (D. Del. April 29, 1998).

2. Because the alleged negligent conduct occurred in Delaware, the Court must apply Delaware state tort law. Toole v. United States, 588 F.2d 403, 406 (3d Cir. 1978).

3. Plaintiff was a business invitee at the Commissary on December 24, 1996. DiSabatino Bros., Inc. v. Baio, 366 A.2d 508, 510 (Del. 1976).

4. Defendant owed Plaintiff a duty to ensure that the Commissary was "kept in a reasonably safe condition." Howard v. Food Fair Stores, New Castle, Inc., 201 A.2d 638, 640 (Del. 1964).

5. In order to fulfill this duty, Defendant was required to warn Plaintiff about the smashed grapes on the floor or prevent her from encountering the grapes if: (1) the grapes posed an "unreasonable risk" to customers, (2) employees of the Commissary either knew about the grapes or with the exercise of reasonable care would have known about the grapes, and (3) Plaintiff could not have been expected to discover the grapes herself prior to slipping on them. DiSabatino, 366 A.2d at 10. Under this standard, Defendant was "not an insurer of [Plaintiff's] safety" while Plaintiff was inside the Commissary. Hess v. United States, 666 F. Supp. 666, 670 (D. Del. 1987).

6. The Court concludes that Plaintiff has proven by a preponderance of the evidence that the mashed grapes on the floor of the Commissary posed an unreasonable risk to customers. The

fact that it was standard policy at the Commissary to search the aisles for fallen debris and to clean the aisles immediately upon discovery of such debris supports this conclusion. Brinkley v. Cat Enters., Inc., 1994 Del. Super. LEXIS 145, at *12-13 (Del. Super. Ct. April 4, 1994).

7. However, the Court concludes that Plaintiff has not proven by a preponderance of the evidence that employees of the Commissary either knew or, with the exercise of reasonable care, would have known about the mashed grapes on the floor. It is undisputed that no Commissary employees knew the grapes were on the floor. Furthermore, there is no evidence concerning how long the grapes were on the floor prior to Plaintiff slipping. The Commissary was not required to have an employee stationed at the produce aisle to ensure that any grapes that fell on the floor were immediately cleaned up. Hess, 666 F. Supp. at 672. In addition to Plaintiff's lack of proof, Defendant produced evidence that employees were required to routinely check the floors for debris throughout the day. Ms. Harris's and Mr. Gowen's testimony regarding the lack of previous slip and fall accidents at the Commissary supports the conclusion that Defendant did adequately monitor the produce area. See id. at 673 (holding that a lack of prior accidents is evidence that a condition was not unreasonably dangerous).

8. In sum, absent sufficient evidence establishing that Defendant's conduct in monitoring the produce aisle was unreasonable, the Court concludes that Plaintiff has failed to sustain her burden of proof. See id. See also Flocco v. Super Fresh Mkts., Inc., 1998 U.S. Dist. LEXIS 20266, at *5, 8 (E.D. Pa. Dec. 29, 1998)(holding that the plaintiffs could not recover for a slip and fall when they offered no "competent evidence from which one, without speculation or conjecture, could reasonably find that defendant" would have been able to discover the dangerous

condition if the defendant had exercised reasonable care); Short v. Wakefern Food Corp., 2000 Del. Super. LEXIS 58, at *10-11 (Del. Super. Ct. March 14, 2000)(holding that, since there was no evidence suggesting that the spilled liquid had been on the floor for more than "a few minutes," the plaintiff could not recover for her slip and fall); Martino v. Great Atl. & Pac. Tea Co., 213 A.2d 608, 610 (Pa. 1965)(holding that absent evidence that an employee failed to check the floor for fallen food and debris, the plaintiff could not recover for slipping and falling on grapes).[2]

9. The Court also concludes that Defendant's failure to place signs in the Commissary warning customers about produce on the floor does not warrant a finding of liability. Plaintiff knew that "sometimes produce debris falls on the floor in produce departments," and that she looked out for such debris when shopping in the Commissary. (D.I. 49 at 61/20 - 62/2). Thus, even if the Commissary had posted warning signs, these signs would provide little or no benefit to customers since, as Plaintiff admitted, customers are aware that produce is sometimes dropped on the floor. Thus, the Court concludes that the mere fact that signs were not posted in the Commissary warning about produce on the floor is insufficient to sustain Plaintiff's burden of proof. See Hess, 666 F. Supp. at 672 (holding that the lack of "wet floor" warning signs did not allow for a finding of negligence when the plaintiff knew that it had been raining all day and knew that the entranceway to defendant's building would inevitable be slippery).

10. Lastly, the Court concludes that Plaintiff has also failed to satisfy the final element of

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[2] The Court acknowledges that in slip and fall cases, it may be difficult for the plaintiff to be able to prove the amount of time a dangerous condition existed. Nonetheless, this difficulty in proof does not absolve Plaintiff of the burden to prove each element of her cause of action by a preponderance of the evidence. See Flocco, 1998 U.S. Dist. LEXIS 20266, at *8.

her cause of action. Plaintiff testified that she was aware that items and obstacles were sometimes on the Commissary floor that had to be routinely avoided by customers. However, at the time of her fall, Plaintiff was looking upward for items on the shelves, and therefore, she did not see the grapes on the floor. The Court is not persuaded that the facts adduced by Plaintiff establish by a preponderance of the evidence that Plaintiff could not have been expected to discover the grapes prior to slipping on them. The Court is mindful that a plaintiff can be "excused from keeping a constant lookout on the floor to observe a dangerous condition." Howard, 201 A.2d at 642.[3] See also Hess, 666 F. Supp. at 671 (citing Howard). However, Plaintiff's testimony demonstrates that the grapes were in the aisle in view of Plaintiff had she glanced at the floor. There is no evidence that the position of the grapes was such that they were covered or hidden from Plaintiff's view in any manner. Thus, on the record here, the Court cannot say that Plaintiff could not have reasonably been expected to discover the grapes if she had been as careful as she was when previously perusing other parts of the Commissary.

11. In sum, the Court concludes that Plaintiff has failed to prove that: (1) Defendant either knew or should have known that the grapes were on the floor, and (2) Plaintiff could not have been expected to discover the grapes herself prior to slipping on them. Therefore, the Court concludes that Defendant is not liable for the injuries Plaintiff suffered.

An appropriate Order will be entered in accordance with these findings of fact and conclusions of law.

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[3] In Howard, the conclusion that a customer in a store is justified in looking at the shelves and not at the floor in front of her was contained in a discussion of contributory negligence. Id. However, this reasoning is equally applicable in the context of Plaintiff's prima facie case.

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UNITED STATES OF AMERICA,	:	
Department of the Air Force,	:	
	:	
Defendant.	:	

O R D E R

At Wilmington this 31 day of May, 2001, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Judgment is entered against Plaintiff and in favor of Defendant on all counts.

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UNITED STATES DISTRICT JUDGE