

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

MARK WILSON,	)	CASE NO. 4 : 00CV00295
	)	
Plaintiff,	)	MEMORANDUM OF POINTS
	)	AUTHORITY IN SUPPORT OF
v.	)	PLAINTIFF'S PETITION FOR
	)	SUBSTITUTION AND
BUREAU OF PRISONS, <u>et al.</u> ,	)	REPRESENTATION BY THE
	)	UNITED STATES PURSUANT
Defendants.	)	TO 28 U.S.C. 2679(d)(3)
_____	)	

**STATEMENT OF THE CASE**

In his complaint in the above captioned case, ~~George Swartz~~, a federal prisoner confined to (Name of Federal Correctional Institution) alleges that ~~John Doe~~, an employee of the United States Department of Justice, Bureau of Prisons, (*Describe the named alleged conduct.*) See, Complaint, ¶¶ \_\_\_\_.

While denying the charges of illegal conduct contained in the Complaint, ~~John Doe~~ asserts that the alleged conduct took place while he was conducting his duties as a federal correctional officer within the confines of a federal correctional institution. See, Affidavit of ~~John Doe~~, ¶¶ \_\_\_\_.

Pursuant to established Department of Justice policy, ~~John Doe~~, has sought representation by the Attorney General. In a letter dated \_\_\_\_\_, the Department of Justice has refused to provide representation of ~~John Doe~~ and has refused to substitute the United States for ~~Mr. Doe~~ in the above captioned case.

## ARGUMENT

When the United States refuses to represent a federal employee in a tort action the effected employee is entitled, by law, to seek review of that decision in Federal District Court.

The "Westfall Act", 28 U.S.C. §§ 2679(d)(3) provides as follows:

In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought 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.

"Westfall" prominently provides for court review of refusals to certify at the behest of defending employees. See §2679(d)(3). Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 431, 115 S.Ct. 2227, 2234-35, 132 L.Ed.2d 375 (1995); Lyons v. Brown, 158 F.3d 605, 607 (1<sup>st</sup> Cir. 1998).

In Lamagno the Supreme Court, after reviewing the history of the legislative predecessors of the "Westfall" Act, explicitly held that the "scope of employment" determination of the Attorney General was subject to judicial review. In addressing the issue of the reviewability of the Attorney General's decision to certify scope of employment, the Supreme Court has held the following:

The certification, removal, and substitution provisions of the Westfall Act, 28 U.S.C. §§ 2679(d)(1)-(3) work together to assure that, when scope of employment is in controversy, that matter, key to the application of the FTCA, may be resolved in federal court. To that end, the Act specifically allows employees whose certification requests have been denied by the Attorney General, to contest the denial in court. § 2679(d)(3). (footnote omitted)

Lamagno, 515 U.S. at 430-31, 115 S.Ct. at 2234-35.

Thus, both the actual language of "Westfall" and the interpretation of the Supreme Court, make clear that any determination by the Attorney General to either certify that an employee was acting within the "scope of employment", or, conversely, that the particular acts of a federal employee were outside the scope of employment, is within the jurisdiction of this United States District Court under both 28 USC § 2679 (d)(3) and federal question jurisdiction. See, Lamagno, 515 U.S. at 435-437, 115 S.Ct. at 2236-37.

Whether the conduct of ~~John Doe~~ was within the "scope of employment", while decided in federal court, is based upon state law. Lyons, 158 F.3d at 609. A proper place to start an analysis of the "scope of employment" in the present case would be a review of the Restatement (Second) of Agency, §228 et seq. (1958) to investigate whether the elements of respondeat superior have been met.

The Restatement's general rule § 228 reads as follows:

- (1) Conduct of a servant is within the scope of employment if, but only if:
  - (a) it is of the kind he is employed to perform;
  - (b) it occurs substantially within the authorized time and space limits;
  - (c) it is actuated, at least in part, by a purpose to serve the master, and
  - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Lyons, 158 F.3d at 609.

In this case the respondeat superior foundations are met. The actions of ~~John Doe~~, (*describe the actual conduct alleged or the conduct of the officer*) is within the standard procedure of correctional officers (*cite to prisons regulations*). ~~John Doe~~ respectfully suggests

that element 1(a) of the Restatement to establish a prima facia case of respondeat superior has been met.

In this case there is no issue as to whether ~~Mr. Doe~~ was acting within the physical confines of his assigned duty area and was in on-duty status at the time of the alleged incident. Affidavit of ~~John Doe~~, ¶¶ \_\_\_\_\_. ~~John Doe~~ respectfully suggests that element 1(b) of the Restatement to establish a prima facia case of respondeat superior has been met.

In the present case there has been no suggestion that the actions of ~~John Doe~~ were the result of a personal frolic. Rather, ~~Mr. Doe~~ was acting as a federal correctional officer dealing with a security matter involving a prison inmate while on duty at a federal correctional institute. ~~Mr. Doe's~~ actions did not result in any personal gain, but, rather, were conducted to further the interests of the federal penal institution. ~~John Doe~~ respectfully suggests that element 1(c) of the Restatement to establish a prima facia case of respondeat superior has been met.

Lastly, the use of force is an unfortunate but expected part of the duties of a federal correctional officer. Bureau of Prisons regulations explicitly authorize the use of force. Attachment \_\_\_\_, to Affidavit of ~~John Doe~~. The duties of a correctional officer require him to intervene in physical confrontations and to often use various degrees of physical force to further the penal goals of his employer, the federal prison system. ~~John Doe~~ would be subject to discipline should he fail to intervene (even if physical force was required) and either prevent or restore order in a felon-rich environment. ~~John Doe~~ respectfully suggests that element 1(d) of the Restatement to establish a prima facia case of respondeat superior has been met.

For the reasons stated above, ~~John Doe~~ urges this Court to find that the elements of a prima facia case of respondeat superior have been met and that ~~Mr. Doe~~ was acting within the scope of his employment for purposes of the "Westfall" Act.

In the present case it is uncontested that at the time of the alleged tort ~~John Doe~~ was an on-duty, federal Correction Officer acting under color of his authority as a federal law enforcement officer. See, Affidavit of ~~John Doe~~, ¶¶ \_\_\_\_\_. While the plaintiff alleges that ~~Mr. Doe~~ exceeded his authority in his conduct (**Complaint**, ¶¶\_\_\_\_), ~~Mr. Doe~~ had both the authority and duty to be present, the authority to exercise lawful authority over the plaintiff, and the lawful authority to use necessary physical force to restore order pursuant to his duties as a federal Correctional Officer. See, Position Description of Federal Correctional Officer, GS- ¶¶ \_\_\_\_; United States Department of Justice, Bureau of Prisons Regulations, \_\_\_\_\_. In the current case (*explain in detail what happened and the participation of the defendant in the fact situation*)

The mere allegation by a federal prisoner that the defendant exceeded his lawful authority, as alleged in the Complaint, and the initial refusal of the Attorney General to certify that ~~Mr. Doe~~ was acting within the scope of his employment does not relieve the United States from the obligation to substitute itself for the defendant in the above captioned case. 28 U.S.C. §2679(d)(3).

In the present case ~~John Doe~~ urges this Court to certify that ~~Mr. Doe~~ was acting within the scope of his employment because (*explain in detail (supported by affidavit) why the employee was action within the scope of his employment. Note (if appropriate) that no criminal charges have been brought against the defendant and/or that no administrative charges have been brought by the Bureau of Prisons against the employee. Note further if any internal charges have been brought against the prisoner.*)

## CONCLUSION

Pursuant to 28 U.S.C. §2679(d)(3) the defendant, ~~John Doe~~, hereby seeks certification by this Court that the acts alleged in the Complaint in this matter were, for purposes of the "Westfall Act", within the scope of employment of the defendant and that the United States is substituted for ~~Mr. Doe~~ as the party defendant by this Court.

Respectfully Submitted,

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~~George Smith~~  
Counsel for ~~John Doe~~

**#97639**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

MARK WILSON, )  
)  
Plaintiff, ) CASE No. 4:00CV00295  
)  
vi. )  
)  
BUREAU OF PRISONS, et al., )  
)  
Defendants. )  
\_\_\_\_\_ )

PETITION BY FEDERAL EMPLOYEE FOR CERTIFICATION AND SUBSTITUTION BY  
THE UNITED STATES AS PARTY DEFENDANT  
PURSUANT TO 28 U.S.C. 2679(d)(3)

~~John Doe~~, a current employee of the United States Department of Justice, Bureau of Prisons, is a named defendant in the above captioned action. ~~Mr. Doe~~ has been sued by a federal prisoner for actions allegedly taken by ~~Mr. Doe~~ during the course of ~~Mr. Doe's~~ duties as a federal correctional officer within the confines of the (Name of Federal Correctional Facility).

~~Mr. Doe~~, in his capacity as an employee of the federal government petitions this Court to find, pursuant to 28 U.S.C. 2679(d)(3), that his actions in the above captioned case were done, if at all, within the scope of his federal employment. Further, ~~Mr. Doe~~ petitions this Court to substitute the United States for ~~Mr. Doe~~ in the above captioned case and strike ~~Mr. Doe~~ as a named defendant.

This motion is supported by the attached Memorandum of Points and Authorities in Support of the Motion for Certification and Substitution Pursuant to 28 U.S.C. 2679(d)(3).

Respectfully Submitted,

\_\_\_\_\_  
George Smith  
Counsel for ~~John Doe~~

