2002 AMC 2797

JOE LEWIS, *ET AL.*

v.

UNITED STATES OF AMERICA, *ET AL.*

United States District Court for the Middle District of Florida (Jacksonville Division in Admiralty), November 6, 2002
No. 3:01-cv-821-J-25TEM

2002SUITS IN ADMIRALTY ACT AND PUBLIC VESSELS ACT — 162. Discretionary Function.

The Coast Guard's decision to attempt a rescue or not is a discretionary function. Once it decides to do so the method of rescue and resources to use are also discretionary. Various search and rescue manuals, although suggesting how to perform a particular operation, do not mandate the course of action, which is left to the decision of the ones performing it. Thus, the government is not liable for failure to follow the suggested methods of rescue, even if an expert witness believes a suggested method should have been used.

Joseph P. Milton, Michael P. Milton (Milton, Leach, D'Andea & Ritter, P.A.) *for Lewis*

Robert D. McCallum, Jr., Asst. Atty. Gen., Paul I. Perez, U.S. Atty., Ralph J. Lee, Asst. U.S. Atty., David V. Hutchinson, Asst. Dir. for Admiralty, and Chris P. Reilly, Trial Counsel, U.S. Dept. of Justice, *for U.S.*

Henry Lee Adams, Jr., D.J.:

This cause is before the Court on the Government's Motion to Dismiss, which was converted to a summary judgment motion (hereinafter, "Converted Motion for Summary Judgment"), Plaintiffs' Motion for Summary Judgment, the parties' responses thereto, and the Government's reply memoranda. Upon consideration of same and being otherwise advised of the record herein, the Court finds as follows:

On February 13, 2000, while Brandon Lewis was scuba diving off the coast of Jacksonville, Florida, he had a diving accident. The United States Coast Guard ("the Coast Guard") rescued and transported Brandon Lewis to a medical facility aboard *CG 41428*. Plaintiffs sue the United States, under the Suits in Admiralty Act ("SAA"), 46 U.S.C. app. §741 *et seq.*, for the Coast Guard's purported negligence in its rescue of Brandon Lewis. The Government in its Converted Motion for Summary Judgment seeks dismissal of this lawsuit, claiming that it is immune from suit under the discretionary function exception.

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The discretionary function exception applies to claims arising under the SAA. 1(1) Pursuant to the discretionary function exception, the Government is not liable for "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. §2680(a).

The Supreme Court articulated a two-part test for determining whether the discretionary function exception bars the Government's liability in a particular case. Both parts of this test must be satisfied for the discretionary function exception to apply. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (noting that the inquiry does not end with a determination that the challenged conduct involves an element of judgment; the court must also determine whether the judgment is the kind that the discretionary function exception was designed to shield).

First, the court must determine whether the nature and quality of conduct at issue involves an element of judgment or choice. *See Berkovitz*, 486 U.S. at 536 (citing *Dalehite v. United States*, 346 U.S. 15, 34, 1953 AMC 1175, 1190(1953)). If the conduct involves an element of judgment or choice, the court must then determine whether that judgment or choice was grounded in policy considerations. This is because the discretionary function exception is intended "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort" *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). Having said this, the Court recognizes that it is not necessary to find that the government actor actually weighed policy considerations before he or she acted. Instead, the focus is on whether the actions are "susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

Before applying this test, the Court must determine what conduct is protected by the discretionary function exception. The Government claims that the discretionary function exception applies to the Coast Guard's decision to rescue Brandon Lewis and its determination of how to conduct that rescue. In contrast, Plaintiffs' position is that, if the exception applies, it applies only to the Coast Guard's decision to rescue Brandon Lewis, not its determination of how it will conduct the rescue.

Plaintiffs' view is based on their belief that once the Coast Guard made the decision to rescue Brandon Lewis, it had no discretion to ignore the procedures set forth in the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual ("SAR Manual"), the Coast Guard Addendum to the SAR Manual ("Coast Guard Addendum"), and the Miami Search and Rescue Plan ("Miami SAR Plan"). 2(2) (These manuals will be referred to collectively as "the Manuals.") Plaintiffs claim that these documents dictate how the Coast Guard was to conduct a rescue, like the one at issue. If Plaintiffs' contention is correct, then the discretionary function exception will not shield the Government from liability in this case because, if a federal statute, policy, or regulation specifically mandated the procedure for the Coast Guard to follow, the Coast Guard had no discretion to ignore these directives and use its own judgment. *See Gaubert*, 499 U.S. at 324.

Specifically, Plaintiffs argue that the following provisions from the Manuals dictate how the Coast Guard should have conducted the rescue of Brandon Lewis: When evaluating a rescue response, the person handling the SAR operation "*should* consider injuries or other medical conditions that might require special response rescue response." *See* SAR Manual, 6.3.1 (emphasis added). The SAR Manual states that this person *should* also consider:

> condition of survivors; (If not known, assume urgent medical attention will be required. If known, obtain a detailed description of injuries. This will determine the need for stretchers, oxygen, blood plasma, intravenous fluids, or other medical supplies.)

> is recognized and medical advice obtained, and basic steps are taken to minimize worsening occurrences...." SAR Manual, 6.15.2 (emphasis added). The section in the Coast Guard Addendum regarding the emergency treatment for decompression sickness and air embolism provides that "[w]here the capability exists, the following steps are *advised*: ... [a]dminister 100% oxygen." Coast Guard Addendum, 6.F.2(5) (emphasis added).

The use of the words "should" and "advised" seriously undermines Plaintiffs' contention that these provisions are mandatory, rather than precatory. *See, e.g., Jolly v. Listerman*, 672 F.2d 935, 945 (D.C. Cir. 1982) ("The use of the word 'should' ... detracts significantly from any claim that this guideline is more than merely precatory. The fact that it is described as a 'guideline' should also hint of precatory intent."); *Hamlet v. United States*, 63 F.3d 1097, 1104 (Fed. Cir. 1995) (citing cases wherein the court found that the use of the "should," is precatory, not mandatory.). The preface to the SAR Manual illustrates this understanding:

> SAR planning is both an art and a science, relying greatly on the creativity and experience of the personnel involved. Because of the many variables encountered during SAR operations and the individuality of each SAR case, the *guidance provided in this [manual] must be tempered with sound judgment, having due regard for the individual situation.* Nothing in this Manual should be construed as relieving SAR personnel of the need for initiative and sound judgment. Therefore, few actions or procedures discussed in this Manual are mandatory. Use of the words "must" or "shall" only distinguish those actions or procedures normally considered mandatory from those that are discretionary.

> define minimum performance standards, create Coast Guard obligations, nor create rights in third parties." *See* Miami SAR Plan, Letter of Promulgation (emphasis added). Thus, by their plain language, the Manuals cannot be interpreted as policy dictating a course of action.

Despite the above language from the Manuals, Plaintiffs are intent on reading mandatory language into these documents. In support of their position, Plaintiffs offer the deposition testimony of their expert, David E. Cole ("Cole"), a retired Coast Guard Commander. Plaintiffs contend that Cole's testimony creates a genuine dispute of material fact, precluding summary judgment on this issue. The Court disagrees. Although the existence of a genuine issue of material fact regarding the mandatory nature of a procedural policy precludes summary judgment, *see Commerce and Industry Ins. Co. v. Grinnel Corp.*, 280 F.3d 566, 573-75 (5 Cir. 2002), Cole's testimony does not create a material dispute of fact.

In *Grinnell*, several insurance companies brought a subrogation action against the City of New Orleans for fire-loss claims. The suit was based upon the alleged negligent acts of members of the city's fire department. Although this was not a case arising under federal law, there was a state statute limiting liability for discretionary acts. In determining whether an act is discretionary, the Fifth Circuit, following the lead of the Louisiana courts, utilized the federal discretionary function exception analysis elaborated in *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

To prove that the actions taken by the city were not discretionary, the insurance companies in *Grinnell* offered testimony from the city's Chief of the Fire Department and its Chief Electrical Inspector. These individuals testified regarding internal policies mandating a specific course of action to be taken under circumstances that were present in that case.

Cole, unlike the witnesses in *Grinnell*, does not testify about an internal policy mandating the course of action for rescues by the Mayport Coast Guard. Instead, he insists that the Manuals mandate a course of action. His insistence, however, is based solely on what he thinks should have happened during this rescue, not what was "required" to happen. This becomes clear early on in Cole's deposition, where Cole states:

> There are a great many viables to say you must do this and you must do that. The Coast Guard, God knows, has enough manuals for everything. What the Coast Guard must do is when it does something, do it right. The manuals provide *guidance* to that. The manuals try to foresee every circumstance that can come up, but I can tell you they don't. You've got to do the best you can. The manuals stress the

> seriousness of decompression sickness. The manuals don't say you must carry ...

> whatever on every boat that gets underway.... *The Coast Guard recognizes in its manuals that it's leaving a great deal up to its field personnel* ... When you say what does the manual require, it requires the Coast Guard to save lives and to use everything available to do it. That's what the Coast Guard manuals require.... Doing what is proper and what is right is required. Now, where does it state everything that is proper and everything that is not proper specifically? I don't know of any Coast Guard publication that says that.

Accordingly, the Court finds that there is no statute, regulation, or policy in the record that supports Plaintiffs' position that a specific course of conduct was mandated in the rescue of Brandon Lewis. Instead, the Manuals confer upon the Coast Guard broad discretion to exercise its own judgment regarding a rescue like the one in this case. Thus, the exercise of judgment by the Coast Guard in this case — be it deciding to rescue Brandon Lewis, deciding how to proceed with the rescue of Brandon Lewis, including the staffing and supplying of a rescue boat and training of its personnel, or deciding what resources to use in executing the rescue — is clearly discretionary and of the nature and quality protected by the discretionary function exception. *See Northern Voyager LP v. Thames Shipyard & Repair Co.*, 2002 AMC 1331, 1335, 214 F.Supp.2d 47, 51 (D. Mass. 2002) (noting that "[n]ot only does the very premise of emergency rescue logically suggest that decisions be made quickly and responsively, without the constraints of inflexible procedures, Coast Guard regulations and procedural handbooks specifically mandate as much").

The Court also finds that the second prong of the discretionary function exception is satisfied. "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. As noted above, the Manuals explicitly grant the Coast Guard the discretion to decide how to rescue an individual. Thus, it is presumed that its decisions in this regard involve policy considerations protected under the exception.

Additionally, the Eleventh Circuit's analysis of the discretionary function exception in *Ochran v. United States*, 117 F.3d 495 (11 Cir. 1997), per

suades this Court that the decisions and ensuing actions taken by the Coast Guard in this case are born out of policy considerations protected by the discretionary function exception. In *Ochran*, the United States was sued for the actions of an Assistant United States Attorney ("AUSA"), who assumed the responsibility of protecting a witness threatened by a criminal drug defendant. The Eleventh Circuit found that any alleged negligence in discharging this duty was not actionable because deciding how to protect a witness involves the "exercise of policy judgment" within the purview of the discretionary function exception. *Id.* at 506. In a footnote, the Eleventh Circuit did add a caveat to its finding when it emphasized that if the AUSA had promised to perform specific actions, such as stationing United States Marshals at the witness' door, and then negligently misplaced the paperwork necessary to make these arrangements, a different result may have been reached. *Id.* at 506 n.7.

Like the AUSA's decision in *Ochran*, the Coast Guard's decision to rescue Brandon Lewis and its decision how to proceed with the rescue of Brandon Lewis are protected by the discretionary function exception as these decisions are unquestionably "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Furthermore, the Coast Guard never made any specific promises about how it would conduct the rescue. Thus, the Eleventh Circuit's caveat in *Ochran* would not afford Plaintiffs the ability to overcome the discretionary function exception.

There is yet another factor that convinces the Court that rescue decisions of Coast Guard Mayport are steeped in policy considerations. "Search and rescue" is only one of the Coast Guard's missions, *see, e.g.*, 15 U.S.C. §2. Thus, the allocation of money and time for the execution of its missions or duties invokes policy considerations. *See, e.g., United States v. Varig Airlines*, 467 U.S. 797, 820 (1984) (explaining that decisions requiring an agency "to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be

obtained against such practical considerations as staffing and funding" are protected by the discretionary function exception); *Ochran*, 117 F.3d at 502 (recognizing that "budgetary constraints are almost always important to government decisions" and that the allocation of limited government resources implicates policy considerations protected by the discretionary function exception). This allocation of funds and time necessarily includes Coast Guard Mayport's decisions about staffing and training its personnel and its decisions regarding whether or not to commit outside resources to a rescue. These decisions are quintessential examples of the kind of judicial "second-guessing" and intervention in

policymaking decisions that the discretionary function exception was designed to prevent. *Varig Airlines*, 467 U.S. at 820.

Based on the above, the Court finds that the discretionary function exception shields the Government from liability for the decisions at issue here. Having found that the discretionary function exception applies in this case, the Court cannot reach the merits of Plaintiffs' Motion for Summary Judgment, as the Court is without subject matter jurisdiction to do so. *See Mid-South Holding Company, Inc. v. United States*, 2000 AMC 2753, 2759, 225 F.3d 1201, 1207 (11 Cir. 2000); *see also Cohen v. United States*, 151 F.3d 1338, 1340 (11 Cir. 1998) (characterizing sovereign immunity as an issue of subject matter jurisdiction).

Accordingly, it is ordered:

1. The Government's Motion to Dismiss is granted.

2. All pending motions are denied as moot.

3. The Clerk is directed to enter final judgment in favor of the Government and against Plaintiffs and close this case.

Endnotes

1 (Popup - Popup)

1. "[T]he SAA implicitly contains a 'discretionary function exception' to the United States' waiver of sovereign immunity, on the ground that the principle of separation of powers requires that the judiciary refrain from interfering in those executive branch actions that involve questions of public policy, economic expediency and administrative practicability." *United States Fire Ins. Co. v. United States*, 1987 AMC 1028, 1034, 806 F.2d 1529, 1535 (11 Cir. 1986) (citing, in part, *Williams v. United States*, 747 F.2d 700 (11 Cir. 1984 *per curiam*), *aff'g and adopting Williams ex rel. Sharpley v. United States*, 581 F.Supp. 847, 852 (S.D. Ga. 1983)); *see also Mid-South Holding Co., Inc. v. U.S.*, 2000 AMC 2753, 2756, 225 F.3d 1201, 1204 (11 Cir. 2000) (noting that the Eleventh Circuit follows the majority holding that the SAA's waiver of immunity is subject to the discretionary function exception) (citing *Williams v. United States*, 747 F.2d 700, 700 (11 Cir. 1984), *aff'g and adopting Williams By and Through Sharpley v. United States*, 581 F.Supp. 847 (S.D. Ga. 1983)).

2 (Popup - Popup)

2. The Miami SAR Plan is for use in SAR operations by all federal agencies in the Seventh Coast Guard District, including Mayport. *See* Miami SAR Plan, Letter of Promulgation.