BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 10-2077

BRADFORD SCOTT HANCOX,
ADMINISTRATOR OF THE ESTATE OF LATIECE RENEE REID GLENN,

Plaintiff - Appellant,

v.

PERFORMANCE ANESTHESIA, P.A.,
AND UNITED STATES OF AMERICA,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

Plaintiff appeals the dismissal of his action by the district court for lack of subject matter jurisdiction based on Feres v. United States, 340 U.S. 145 (1950). Jurisdiction to this Court is provided by 28 U.S.C. § 1291. Defendant's motion to dismiss was granted by order entered August 27, 2010. (J.A. 88-103). Plaintiff filed a timely notice of appeal on September 21, 2010. (J.A. 104-05).

STATEMENT OF ISSUE

Whether the district court properly granted the government's motion to dismiss for lack of subject matter jurisdiction because the plaintiff's claims are barred by the Feres doctrine.

STATEMENT OF CASE[1]

Plaintiff filed this wrongful death, medical malpractice action in Cumberland County Superior Court in Cumberland County, North Carolina on June 11, 2009. (J.A. 7-15). The action was removed to federal district court on July 9, 2009. (J.A. 2, Docket Entry 1). At the time of removal, the United States certified that defendant Major Corey Eichelberger was acting within the scope of his employment as an employee of the United States Department of the Army at all times relevant to the incident alleged in the Complaint, and substituted itself as a party defendant in lieu of Major Eichelberger. (J.A. 3, Docket Entry 2). Subsequently, on July 24, 2009, the United States also certified scope and substituted itself as a party defendant in lieu of defendants Raymond E. Brezinski, Walter R. Hand, Jr., and Denise Conneen, Executrix of the Estate of Robert L. Conneen.[2] (J.A. 3, Docket Entry 6-9).

On September 21, 2009, the United States filed a motion to dismiss for lack of subject matter jurisdiction citing Feres v. United States, 340 U.S. 135 (1950). (J.A. 3, Docket Entry 12). Plaintiff filed a response on November 12, 2009 (J.A. 4, Docket

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[1] All factual citations are to the Joint Appendix ("J.A.") filed with this Court on November 15, 2010.

[2] Robert Conneen committed suicide prior to the filing of plaintiff's complaint. (J.A. 9, ¶ 10).

Entry 16), and the United States filed a reply on November 23, 2009. (J.A. 4, Docket Entry 18).

On August 27, 2010, the district court granted the government's motion to dismiss. (J.A. 5, Docket Entry 27; J.A. 88-103). Plaintiff filed a timely notice of appeal on September 21, 2010. (J.A. 104-05).

STATEMENT OF FACTS

In June 2007, Corporal Latiece Glenn ("Corporal Glenn"), an active duty soldier, was pregnant with an estimated delivery date of July 1, 2007. (J.A. 10). On June 21, 2007, Corporal Glenn's water broke while she was at home, and she immediately went to Womack Army Medical Center ("WAMC") at Fort Bragg, North Carolina, where she received prenatal care. (J.A. 10). Later that day, medical staff prepared Corporal Glenn for caesarian section delivery because her son failed to descend. (J.A. 11). The medical staff included Walter Hand, Jr. ("Hand"), Robert Conneen ("Conneen"), and Raymond Brezinski ("Brezinski"), Certified Registered Nurse Anesthesists employed at WAMC pursuant to a personal services contract,[3] and Major Corey Eichelberger ("Eichelberger"), an active duty Army nurse anesthetist student. (J.A. 9-10).

In preparation for the caesarian section delivery, an intrathecal catheter was inserted. (J.A. 9). During placement of the catheter, Corporal Glenn's spinal cord was punctured, causing it to leak cerebrospinal fluid. (Id.). As a result of the puncture, Corporal Glenn received spinal, rather than epidural, anesthesia. (Id.). Corporal Glenn was later diagnosed with

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[3] A copy of the personal services contract is set forth at J.A. 20-87.

meningitis, for which she received antibiotics in increasing dosages. (J.A. 11). Despite treatment efforts, she died on June 27, 2007. (Id.).

Prior to filing suit in state court, Plaintiff filed an administrative claim with the United States Army Claims Service. (J.A. 90). The claim was denied based on the holding in Feres v. United States, 340 U.S. 145 (1950).

SUMMARY OF ARGUMENT

Plaintiff's action is based on injuries sustained by Corporal Glenn while an active duty soldier receiving medical treatment at the Womack Army Medical Center-injuries incident to her military service. According to Feres v. United States, 340 U.S. 145 (1950), the district court lacked subject matter jursiction over plaintiff's claims and properly dismissed the action pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure.

Defendant Eichelberger was an Army Major on active duty and thus an employee of the government for purposes of the Federal Tort Claims Act. Pursuant to the Gonzalez Act, 10 U.S.C. § 1089, and the terms of the personal services contract between Performance Anesthesia, P.A. and the United States, defendants Hand, Conneen, and Brezinski were also employees of the United States. All of the individual defendants were acting within the scope of their employment at the time of the alleged negligence. Dismissal of plaintiff's action was mandated by Feres and consistent with the Feres rationales. Plaintiff's efforts to limit the scope of the well-established Feres doctrine should be rejected and the district court's dismissal affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED THE MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Standard of Review.

The dismissal of an action under Federal Rules of Civil Procedure 12(b)(1) is a matter of law reviewed de novo. See Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995); Tillman v. Resolution Trust Corp., 37 F.3d 1032, 1034 (4th Cir. 1994).

B. Discussion of Issue.

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-80, provides that the United States may be sued for injuries caused by the negligence of federal employees acting within the scope of their employment if a private person would be liable under like circumstances. 28 U.S.C. § 1346(b). However, this waiver of sovereign immunity is subject to the judicially-created exception known as the Feres doctrine. Applehans v. United States, 877 F.2d 309 (4th Cir. 1989)(citing Feres v. United States, 340 U.S. 135 (1950)).

Feres and its progeny hold that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Feres, 340 U.S. at 146. Receipt of medical care in

military facilities by members of the military on active duty is "activity incident to service" and thus a lawsuit against the United States arising from medical treatment of a service member on active duty is barred under Feres. Kendrick v. United States, 877 F.2d 1201, 1203 (4th Cir. 1989)(citations omitted).

Plaintiff's administrative claim was denied by the U.S. Army Claims Service based on the holding in Feres. To avoid the Feres bar, plaintiff filed suit in state court and disguised his claims as against the individual defendants. Plaintiff suggests the United States improperly substituted itself for the individual defendants so the matter could be removed to federal district court and the individual defendants insulated from liability by a certification of scope of employment by the Attorney General. The substitution, removal, and certification by the United States were proper-as was the dismissal of plaintiff's complaint by the district court based on Feres.[4]

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[4] With respect to the certification of scope, the individual defendants were certified by the Attorney General's designee pursuant to 28 U.S.C. § 2679 to be employees of the government acting within the scope of their employment at the time of the alleged negligence. This was prima facie evidence that the individual defendants were acting within the scope of their employment. See Whedbee v. United States, 352 F. Supp. 2d 618, 624-25 (M.D.N.C. 2005). There is no evidence in the record challenging the scope of certification.

1. The Individual Defendants Were Employees of the United States Acting Within the Scope of their Employment at the Time of the Alleged Negligence and Substitution Was Proper.

Employees of the United States may not be sued for torts they commit while acting within the scope of their employment. United States v. Smith, 499 U.S. 160, 165 (1991). Rather, a plaintiff's "remedy against the United States provided by [the FTCA] . . . is exclusive." 28 U.S.C. § 2679(b)(1). Upon certification by the Attorney General that a defendant who is an employee of the United States was acting within the scope of employment at the time of the alleged negligence, the action is deemed as against the United States, and the United States is substituted as the party defendant. Id.

Whether an individual is an employee of the government is a question of federal law, not state law. See, e.g., Logue v. United States, 412 U.S. 521, 528 (1973); Robb v. United States, 80 F.3d 884, 887 (4th Cir. 1996). Under the FTCA, an "'[e]mployee of the government' includes (1) officers or employees of any federal agency, members of the military . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671.

Plaintiff's contention that the individual defendants are "private contractors" and not federal employees is not supported by the facts or the law in this case. First, defendant Eichelberger was an Army Major on active duty at the time of the alleged negligence and therefore an employee of the government.[5] Second, defendants Hand, Conneen, and Brezinski were working as Certified Registered Nurse Anesthetists at the time of the alleged negligence and thus serving under a personal services contract. (J.A. 9-10, 20-87). The Gonzales Act, 10 U.S.C. § 1089, establishes that the individual defendants acting under the personal services contract are federal employees as a matter of law. See Robb, 80 F.3d at 889 n.3 (health care personnel "may be deemed employees of the government for FTCA purposes because they were hired pursuant to an act of Congress which designates them as such").

The Gonzalez Act is one of a series of immunity statutes designed to protect certain classes of Government employees from the threat of personal liability. Smith, 499 U.S. at 162-63. "The Gonzalez Act provides that in suits against military medical personnel for torts committed within the scope of their employment,

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[5] The district court also determined Eichelberger, as a student nurse anesthetist, was also serving under the personal services contract pursuant to a teaching clause (1.4.11) contained in the contract. (J.A. 95).

the Government is to be substituted as the defendant and the suit is to proceed against the Government under the FTCA." Id.

Specifically, the Gonzalez Act provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, . . . the Department of Defense, . . . or the Central Intelligence Agency . . . while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

10 U.S.C. § 1089(a)(emphasis added).

Here, defendants Hand, Conneen, and Brezinski were operating under a personal services contract pursuant to § 1091. The U.S. Secretary of Defense has the authority to "enter into personal services contracts to carry out health care responsibilities in such [medical treatment] facilities as determined to be necessary by the Secretary." See 10 U.S.C. § 1091(a)(1). A "personal services contract" is "[a] contract that, by its express terms or as administered, makes the contractor personnel appear, in effect,

to be government employees." 32 C.F.R. § 107.3. Section 107.5 further provides:

> (a) Each contract under 10 U.S.C. 1091 with an individual or with an entity, such as a professional corporation or partnership, for the personal services of an individual must contain language specifically acknowledging the individual as a personal services contractor whose performance is subject to supervision and direction by designated officials of the Department of Defense.
>
> (b) The appearance of an employer-employee relationship created by the DoD supervision of a personal services contractor will normally support a limited recognition of the contractor as equal in status to a DoD employee in disposing of personal injury claims arising out of the contractor's performance. Personal injury claims alleging negligence by the contractor within the scope of his or her contract performance, therefore, will be processed as claims alleging negligence by DoD military or civil service personnel.

32 C.F.R. § 107.5(a), (b).

Thus, pursuant to the Gonzalez Act, health care providers who serve under a personal services contract authorized by the United States Secretary of Defense are deemed to be employees of the government for the purpose of disposing of personal injury claims.

Moreover, the contract between the Government and Performance Anesthesia, P.A. specifically states that the contract is for personal services and the individual contractors are subject to the supervision of Government employees as required under 32 C.F.R. § 107.5(a). Specifically, the contract provides:

> *This is a Personal Services contract.* Performance under personal services is subject to the day-to-day

> supervision and direction of designated employees of the Government. The government will evaluate the quality of professional and administrative services provided, and retain control over the medical and professional aspects of services rendered (e.g., professional judgments, diagnosis for specific medical treatment). The Government designated official is the Chief, Anesthesia and Operative Services, or his designated representative. All CRNAs presented by the contractor must be approved by the WAMC Chief, Anesthesia Nursing, or his designated representative, prior to application for clinical privileges.

(J.A. 41).

In fact, Clause 1.1.2 of the personal services contract specifically references the Gonzalez Act in stating that health care providers serving under the contract do not need to provide their own malpractice insurance:

> Direct health care providers in performance of services are not responsible for obtaining medical malpractice insurance under this contract in accordance with the Gonzales[sic] Act (10 U.S.C. Section 109[sic], also known as the Medical Malpractice Immunity Act). The Government will not reimburse or otherwise pay for medical malpractice insurance should it be purchased by the contractor or contractor employees.

(J.A. 41).

The Gonzalez Act does not require personal services contracts be made directly with the individual health care provider in order for the exclusive remedy to lie under the FTCA. Rather, the Gonzalez Act states only that a health care provider must be "serving under" a Personal Services Contract in order to be covered. 10 U.S.C. § 1089(a). Furthermore, 32 C.F.R. § 107.5(a)

clearly contemplates the ability of the United States Secretary of Defense to contract with an entity for the personal services of its individual employees, while treating those individuals as employees of the government for purposes of the FTCA. This section provides that "[e]ach contract under 10 U.S.C. § 1091 with an individual or with an entity, such as a professional corporation or partnership, for the personal services of an individual must contain language specifically acknowledging the individual as a personal services contractor. . . ." 32 C.F.R. § 107.5(a).

Plaintiff's reliance on McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007), in support of his contention that the individual defendants are "private contractors" and not federal employees, is misplaced. In McMahon, Presidential Airways, a private military contractor, claimed it was entitled to the government's Feres immunity under a theory of derivative sovereign immunity. Unlike the instant case, there was no personal services contract between Presidential Airways and the United States. Moreover, the plaintiff did not sue employees of Presidential Airways nor did the United States certify scope and substitute itself for Presidential Airways as it did here.

Here, defendants Hand, Conneen, and Brezinski were operating under a personal services contract and are immunized by the Gonzalez Act as federal employees. Defendant Eichelberger was an

Army Major on active duty at the time of the alleged negligence and therefore an employee of the government. Thus, the individual defendants are not proper defendants in this action and any claims against them are, as a matter of law, claims against the United States. Thus, the substitution of the United States for the individual defendants was proper, and a suit against the United States under the FTCA was the plaintiff's exclusive remedy.

2. Plaintiff Cannot Escape Application of Feres by Just Suing the Individual Defendants in State Court.

Plaintiff mistakenly claims sovereign immunity cannot apply in this case because the United States "stands in the shoes" of the named defendants who could not have asserted a defense of sovereign immunity. This is wholly inconsistent with established law and, if true, would lead to an end-around of the Feres doctrine.

In support of his claim, plaintiff cites Knowles v. United States, 91 F.3d 1147 (8th Cir. 1996), and Starns v. United States, 923 F.2d 34, 37 (4th Cir. 1991). The Feres doctrine, however, was not implicated in either case and neither case stands for the proposition plaintiff claims. Knowles and Starns address application of state statutory malpractice damages caps to FTCA cases. Knowles, 91 F.3d at 1149; Starns, 877 F.2d at 35. Thus, these cases address the extent of the government's liability for damages, not immunity from suit. Neither case suggests the

government has waived sovereign immunity in cases where a plaintiff sues an employee acting within the scope of his employment. In fact, Knowles notes that the United States is liable to the same extent the employee would have been absent immunity from suit, acknowledging there may be circumstances where the government is not liable at all because sovereign immunity has not been waived. Id. at 1150 (emphasis added).

Plaintiff also mistakenly believes Durant v. Neneman, 884 F.2d 1350 (10th Cir. 1989), and Chapman v. Westinghouse Elec. Corp., 911 F.2d 267, 271 (9th Cir. 1990), support the conclusion that sovereign immunity does not apply in this case. Durant, however, is not analogous because it addressed "intra-military immunity," rather than traditional Feres immunity, which is at issue in the instant case. Traditional Feres immunity is implicated in cases where a plaintiff connected with the military asserts liability against the United States (or employees of the United States acting within the scope of their employment) under the FTCA for injury arising out of activity incident to service. Durant, 884 F.2d at 1352. On the other hand, "intra-military immunity" is implicated in cases where liability is asserted by servicemen against military actors for acts committed within the context of military service.

Id.[6] In such claims, liability is not founded upon the FTCA and liability of the United States is not implicated. Id.

In Durant, a wrongful death and personal injury action was brought against a serviceman who struck two other servicemen on a military base with his vehicle while driving to a duty station. The United States did not certify scope and was not substituted for the defendant. The court held the case did not involve traditional Feres immunity, but rather "intra-military immunity." 884 F.2d at 1352. In determining whether the defendant was immune from suit, the Court looked at whether the defendant was participating in military or nonmilitary conduct. Concluding the defendant was merely driving to work, and thus not engaged in military conduct, the defendant was not immune from suit. Id. at 1354.

In contrast, in the instant case the United States has certified scope and substituted itself for the individual defendants. Moreover, the instant case involves traditional Feres immunity because the plaintiff's claims are alleged against government employees acting within the scope of their employement (i.e. FTCA claims), and the liability of the United States is clearly implicated. See 28 U.S.C. § 1346.

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[6]In Durant, the court noted the doctrine of intra-miltary immunity is an out-growth of the third Feres rationale that decries the propriety of civilian courts delving into military matters and calling to bar military decisions and institutions. Id. at 1352.

Chapman is likewise inapplicable because the defendant, Westinghouse, was not a government employee. Chapman, 911 F.2d at 271. In making this determination, the Ninth Circuit looked to the terms of the contract between Westinghouse and the government, which stated, in pertinent part:

> [I]n carrying out the work under this Contract, [Westinghouse] shall be responsible for the employment of all . . . personnel. Persons employed by the Contractor shall be and remain employees of the Contractor, and shall not be deemed employees of [Department of Energy] or the [g]overnment.

Id. at 271. (internal quotations omitted and emphasis added).

The court stated that if Westinghouse were a government employee, Chapman's suit might well be foreclosed by the Feres doctrine. Id. The individual defendants in this case were, as set forth above, government employees. They were also acting within the scope of their employment at the time of the alleged negligence acts. Under the reasoning established in Chapman, plaintiff's suit here is foreclosed by Feres.

In United States v. Johnson, 481 U.S. 681 (1987), the United States Supreme Court confirmed that Feres bars actions under the FTCA on behalf of a service member killed during the course of an activity invident to service, where the complaint alleges negligence on the part of civilian employees of the Federal Government. Johnson, a helicopter pilot for the United States

Coast Guard, and a crew of several other Coast Guard members were killed while responding to a distress call from a lost vessel. Johnson's wife filed suit under the FTCA against the Federal Aviation Administration ("FAA"), a civilian agency of the Federal Government, claiming FAA flight controllers negligently caused her husband's death. Johnson, 481 U.S. at 683. The Court cited numerous decisions of lower courts holding that Feres barred suits against the Government even though the negligence alleged was on the part of a civilian employee. Id. at 687 n.8. (Citations omitted). Johnson is controlling in the instant case, and supports the district court's conclusion that the plaintiff's action, although skillfully pled, is an action against the United States, and, as set forth more fully below, is barred by Feres.

3. Corporal Glenn's Injuries Were "Incident to Service" and This Action Is Barred by Feres.

The Feres doctrine "provides a broad blanket of immunity to protect the government against allegations of negligence in military contexts." Estate of McAllister v. United States, 942 F.2d 1473, 1479 (9th Cir. 1991). In Feres, the Supreme Court unanimously held that, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. "[A] service member is injured incident to

service" if the injury is "because of his military relationship with the [g]overnment[.]" Johnson, 481 U.S. at 689. In determining whether a service member's injuries were incurred "incident to service," courts have found several factors to be relevant, with no single one being dispositive. Important factors in resolving the service question include: whether the injury arose while a service member was on active duty, Kohn v. United States, 680 F.2d 922, 925 (2d Cir. 1982); whether the injury arose on a military situs, Stewart v. United States, 90 F.3d 102 (4th Cir.1996); whether the injury arose during a military activity, Costo v. United States, 248 F.3d 863 (9th Cir. 2001); whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service when the injury arose, Quintana v. United States, 997 F.2d 711 (10th Cir. 1993); and whether the injury arose while the service member was subject to military discipline or control, Stewart, 90 F.3d at 104.

It is well-established that claims by active members of the military predicated upon "medical treatment at military facilities [are] 'incident to service'" and barred by Feres. See, e.g., Appelhans, 877 F.2d 309, 310 (4th Cir. 1989); id. At 311 ("The fact that [plaintiff's] injury occurred as a result of medical treatment by military doctors . . . conclusively demonstrates that that injury was 'incident to service.'"); see also Hartline v. United

States, 19 F.3d 11 (4th Cir. 1994) (unpublished); Kendrick 877 F.2d 1201; Walker v. United States Dept. of the Army, 60 F. Supp. 2d 553, 556 (E.D. Va. 1999); Hayes v. United States Dept. of the Army, 44 F.3d 377, 378-79 (5th Cir. 1995); Jones v. United States, 112 F.3d 299, 302 (7th Cir. 1997); Jackson v. United States, 110 F.3d 1484, 1489 (9th Cir. 1997); Cutshall v. United States, 75 F.3d 426, 428 (8th Cir. 1996).

Also, in Stansberry v. Middendorf, 567 F.2d 617, 617-18 (4th Cir. 1978), the Fourth Circuit barred a suit for injuries sustained when a Navy ambulance transporting a Navy serviceman was in an accident occurring off base. The serviceman's presence in the Navy ambulance depended on his status as a servicemen. The injuries alleged were therefore incident to service.

In the analogous case of Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985), survivors brought an action under the FTCA when a United States Army sergeant died after allegedly receiving negligent medical treatment in a military hospital. In affirming the district court's dismissal of the case under Feres, the Eleventh Circuit said:

> In this situation, the district court need only decide whether the injury arose out of or during the course of an activity incident to service in the Armed Forces . . . The provision of benefits to soldiers because of their status as military personnel is considered activity incident to [such] service . . . Military medical care constitutes such benefits; accordingly, suits by

> servicemen or their representatives for medical malpractice are barred by the Feres doctrine.

Rayner, 760 F.2d at 1219 (citations omitted).

Under Feres scrutiny, the instant case is indistinguishable from Rayner. Plaintiff alleges that Army medical staff were negligent in providing medical care for Corporal Glenn while she received treatment at Army Womack Medical Center. Corporal Glenn was an active duty Army soldier at all times relevant to the alleged medical malpractice in the Complaint. She was entitled to treatment at Womack Army Medical Center because of her status as an active duty member of the military. The injuries are alleged to have resulted from negligence of medical staff, all of whom the United States has certified were acting within the scope of their employment for the United States Department of the Army.[7] Clearly, Glenn received medical care at Womack Army Medical Center "because of [her] military relationship with the government." See Johnson, 481 U.S. at 689 (explaining that, under Feres, a service member is injured incident to service if the injury is because of his

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[7] Any effort to distinguish this case based on the fact that Brezinski, Hand, and Conneen were civilians employed under a personal services contract, rather than as active duty military members, is unavailing and irrelevant as a point on distinction. Based upon the Supreme Court's decision in Johnson, it is of no consequence under the Feres inquiry that the alleged tortfeasors were civilians. Id. at 691 (applying Feres in a case involving alleged negligence of Federal Aviation Administration employees).

military relationship with the government). As such, any injury she sustained as a result of such medical care is a service-related injury, and any suit[8] based upon such injury is barred by the Feres doctrine.

Indeed, both of the companion cases decided with Feres itself dealt with allegations of medical malpractice. See Jefferson v. United States, 340 U.S. 135 (1950); Griggs v. United States, 340 U.S. 135 (1950). The plaintiff in Jefferson was a discharged soldier who alleged negligence by an Army physician who operated on him while he was on active duty. In Griggs, an executrix alleged that the decedent service member died as a result of the negligent medical treatment of Army surgeons. The Supreme Court denied recovery in both cases, holding that injuries which arise from negligent medical care are incident to service. In so holding, the Court noted that the common thread between the three was that "each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." Feres, 340 U.S. at 138. In Johnson, 481 U.S. at the Court noted that while all of the cases it had decided under Feres involved allegations of negligence by members of the military, it had never suggested that

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[8] Feres also bars suits by a service member's family for claims that are derivative to the service member's action for injuries sustained "incident to service." Kendrick v. United States, 877 F.2d 1201 (4th Cir. 1989).

the military status of the alleged tortfeasor was crucial to application of the Feres doctrine. Johnson, 481 U.S. at 686.[9]

Furthermore, the rationales underlying the Feres doctrine support the district court's dismissal. These rationales recognize (1) the distinctly federal nature of the Feres doctrine, (2) the availability of existing alternative compensation schemes in the military, and (3) the fear of damaging military structure and discipline. See Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-73 (1977). Indeed, in Kendrick, this Court upheld a district court's finding of a Feres bar to plaintiff's medical malpractice claim against the military was consistent with the three rationales. Id. at 1204.

The plaintiff in Kendrick was a sergeant on active duty in the United States Army, who brought a medical malpractice claim pursuant to the FTCA after being treated at Bassett Army Community Hospital, Fort Wainwright, Alaska, for injuries sustained in a motor vehicle accident. Id. at 1202. The Court held that the

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[9] The Sixth Circuit, relying on Johnson, has even gone so far as to state that "in recent years the [Supreme] Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military. Applehans, 877 F.2d at 312 (citing Major v. United States, 835 F.2d 641 (6th Cir. 1987)) (emphasis original).

dismissal of Kendrick's claims was appropriate in light of the three broad Feres rationales. Id. at 1204-05.

First, the Supreme Court has recognized the relationship existing between the United States and its military personnel is one "distinctly federal in character," and application of local tort law to that relationship pursuant to the FTCA is inappropriate. Kendrick, 877 F.2d at 1204. (internal citations omitted.) Where a servicemember is injured incident to service it "'makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman.'" Id. (internal citations omitted). Instead, application of the underlying federal remedy that provides "'simple, certain, and uniform compensation for injuries or death of those in armed services'" is appropriate. Id. (internal citations omitted). Corporal Glenn was an active duty Army soldier entitled to treatment at Womack Army Medical Center because of her status as an active duty member of the military. In claiming this rationale does not apply in the instant case, plaintiff disregards several important facts:(1) that defendant Eichelberger was an Army Major on active duty, and (2) defendant Hand, Conneen, and Brezinski were employees of the United States Department of the Army serving the medical needs of military personnel under a personal services contract authorized by the United States

Secretary of Defense, not merely "private contractors" with no relationship to the military. These important facts give rise to the "distinctly federal relationship" between the United States and its military personnel. Moreover, Corporal Glenn possessed the distinctive relationship with the government that underlies the first rationale under Feres.

The second rationale of Feres is that, in light of the comprehensive system of benefits designed to compensate injured service personnel, Congress did not envision that service members would recover under the FTCA as well. Johnson, 481 U.S. at 689-90. Plaintiff contends this rationale does not apply here because the United States "voluntarily" substituted itself for "private contractors" who are not liable for the benefits available under the existing alternative compensation schemes in the military. Again, the individual defendants in this case are not "private contractors" like Presidential Airways in McMahon. Rather, plaintiff's suit is a suit against the United States under the FTCA. As the Court concluded in Stencel, there is no reason to modify what the Court has previously held to be the law: the statutory veterans' benefits "provid[e] an upper limit of liability for the Government as to service-connected injuries." Kendrick, 877 F.2d at 1205. The same reasoning equally applies here.

Finally, the third Feres rationale - preserving military discipline - is not as narrow as plaintiff suggests. See, e.g., Stewart, 90 F.3d at 106. As the Court noted in Johnson:

> Feres and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the Feres doctrine because they are the "type[s]" of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness . . . Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

Johnson, 481 U.S. at 690-91; see also Kendrick, 877 F.2d at 1205. (emphasis added). Thus, the relevant inquiry is whether plaintiff's claim is the type of claim, that if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Stewart, 90 F.3d at 106. Plaintiff's lawsuit falls in this category because it alleges negligence by employees of the United States Department of the Army, some of whom were serving the medical needs of military personnel under a personal services contract authorized by the United States Secretary of Defense. The

personal services contract authorized by the United States Secretary of Defense provides that (1) performance of the individual defendants is subject to the day-to-day supervision and direction of designated employees of the Government, (2) the government will evaluate the quality of professional and administrative services provided, and retain control over the medical and professional aspects of services rendered (e.g., professional judgments, diagnosis for specific medical treatment), (3) the Government designated official is the Chief, Anesthesia and Operative Services, or his designated representative, and (4) all CRNAs presented by the contractor must be approved by the WAMC Chief, Anesthesia Nursing, or his designated representative, prior to application for clinical privileges. In this case, and others of its variety, military medical personnel might have "'to testify in court as to each other's decisions and actions.'" Stewart, 90 F.3d at 106. Under the proper analysis, dismissal of plaintiff's action is consistent with the third Feres rationale as well.

CONCLUSION

The district court did not err in granting the government's motion to dismiss for lack of subject matter jurisdiction. Plaintiff's action is barred by the Feres doctrine, and the judgment of the district court should be affirmed.

Respectfully submitted, this 17th day of December, 2010.

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