UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID ARNOLD,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 1:21-cv-10731-IT
	*	
MICHAEL PEARLMAN,	*	
	*	
Defendant.	*	

MEMORANDUM & ORDER

December 15, 2021

TALWANI, D.J.

Plaintiff David Arnold commenced this tort action in Middlesex Superior Court against Defendant Michael Pearlman, an employee of the Smithsonian Astrophysical Observatory ("SAO"). The United States removed the case to federal court, moved to substitute the United States for Pearlman, and moved to dismiss the complaint for lack of jurisdiction and failure to state a claim. For the following reasons, the government's Motion to Substitute [#4] and Motion to Dismiss [#5] are GRANTED.

I. Factual Background

As alleged in the Complaint [#1-1] and the accompanying documents, the facts are as follows. Arnold is a physicist who designs retroreflectors for the laser tracking of satellites. Compl. ¶ 3 [#1-1]. Pearlman, also a physicist, was Arnold's supervisor at various times beginning around 1970 while Arnold was employed by the SAO. Id. at ¶ 4.

Beginning on October 1, 2014, Arnold was hired as an independent contractor to provide technical services to the SAO in the analysis of retroflector configurations for satellite missions. Compl. Ex. A—Purchase Orders 9-11 [#1-1]. The contract between Arnold and the SAO stated

that his services would be billed at the rate of fifty dollars per hour for up to 240 hours and included an additional three thousand dollars for travel expenses for the period of performance from October 1, 2014, through September 30, 2015 "or until funding limit is reached." Id. The contract was extended for an additional year with the same terms on November 24, 2015, and again on November 15, 2016. Id. at 12-13. It was then extended for an additional three months through November 30, 2017. Id. at 14. Finally, on May 17, 2018, Arnold signed a purchase order extending his contract for an additional three years, from December 1, 2017, through November 30, 2020, with the same terms. Pearlman Decl. Ex. A—Purchase Orders 15 [#12-2]. The purchase orders specified that Pearlman was "delegated as the Contracting Officer's Technical Representative" and would be responsible for resolving issues that arose with respect to "matters of acceptability or workmanship and other technical requirements" and "approving and accepting work performed" under the contract. Compl. Ex. A—Purchase Orders 10 [#1-1]; Pearlman Decl. Ex. A—Purchase Orders 16 [#12-2].

On March 21, 2016, Pearlman asked whether Arnold was available to help design the Italian Lares-2 satellite. Compl. ¶ 5 [#1-1]; Compl. Ex. B—3/21/2016 Emails 16 [#1-1]. Pearlman informed Arnold that "[t]he initial work would be done under my support for you" and that Arnold could "include this under SAO funding at least initially." Compl. Ex. B—3/21/2016 Emails 16 [#1-1]. Beginning in March 2016, Arnold worked on the Lares-2 project extensively. Compl. ¶ 6 [#1-1]. At some point, Arnold proposed a new design that significantly expanded the scope of the project, and his work then went far beyond the 240 hours specified in his contract with the SAO. Id. at ¶¶ 7, 11.

On November 20, 2017, Arnold emailed Pearlman stating that "[t]he workload over the past year has been beyond available funding." Compl. Ex. G—11/20/20217 Emails 24 [#1-1].

Pearlman responded that "[a]s far as funding goes, I had to fight hard to get what we got." Id. About ten days later, Pearlman emailed Arnold asking him to provide an annual cost breakdown on his letterhead for each of the next three years using the same labor and travel costs as in the prior contracts. Compl. Ex. H—11/30/2017 Emails 25-26 [#1-1]. Arnold responded that his workload between the summer of 2016 and November 2017 had been such that he "work[ed] a large part of every day," despite being "paid for 5 hours a week." Id. at 25. Arnold went on to say that he had "no way to predict what new issues [would] appear [over] the next 3 years," that he "expect[ed] to be working at a level that exceed[ed] that of the last several years" and that he "realize[d] that funding for this kind of analysis [wa]s very difficult to obtain." Id. at 26. He then expressed that whatever Pearlman could negotiate would be "fine," that he would "probably continue to work more than the available funding," and that he "enjoy[ed] the work and want[ed] to be doing something useful." Id. He also noted that he suspected another scientist working on the project was "doing the same thing." Id.

In the statement of work supporting the 2018 purchase order, Arnold included design studies for the Lares-2, and his summary of his previous work under the contract similarly included work on Lares-2. Pearlman Decl. Ex. A—Purchase Orders 22-23 [#12-2]. Arnold ceased working on the Lares-2 satellite at the end of October 2018. Compl. ¶ 6 [#1-1]. On November 11, 2018, Arnold invoiced the SAO under the 2018 purchase order for $15,000 in services, stating that "[t]he primary work has been on the design of the LARES-2 retroreflector array." Pearlman Decl. Ex. A—Purchase Orders 26 [#12-2].

Arnold alleges, however, that he expected to be paid retroactively for the full amount of his work on Lares-2. Compl. ¶ 13 [#1-1]. He claims that Pearlman's "statement that there would be funding for Mr. Arnold's work under the SAO contract turned out to be false." Id. at ¶¶ 9-10.

Specifically, he states that the Italian Space Agency ("ASI") was funding the Lares-2 project and that the National Aeronautics and Space Administration ("NASA") was not permitted to provide funding to support ASI's work without an agreement between ASI and NASA. Id. at ¶ 10. Pearlman allegedly knew that no such agreement between the organizations existed and that it would therefore not be possible to obtain funding from NASA, which supported Pearlman's work at the SAO, for Arnold's work on Lares-2. Id. Arnold brings a single count of misrepresentation against Pearlman based on this alleged conduct. Id. at ¶¶ 17-18.

II. Discussion

A. *Removal and Substitution*

The Federal Employees Liability Reform and Tort Compensation Act of 1988, more commonly known as the Westfall Act, authorizes the Attorney General to certify that a federal employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose" and to remove a case to federal court.[1] Id. at 229-30 (citing 28 U.S.C. § 2679(d)). Here, the Acting United States Attorney for the District of Massachusetts has certified that Pearlman was acting within the scope of his employment with the United States at the time of events alleged. Certification [#1-3]. The certification is "conclusive[] . . . for purposes of removal." 28 U.S.C. § 2679(d)(2).

The Westfall Act also "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." Osborn v. Haley, 549 U.S. 225, 229 (2007) (citing 28 U.S.C. § 2679(b)(1)). "Upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case

[1] That power has been delegated to United States Attorneys for the district where the civil action is commenced. See 28 C.F.R. § 15.4.

then falls under the governance of the Federal Tort Claims Act ['FTCA']." Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995). In this case, the United States moves the court to substitute the United States as defendant in place of Pearlman with respect to Arnold's misrepresentation claim based on the Acting United States Attorney's certification. Mot. to Substitute [#4].

Arnold challenges the certification, arguing that it should be rejected because Pearlman was acting beyond the scope of his authority. Pl's Opp. 1 [#9]. A plaintiff may request *de novo* judicial review of the scope-of-employment determination for purposes of assessing the applicability of sovereign immunity under the FTCA. See Gutierrez de Martinez, 515 U.S. at 420. In making that assessment, the court is not limited to the allegations of the complaint:

> Where the movant contends that, even accepting the allegations of the complaint as true, the defendant acted within the scope of employment, the motion to substitute may be decided on the face of the complaint (akin to a motion to dismiss); where the movant contests the facts as pled, the motion may be decided by reference to affidavits and other evidence outside the pleadings (akin to a summary judgment motion); and where the plaintiff demonstrates that a genuine issue of material fact exists with respect to the scope of employment, the district court may hold an evidentiary hearing to resolve the material factual disputes about the immunity-related facts.

Davric Maine Corp. v. U.S. Postal Serv., 238 F.3d 58, 66 (1st Cir. 2001). "[T]he burden is upon [the plaintiff] to prove any facts needed to contradict the government's characterization of the conduct in dispute." Lyons v. Brown, 158 F.3d 605, 610 (1st Cir. 1998).

Whether Pearlman was acting within the scope of his employment at the time of the event alleged is governed by state law. See id. at 609. In Massachusetts, the "conduct of an agent is within the scope of employment (1) if it is of the kind he is employed to perform; (2) if it occurs substantially within the authorized time and space limits; and (3) if it is motivated, at least in part, by a purpose to serve the employer." Wang Labs., Inc. v. Bus. Incentives, Inc., 398 Mass. 854, 859, 501 N.E.2d 1163 (1986) (internal citations omitted).

Arnold's argument against certification goes primarily to the first element. He claims that the Smithsonian does not fund work for projects undertaken for a foreign agency and that, therefore, Pearlman's request that Arnold perform work for the ASI on Lares-2 was not within the scope of his employment. Id. at 1-2. But even accepting as true that Pearlman was not *supposed* to pay Arnold for work on Lares-2 under his NASA contract, the evidence before the court demonstrates that Pearlman did *in fact* pay Arnold for that work—up to Arnold's contract limit. Indeed, in his proposal supporting the 2018 purchase order, Arnold included a summary of previous work under the contract, which included design studies for the proposed Lares-2 satellite. Pearlman Decl. Ex. A—Purchase Orders 15 [#12-2]. Given these facts, the court concludes that Pearlman was acting within the scope of his employment with the SAO, where his job responsibilities included supervising Arnold's work as an independent contractor.[2]

Accordingly, the Acting United States Attorney's certification was appropriate, and the United States is properly substituted for Pearlman.

B. *Subject Matter Jurisdiction*

Where the court has found substitution appropriate, Arnold's claim of misrepresentation must be dismissed for lack of subject matter jurisdiction, as the FTCA bars such claims against the federal government. 28 U.S.C. § 2680(h); see Wood v. United States, 290 F.3d 29, 35 (1st Cir. 2002) (holding that absent waiver of sovereign immunity, "the federal courts lack subject matter jurisdiction over torts against the United States").

[2] In his Affidavit ¶ 5 [#9-1], Arnold speculates that Pearlman asked Arnold to work on Lares-2 to "add to [Pearlman's] prestige in the space geodesy and laser ranging communities." That does not satisfy Arnold's burden of demonstrating that a genuine issue of material fact exists with respect to the scope of Pearlman's employment.

III. Conclusion

For the foregoing reasons, the government's Motion to Substitute [#4] and Motion to Dismiss [#5] are GRANTED.

IT IS SO ORDERED

December 15, 2021

/s/ Indira Talwani
United States District Judge