UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015	MDL No. 1:18-md-02824-WJ
THIS DOCUMENT RELATES TO:	
ALL CASES	

UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

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MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States moves for partial summary judgment under Federal Rule of Civil Procedure 56(a) on Plaintiffs' claims against it under the Federal Tort Claims Act ("FTCA"). In support of this motion, the United States submits the following Memorandum in support, which includes a Statement of Undisputed Material Facts.

MEMORANDUM IN SUPPORT

The United States is entitled to summary judgment on Plaintiffs' claims under the FTCA because there is no genuine issue of any material fact and the United States is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (a). The United States is entitled to judgment on Plaintiffs' tort claims by virtue of the FTCA's discretionary function exception. 28 U.S.C. § 2680(a).

INTRODUCTION

This litigation arises from an inadvertent release of mine-impacted water from the Gold King Mine on August 5, 2015. This release occurred in the course of efforts that EPA and others had undertaken to respond to contamination at abandoned mines in Colorado. Plaintiffs advance a series of claims against Federal Defendants, including tort claims against the United States under the FTCA.

In 2018, Federal Defendants filed subject-matter jurisdiction challenges to Plaintiffs' tort and environmental law claims. Doc. 44. With respect to the tort claims, the Court denied the motions to dismiss "at this time" to permit "an opportunity for discovery regarding the discretionary function exception." *In re Gold King Mine Release in San Juan Cty., Colo.*, No. 1:18-md-02824, 2019 WL 999016, at *5 (D.N.M. Feb. 28, 2019). The Court stated that limited

discovery was warranted because Plaintiffs had identified a potentially non-discretionary regulation under OSHA, 29 C.F.R. § 1910.120(e)(7), which stated that "Employees who are engaged in responding to hazardous emergency situations at hazardous waste clean-up sites that may expose them to hazardous substances shall be trained in how to respond to such expected emergencies." 2019 WL 999016, at *5. The Court noted that Plaintiffs had argued '"it is not clear that EPA performed any training at all,'" and that "'[n]o one disputes that [the OSHA provision] specifically mandates at least *some* training and Sovereign Plaintiffs are entitled to discover whether EPA conducted any training.'" *Id.* Thus, the Court denied the motion with respect to the FTCA claims so that Plaintiffs could conduct discovery "regarding the discretionary function exception." *Id*.

In response to the Court's ruling regarding application of the discretionary function exception, on March 27, 2019, the United States submitted evidence to Plaintiffs showing that EPA had engaged in substantial training to meet the OSHA regulation identified by the Court. *See* Doc. 177-2. Despite repeated requests, Plaintiffs have failed to identify any other specific discovery they needed regarding EPA's OSHA training or any other issue regarding application of the FTCA's discretionary function exception.[1] Accordingly, the United States is entitled to summary judgment on the FTCA claims.

[1] In late March and early April 2019, the United States asked Plaintiffs to identify what additional discovery they needed to address the jurisdictional issues that the United States had raised in its motion to dismiss. *See* Doc. 177-2, 177-3. However, Plaintiffs refused to identify any jurisdictional discovery. Doc. 177-4. On May 23, 2019, the Special Master also requested that the parties identify specifically what jurisdictional discovery they needed, *see* Doc. 181 at 1, n.1, and later, at a May 31, 2019, status conference, specified that he had expected to receive "something like you would get in a Rule 56(d) affidavit." Exh. 2 at 23:18 – 24:10. Despite this, Plaintiffs have failed to identify what specific discovery they need to satisfy their burden of showing that jurisdiction exists. *See* Doc. 183-1.

LEGAL STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure provides that the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." The Supreme Court has made it clear that summary judgment is not a "disfavored procedural shortcut," rather, it is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). A motion for partial summary judgment is resolved under the same standard as a motion for summary judgment. *See Franklin v. Thompson,* 981 F.2d 1168, 1169 (10th Cir. 1992). The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A "mere existence of a scintilla of evidence" in support of the non-movant's position, however, is insufficient; "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Further, "[c]onclusory allegations that are unsubstantiated do not create an issue of fact and are insufficient to oppose summary judgment." *Elsken v. Network Multi–Family Sec. Corp.,* 49 F.3d 1470, 1476 (10th Cir. 1995). In the present case, Plaintiffs are unable to meet their burden.

STATUTORY BACKGROUND

The Federal Tort Claims Act "'is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.'" *Garling v. EPA*, 849 F.3d 1289, 1294 (10th Cir. 2017) (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)). The FTCA lists exceptions to the waiver of sovereign immunity in 28 U.S.C. § 2680. "When an exception applies, sovereign immunity remains, and federal courts lack jurisdiction." *Garling*, 849 F.3d at 1294. The discretionary function exception, 28 U.S.C. § 2680(a), provides that the United States 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.

"This discretionary function exception 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Garling*, 849 F.3d at 1295 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* ("*Varig Airlines*")), 467 U.S. 797, 808 (1984)). As this Court recently stated, "Its application is a threshold jurisdictional issue in any FTCA case." *C de Baca v. United States*, ___ F. Supp. 3d __, 2019 WL 2477178, at *72 (D.N.M. June 13, 2019).

STATEMENT OF UNDISPUTED MATERIAL FACTS ("UMF")

1. EPA employees working at the Gold King Mine site prior to the August 5, 2015, release had training in compliance with 29 C.F.R. § 1910.120(e)(7). On-Scene Coordinators ("OSCs") Steve Way and Hays Griswold were the only two EPA employees involved in the

removal site evaluation at the Gold King Mine prior to the August 5, 2015 release. Exh. 1, ¶ 4 (Laura Williams Declaration).

2. Because working at hazardous waste sites involves exposing workers to many potential risks, safety training is critically important. EPA makes this training a top priority. EPA trains its OSCs in compliance with regulations under the Occupational Health and Safety Act ("OSHA"). Specifically, OSCs must have OSHA training in compliance with 29 C.F.R. § 1910.120(e), for Hazardous Waste Operations and Emergency Response (HAZWOPER). This includes initial HAZWOPER Training, consisting of 40 hours of training, which involves both classroom instruction and supervised field training. Topics covered by the 40-hour HAZWOPER Training include, but are not limited to, training modules on Site Safety & Health, Site Characterization, Hazard Recognition, Safety Planning and Site Health & Safety Plans, Site Control & Survey, Spill Containment, and Decontamination. Additionally, OSCs must complete annual HAZWOPER "Refresher Training." This HAZWOPER training covers the classroom and hands-on training identified in 29 C.F.R. § 1910.120. Exh. 1 ¶ 5.

3. Steve Way completed the initial 40-hour HAZWOPER training in December 1985, and thereafter completed annual HAZWOPER refresher training, including on March 4, 2015, prior to the Gold King Mine release. Hays Griswold completed the initial 40-hour HAZWOPER training in November 1987, and thereafter completed annual HAZWOPER refresher training, including on March 4, 2015, prior to the Gold King Mine release. Exh. 1 ¶ 6.

4. EPA also issues training guidance for OSCs. The most recent guidance prior to the Gold King Mine release was the Training Plan for EPA On-Scene Coordinators, dated June 2014. This training outlines the core training program for all OSCs. In addition to the OSHA training described above, this Training Plan provides OSCs with an array of additional

emergency response training, including training outlined in the EPA's Emergency Responder Health and Safety Manual. The training covers the development of a site specific Health and Safety Plan, as well as particular worker protection measures, including medical surveillance, respiratory protection, and stress management. Exh. 1 ¶ 7.

5. In March of 2015, EPA Region 8 conducted an "OSC Training Week" in Denver, Colorado. The training ran from Monday March 2, 2015, to Thursday March 5, 2015. Steve Way and Hays Griswold attended every session of the training. The HAZWOPER refresher training occurred on March 4, 2015. The training in OSC Training Week, in conjunction with the initial 40-hour HAZWOPER training, covered all applicable training in the Training Plan for EPA On-Scene Coordinators (June 2014), including both OSHA training and the EPA Emergency Responder Health and Safety Manual training. The OSC training covers procedures for responding to expected emergencies. Additionally, the training covers drafting site specific Health and Safety Plans to address potential emergencies that may occur at a site. The training discusses the need for a Health and Safety Plan to define responsibilities, lines of authority, resources, and actions necessary to respond to reasonably expected emergencies that could occur on a site. The training also covers such subjects such as medical transport of employees, evacuation routes, personal protective equipment, firefighting, and spill containment, among other topics. Exh. 1 ¶ 8.[2]

[2] In Federal Defendants' facial subject-matter challenge to Plaintiffs' tort claims, the Federal Defendants presumed that the facts stated in Plaintiffs' complaints were true for purposes of the motion. Under those facts, presumed to be true, the Court did not identify any other potential factual issue regarding application of the FTCA's discretionary function exception beyond compliance with the OSHA regulation.

ARGUMENT

I. The United States Is Entitled to Summary Judgment on Plaintiffs' FTCA Claims.

The United States is entitled to summary judgment on Plaintiffs' FTCA claims because it is undisputed that the EPA complied with the OSHA emergency response training regulation, 29 C.F.R. § 1910.120(e), the only provision that the Court identified as a potential non-discretionary requirement. In its motion to dismiss, the United States made a facial subject-matter jurisdiction challenge to Plaintiffs' FTCA claims. Doc. 44 at 12. The Court denied the motion with respect to the FTCA after identifying the OSHA regulation and holding that Plaintiffs were entitled to discovery regarding application of the FTCA's discretionary function exception. After the order, the United States produced evidence that EPA complied with the regulation: namely, that the only two EPA employees working at the Gold King Mine site prior to the August 5, 2015 release, had the requisite OSHA training. Because Plaintiffs will not be able to raise a genuine issue of material fact regarding EPA's compliance with the OSHA regulation, the United States is entitled to judgment as a matter of law on Plaintiffs' FTCA claims.

A. The Only FTCA Claim the Court Identified in Denying the Facial Subject-Matter Jurisdiction Challenge Involved Compliance with OSHA's Training Regulation.

The United States filed a facial subject-matter jurisdiction challenge to the Plaintiffs' FTCA claims based on the Act's discretionary function exception. In the Court's Order addressing United States' motion, the Court articulated the two-part test for determining whether conduct falls within the FTCA's discretionary function exception.

> First, we ascertain the precise governmental conduct at issue and consider whether that conduct was "discretionary," meaning whether it was "a matter of judgment or choice for the acting employee." [*Berkovitz v. United States*, 486 U.S. 531, 536 (1988)]. Conduct is not discretionary if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to

> follow. In this event, the employee has no rightful option but to adhere to the directive." *Id.*
>
> If the first element of the *Berkovitz* test is satisfied, we then consider the second element—whether the decision in question is one requiring the exercise of judgment based on considerations of public policy. *Id.* at 536–37. In so doing, we do not consider the employee's "subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).
>
> If both the first and second elements of the *Berkovitz* test are met, the discretionary function exception to the waiver of sovereign immunity applies. Stated another way, if a plaintiff can establish that either element is not met, the plaintiff may proceed because the exception does not apply. *Sydnes v. United States,* 523 F.3d 1179, 1183 (10th Cir. 2008).

2019 WL 999016, at *4-*5 (quoting *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008)) (cleaned up). The Court also recognized, "'[A] government agent's discretionary actions are [presumed to be] grounded in policy, and it is up to the challenger to allege facts showing that the actions were actually not policy-oriented.'" 2019 WL 999016, at *5 (quoting *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016)).

When the discretionary function exception of the FTCA is raised, Plaintiffs bear the burden of alleging and proving that a claim falls outside the discretionary function exception. *Hardscrabble Ranch*, 840 F.3d at 1220; *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998). As the Court explained, the first step for the Court in addressing a discretionary function exception challenge is determining the precise nature of the conduct at issue based on what was alleged in the Complaint and then deciding whether any provision contains a specific prescription for that conduct under the first part of the discretionary function exception test. 2019 WL 999016, at *4. In ruling on the United States' facial subject-matter challenge to Plaintiffs' FTCA claims, the Court identified only one provision that potentially removed the government's discretion and entitled Plaintiffs to discovery. *Id*. at *5. Plaintiffs alleged that EPA negligently

failed to train, and that OSHA, 29 C.F.R. § 1910.120(e) required emergency response training. The Court did not find that any other allegations implicated non-discretionary governmental conduct despite Plaintiffs' citation of many other provisions in their complaints and in response to the United States' motion. Based upon the single OSHA regulation, the Court held that discovery could proceed on the applicability of the discretionary function exception.

Because the United States made a facial subject-matter jurisdiction challenge to Plaintiffs' FTCA claims as alleged in their Complaints, and Plaintiffs bear the burden of showing that alleged negligent conduct survives a discretionary function exception challenge, the parties must assume that the Court determined that it could not exercise FTCA jurisdiction over any other alleged tortious conduct. Otherwise, the Court would have identified other non-discretionary conduct that survived the United States' facial subject-matter jurisdiction challenge to Plaintiffs' FTCA claims as alleged in their Complaints, entitling Plaintiffs to conduct discovery on those claims.

The Court also did not identify any allegedly tortious conduct by EPA employees that was not susceptible to policy analysis. As the Court also pointed out, alleged tortious conduct only survives under the second part of the discretionary function exception test when Plaintiffs have "allege[d] facts showing that the actions were actually not policy-oriented." 2019 WL 999016, at *5 (quoting *Hardscrabble*, 840 F.3d at 1222). In its order, the Court did not identify any facts that Plaintiffs had alleged in their complaints showing that any claimed tortious conduct of EPA employees at Gold King Mine was "actually not policy-oriented," pursuant to the Tenth Circuit's *Hardscrabble Ranch* standard. Thus, Plaintiffs have not alleged any facts on

the second part of the discretionary function exception test that would allow the Court to exercise FTCA jurisdiction over tort claims and entitle Plaintiffs to conduct discovery on those claims.[3]

B. The EPA Complied with OSHA's Training Regulation.

The United States submitted the Declaration of Laura Williams to show that EPA complied with the OSHA regulation that the Court identified in its Order. *See* Exh. 1. Ms. Williams, who has been working for EPA for over thirty years, has been the EPA Region 8 Emergency Response Unit Leader/Supervisor since November 2011. Exh. 1 ¶¶ 1-4. In this position, she supervises the Region's OSCs, including Steve Way and Hays Griswold, the only two EPA employees involved in the removal site evaluation at the Gold King Mine prior to the August 5, 2015 release. *Id.* ¶ 4; *see* UMF No. 1.

Ms. Williams attests that, because working at hazardous waste sites involves exposing workers to many potential risks, safety training is critically important. *Id.* ¶ 5. Accordingly, EPA makes safety training a top priority. *Id.* Ms. Williams confirms that EPA's OSCs are trained in compliance with OSHA regulations, and, specifically, that OSCs must have OSHA training in compliance with 29 C.F.R. § 1910.120(e), for Hazardous Waste Operations and Emergency

[3] If Plaintiffs contend that the Court did not intend its order to foreclose Plaintiffs from pursuing other FTCA claims, they must convince the Court that other tort claims survived the Federal Defendants' facial subject-matter jurisdiction challenge and they must specify, pursuant to Fed. R. Civ. P. 56(d), what particular discovery is needed to determine whether the discretionary function exception applies to those claims. *See infra* Section II. As the Supreme Court has stated, a federal court must address subject-matter jurisdiction before the substantive merits of a case because "[w]ithout jurisdiction the court cannot proceed *at all in any cause*." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (emphasis added; internal quotations omitted). A jurisdictional issue that implicates the government's sovereign immunity, such as the FTCA's discretionary function exception, gives not only "protection from liability, but also from suit, including the burden of discovery." *Sydnes v. United States*, 523 F.3d 1179, 1186 (10th Cir. 2008) (internal quotations omitted). Thus, when the applicability of sovereign immunity is in question, a court should permit only limited discovery necessary to verify the applicability of immunity. *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1063 (10th Cir. 2010).

Response (HAZWOPER). Exh. 1 ¶ 5. Ms. Williams explains that this training includes initial HAZWOPER Training, consisting of 40 hours of training, which involves both classroom instruction and supervised field training. *Id.* Topics covered by the 40-hour HAZWOPER Training include, but are not limited to, training modules on Site Safety & Health, Site Characterization, Hazard Recognition, Safety Planning and Site Health & Safety Plans, Site Control & Survey, Spill Containment, and Decontamination. *Id.* After this training is completed, the trainee receives a HAZWOPER certification. *Id.* Ms. Williams attests that OSCs must also complete annual HAZWOPER "Refresher Training." This HAZWOPER training covers the classroom and hands-on training identified in 29 C.F.R. § 1910.120. Exh. 1 ¶ 5; *see* UMF No. 2.

One of Ms. Williams' responsibilities as the Emergency Response Unit Leader/Supervisor is to ensure that each of the 16 OSCs who she manages have OSHA training. *Id.* ¶ 6. In completing her Declaration, Ms. Williams reviewed the training records for Steve Way and Hays Griswold. *Id.* Ms. Williams attests that Steve Way completed the initial 40-hour HAZWOPER training in December 1985, and thereafter completed annual HAZWOPER refresher training, including on March 4, 2015, prior to the Gold King Mine release. *Id.* Ms. Williams further attests that Hays Griswold completed the initial 40-hour HAZWOPER training in November 1987, and thereafter completed annual HAZWOPER refresher training, including on March 4, 2015, prior to the Gold King Mine release. *Id.*; *see* UMF No. 3.

Ms. Williams states that beyond this OSHA training, EPA provides OSCs with an array of additional emergency response training, including training outlined in the EPA's Emergency Responder Health and Safety Manual. *Id.* ¶ 7. This training covers the development of a site-specific Health and Safety Plan, as well as particular worker protection measures, including medical surveillance, respiratory protection, and stress management. *Id.* The training also

includes particular safety measures for working with radioactive materials, for working with chemical and biological agents, and for working in confined spaces. *Id.*; *see* UMF No. 4.

Finally, Ms. Williams describes "OSC Training Week" provided in Denver, Colorado from Monday March 2, 2015, to Thursday March 5, 2015. *Id.* ¶ 8. Ms. Williams attests that Steve Way and Hays Griswold attended every session of the training. *Id.* The HAZWOPER refresher training occurred on March 4, 2015. *Id.* Accordingly, the training in OSC Training Week, in conjunction with the initial 40-hour HAZWOPER training, covered all applicable training in the Training Plan for EPA On-Scene Coordinators (June 2014), including both OSHA training and the EPA Emergency Responder Health and Safety Manual training. *Id.* Ms. Williams states that the OSC training specifically covers procedures for responding to expected emergencies, including the need for a Health and Safety Plan to define responsibilities, lines of authority, resources, and actions to respond to reasonably expected emergencies that could occur on a site. *Id.* The training also covers such subjects such as medical transport of employees, evacuation routes, personal protective equipment, firefighting, and spill containment, among other topics. *Id.* ¶ 8; *see* UMF No. 5.

II. Plaintiffs Have Not Articulated Any Specific Additional Discovery Needed to Respond to the United States' Summary Judgment Motion.

In response to this motion, Plaintiffs cannot merely assert that the Court has allowed discovery and "additional discovery is required to demonstrate a factual dispute or 'that evidence supporting a party's allegation is in the opposing party's hands.'" *Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quoting *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984)).

Despite repeated requests, Plaintiffs have failed to identify any specific discovery needed regarding the OSHA training regulation or any other discretionary function issue. Therefore, the Court should grant the motion for summary judgment. Rule 56(d) requires Plaintiffs to show through affidavit or declaration, "precisely how additional discovery will lead to a genuine issue of material fact." *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000); *see also Garcia*, 533 F.3d at 1179–80 (affirming denial of Rule 56(d)[4] request where the party opposing summary judgment did not identify any specific facts that would create a genuine issue of material fact, let alone identify what steps had been taken to obtain such information).

Over the course of four months since the United States' submission of the evidence of OSHA compliance to Plaintiffs, they have not sought any discovery on that issue or identified any other specific discovery required relevant to application of the FTCA's discretionary function exception. If Plaintiffs cannot raise a genuine issue of material fact regarding compliance with the OSHA regulation based on information currently in their possession, they must submit a declaration or affidavit specifying what discovery is needed. Fed. R. Civ. P. 56(d).

The Tenth Circuit has specifically addressed the scope of discovery on application of the FTCA's discretionary function exception that a district court might allow in response to a summary judgment motion. In *Garcia v. U.S. Air Force*, the Tenth Circuit held that a party seeking to avoid summary judgment under Rule 56(d) must submit an affidavit that identifies "the probable facts not available and what steps have been taken to obtain these facts." 533 F.3d at 1179. The court explained that a "party may not invoke [Rule 56(d)] by simply stating that

[4] Many of the cases refer to Rule 56(f) which contained the language of the current Rule 56(d) prior to the 2010 Rules Amendment. *See* Fed. R. Civ. P. 56, 2010 Advisory Committee Notes.

discovery is incomplete but must state with specificity how the additional material will rebut the summary judgment motion." *Id.* (internal quotations omitted). Since the affidavit submitted by the non-movants failed to identify any specific facts that would preclude summary judgment, "let alone identify what steps had been taken to obtain such facts and a plan for the future," the Tenth Circuit found the district court did not abuse its discretion by denying the plaintiffs the opportunity to conduct further discovery. *Id.* at 1179–80.

Likewise, in *Miller v. United States*, 710 F.2d 656, 658–59 (10th Cir. 1983), the United States, before discovery commenced, filed a motion for summary judgment accompanied by an affidavit supporting application of the discretionary function exception. *Id.* The plaintiffs responded with an affidavit "requesting a stay of summary judgment proceedings pending completion of discovery, pursuant to Fed. R. Civ. P. [56(d)], and outlining the reasons that the plaintiffs could not, without discovery, file responsive affidavits or otherwise be prepared to meet the motion for summary judgment." *Id.* at 658. The Tenth Circuit upheld summary judgment, even though the plaintiffs were denied an opportunity to conduct any discovery whatsoever, because the evidence provided by the government was sufficient to demonstrate that the discretionary function exception applied. *Id.*

These cases reflect federal courts' reluctance to allow open-ended discovery in response to a summary judgment motion, particularly when the motion "is grounded on a claim of [immunity]," such as application of the FTCA's discretionary function exception. *Lewis*, 903 F.2d at 758. As the Tenth Circuit has stated immunity "should be resolved prior to discovery and on summary judgment if possible." *Jones v. City & Cty. of Denver, Colo.*, 854 F.2d 1206, 1211 (10th Cir. 1988) (citations omitted); *see also Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (because the entitlement is "an immunity from suit rather than a mere defense to liability . . . we

repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation").

Here, Plaintiffs have failed to identify any specific discovery that might raise a genuine fact issue regarding compliance with the OSHA regulation and application of the discretionary function exception. *Lewis*, 903 F.2d at 759. ("[T]he burden placed upon the nonmoving party at the summary judgment stage to demonstrate a *genuine* issue of fact goes beyond the burden of producing 'some evidence.'"). Plaintiffs should not be entitled to any other discovery regarding application of the discretionary function exception because there is nothing in the Court's order to indicate that any other tort claims survived the United States' facial subject-matter jurisdiction challenge.

CONCLUSION

For all the foregoing reasons, the United States' motion for partial summary judgment should be granted.

DATED: August 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2019, I electronically filed the foregoing United States' Motion and Memorandum for Partial Summary Judgment, with supporting exhibits, using the Electronic Case Filing (ECF) system of this Court. The ECF system will send a "Notice of Electronic Filing" to the attorneys of record.

/s/ Adam Bain
Adam Bain