

2-1-2003

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### Recommended Citation

Rebecca L. Andrews, Notes and Comments, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 Wash. L. Rev. 161 (2003).

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## **SO THE ARMY HIRED AN AX-MURDERER: THE ASSAULT AND BATTERY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DOES NOT BAR SUITS FOR NEGLIGENT HIRING, RETENTION AND SUPERVISION**

Rebecca L. Andrews

*Abstract:* The Federal Tort Claims Act (FTCA) waives the federal government's sovereign immunity as to claims for injuries caused by an act or omission of a government employee within his or her scope of duty. However, this waiver is not absolute and the government has retained immunity for many claims, including those arising out of an assault or battery. The federal circuit courts are split regarding whether this exception applies to claims for the negligent hiring, retention and supervision of federal employees who commit an assault or battery. While the U.S. Supreme Court has left the question unanswered, the Ninth Circuit Court of Appeals has stated that such claims are allowed, while most other circuits have taken the opposite view. This Comment argues that claims for the negligent hiring, retention and supervision of federal employees are not barred by the assault and battery exception to the FTCA. The legislative history and intent of the FTCA urge such a reading, as does recent Supreme Court jurisprudence. Finally, any danger that barred claims may be disguised as claims for negligent hiring, retention and supervision can be avoided through the use of the Federal Rules of Civil Procedure.

### **INTRODUCTION**

Marvin, a recruiter for the United States Army, visited the home of a young potential enlistee.<sup>1</sup> While in her home as a representative of the United States government, he assaulted and raped her. When Marvin had applied to enlist in the Army he failed to note on his application that he had served time in a state prison. Disregarding its own procedures, the Army did not investigate whether Marvin had a criminal record. Such an investigation would have revealed that Marvin had previously been convicted of forcibly raping a minor female. This conviction may have rendered Marvin ineligible to join the Army. Because of its own negligence in hiring Marvin, the government not only approved of Marvin's enlistment but placed him in the recruitment office where he would have frequent contact with young women. While the government's negligence in hiring, retaining and supervising Marvin was a proximate cause of the victim's injury in this case and the claim for compensation arises out of this negligence as well as the assault and

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1. Hypothetical created by the author.

battery, many federal courts would not allow the victim to recover against the United States government.<sup>2</sup>

The Federal Tort Claims Act (FTCA) is a waiver of sovereign immunity that allows individuals to sue the federal government for injuries suffered as a result of government negligence.<sup>3</sup> The FTCA is not a complete waiver because Congress has created several exceptions to it.<sup>4</sup> One such exception is labeled the “intentional tort exception” or the “assault and battery exception.”<sup>5</sup> This exception retains the federal government’s sovereign immunity for all claims arising “out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.”<sup>6</sup> However, it does not cover all intentional torts, including the intentional infliction of emotional distress or rape.<sup>7</sup>

Courts vary in their interpretation of the assault and battery exception. The U.S. Supreme Court has held that the assault and battery exception does not bar claims for government negligence that proximately causes an assault or battery by a federal employee, when there is an independent duty owed by the government to the plaintiff.<sup>8</sup> Some courts interpret this exception to allow only claims for antecedent government negligence in performing a duty owed the plaintiff unrelated to the government’s employment relationship with the assailant.<sup>9</sup> These courts have held that the assault and battery exception bars claims based on the negligent hiring, retention and supervision of government employees,<sup>10</sup> sometimes arguing that such claims are respondeat superior in disguise.<sup>11</sup> The

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2. The Second, Fourth, Fifth and Tenth Circuits, as well as a federal district court for the district of Maine, have all either held, or implied, that they would not allow this hypothetical victim to recover. See *infra* notes 98–104 and 170–209 and accompanying text.

3. 28 U.S.C. §§ 1346(b)(1), 2670–2680 (2000).

4. *Id.* § 2680.

5. See *Sheridan v. United States*, 487 U.S. 392, 400 (1988); *Senger v. United States*, 103 F.3d 1437, 1438 (9th Cir. 1996). Because this Comment deals exclusively with assault and battery, the exception will be labeled the “assault and battery exception” throughout.

6. 28 U.S.C. § 2680(h).

7. *Id.*

8. *Sheridan*, 487 U.S. at 403.

9. See, e.g., *Guccione v. United States*, 878 F.2d 32, 33 (2d Cir. 1989); *Lilly v. United States*, 141 F. Supp. 2d 626, 628–29 (S.D. W. Va. 2001); *LaFrancis v. United States*, 66 F. Supp. 2d 335, 341–42 (D. Conn. 1999).

10. See, e.g., *Lilly*, 141 F. Supp. 2d at 628; *La Francis*, 66 F. Supp. 2d at 342; *Guccione*, 878 F.2d at 33.

11. See *Guccione v. United States*, 847 F.2d 1031, 1036 (2d Cir. 1988), *rehearing denied*, 878 F.2d 32 (2d Cir. 1989).

Supreme Court has not, however, required this reading<sup>12</sup> and the Ninth Circuit has refused to adopt it.<sup>13</sup> Instead, the Ninth Circuit has read the assault and battery exception to allow federal district courts jurisdiction over claims of negligence directly related to the employment relationship between the government and the assailant, including claims for negligent hiring, retention and supervision.<sup>14</sup>

This Comment argues that the assault and battery exception to the FTCA is not a bar to claims against the United States government for the negligent hiring, retention and supervision of government employees who commit assault and battery outside of the scope of their employment. Part I outlines the distinction between claims based on respondeat superior and those based on negligent hiring, retention and supervision. Part II reviews the statutory language and legislative history of the FTCA and the assault and battery exception. Part III traces the Supreme Court's jurisprudence on the assault and battery exception. Part IV details the lower courts' reactions to the Supreme Court's decisions. Finally, Part V argues that the FTCA grants federal district court jurisdiction over claims for the negligent hiring, retention and supervision of government employees who commit assault and battery outside of their scope of duty.

## I. RESPONDEAT SUPERIOR AND NEGLIGENT HIRING, RETENTION AND SUPERVISION ARE PRACTICALLY AND ANALYTICALLY DISTINCT

According to tort law, both today and at the time of the FTCA's passage in 1946, an employer may be liable for an employee's tort under at least two theories: (1) respondeat superior and (2) negligent hiring, retention or supervision.<sup>15</sup> Under respondeat superior, an employer is liable for an employee's tort regardless of fault.<sup>16</sup> Under negligent hiring, retention or supervision, if the employer knew or should have known that the employee would likely subject third parties to an unreasonable risk of

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12. See *Sheridan*, 487 U.S. at 403 n.8.

13. See, e.g., *Senger v. United States*, 103 F.3d 1437, 1442 (9th Cir. 1996); *Brock v. United States*, 64 F.3d 1421, 1425 (9th Cir. 1995); *Bennett v. United States*, 803 F.2d 1502, 1504 (9th Cir. 1986).

14. See, e.g., *Senger*, 103 F.3d at 1442; *Brock*, 64 F.3d at 1425; *Bennett*, 803 F.2d at 1504.

15. See 22 AM. JUR. 2d *Damages* § 788 (1996); 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

16. See 22 AM. JUR. 2d *Damages* § 788 (1996); WILLIAM J. PROSSER, HANDBOOK ON THE LAW OF TORTS 473-75 (1941).

harm an employer can be held liable for an employee's intentional tort.<sup>17</sup> Under a traditional tort law analysis these two theories of liability are analytically distinct.<sup>18</sup> Negligent hiring, retention and supervision requires a negligent act or acts on the part of a supervising employee while respondeat superior has no such requirement.<sup>19</sup>

#### A. *Respondeat Superior*

The doctrine of respondeat superior is based on the vicarious liability of an employer for an employee's torts committed within the scope of employment.<sup>20</sup> Although the employer may not be at fault, the employer may still be liable under state tort law for injuries caused by its employee acting within his or her scope of duty.<sup>21</sup> The policy rationales behind respondeat superior include compensating the plaintiff, preventing future tortious conduct, and allocating risk to those most able to pay and to those who benefit from the employee's actions.<sup>22</sup>

The meaning of "scope of duty" is vague, and at the time of the FTCA's passage it could be decided by a number of factors.<sup>23</sup> Such factors included the time, place, and purpose of the act, whether it was a task normally undertaken by servants, whether it was the kind of task the employee was employed to perform, and whether it was motivated by the desire to further the employer's purposes.<sup>24</sup> The fact that an employee's action is improper or prohibited does not automatically exempt it from the employee's scope of duty if it satisfies some of the other factors listed above.<sup>25</sup> The U.S. Supreme Court, state courts and a leading commentator have all noted that an employer may be vicariously liable for its employees' intentional torts committed while acting within the

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17. See 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

18. See *id.*; 22 AM. JUR. 2d *Damages* § 788 (1996).

19. See 27 AM. JUR. 2d *Employment Relationship* § 472 (1996); 22 AM. JUR. 2d *Damages* § 788 (1996). Because an employer as an incorporeal entity cannot act without the action of its employees, both of these torts are forms of vicarious liability. For the purposes of this article, the actions of a supervising employee will be ascribed to the employer while those of an employee acting outside of his or her scope of duty will not.

20. 22 AM. JUR. 2d *Damages* § 788 (1996).

21. *Id.*

22. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

23. See PROSSER, *supra* note 16, at 476.

24. See RESTATEMENT (SECOND) OF AGENCY § 228, at 504 (1958).

25. See PROSSER, *supra* note 16, at 476.

scope of duty.<sup>26</sup> In these situations, the employment relationship is enough to create the liability without any independent action attributable to the employer.<sup>27</sup> Because the employer's liability does not depend upon the employer's independent negligent or wrongful conduct, respondeat superior does not create an independent cause of action, but merely extends liability for damages from the employee to the employer.<sup>28</sup>

### B. *Negligent Hiring, Retention and Supervision*

In contrast to the doctrine of respondeat superior, negligent hiring, retention and supervision requires a negligent act or omission on the part of the employer.<sup>29</sup> While the plaintiff pleading respondeat superior does not need to demonstrate that the employer acted negligently, a plaintiff pleading negligent hiring, retention and supervision must demonstrate that the employer was negligent.<sup>30</sup> At the time of the FTCA's passage, the doctrine of negligent hiring, retention and supervision was still in its infancy and would have fallen under the duty to exercise control over the actions of others.<sup>31</sup> According to commentator William J. Prosser it had been recognized in 1941 that employers owe a duty to prevent their employees from harming others even in the absence of a special relationship to the victim.<sup>32</sup> Today, a contemporary plaintiff arguing that an employer violated this duty must prove that the employer knew or should have known that the employee would likely subject third parties to an unreasonable risk of harm.<sup>33</sup>

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26. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998); *Hechinger Co. v. Johnson*, 761 A.2d 15, 24–25 (D.C. 2000) (stating that if employee acts in part to serve employer's interest, employer will be held liable for intentional torts of employee even if prompted partially by personal motives, such as revenge); *Clark v. Pangan*, 998 P.2d 268, 270–71 (Utah 2000) (noting Utah has long held an employer can be vicariously liable for intentional torts of employees acting within scope of duty); *Jordan v. Cates*, 935 P.2d 289, 292 (Okla. 1997) (noting requirements to establish employer liability for intentional tort of employee); PROSSER, *supra* note 16, at 476 (noting an employer may be liable for the intentional torts of its employee in certain circumstances).

27. 22 AM. JUR. 2d *Damages* § 788 (1996).

28. See *id.*

29. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996). See RESTATEMENT (SECOND) OF AGENCY § 219, at 481 (1958) (stating that masters are not liable for the tort of a servant if that servant was "acting outside of the scope of employment unless the master (a) intended the conduct or the consequences, or (b) the master was negligent or reckless . . ." (emphasis added)).

30. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

31. See PROSSER, *supra* note 16, at 198–200.

32. *Id.*

33. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

The policy rationales behind respondeat superior mentioned above highlight the differences between respondeat superior and negligent hiring, retention and supervision. In the case of respondeat superior there is a deliberate decision by the court to place liability with the employer even though the only cause of the injury is the employee's action.<sup>34</sup> This decision is based on the policies of compensating the plaintiff, preventing future tortious conduct, and allocating risk to those most able to pay and to those who benefit from the employee's actions.<sup>35</sup> In contrast, in the case of negligent hiring, retention and supervision there are at least two causes of the injury: negligence attributed to the employer and the employee's tortious action.<sup>36</sup>

In sum, the tort of negligent hiring, retention and supervision requires an affirmative, negligent action on the part of the employer. This same action is not a requirement of respondeat superior. Thus, these torts are different and distinct.

## II. THE FEDERAL TORT CLAIMS ACT

The FTCA grants jurisdiction to federal district courts to hear claims against the United States government for injuries caused by the negligent or wrongful acts of its employees.<sup>37</sup> The FTCA was passed in 1946 to provide an effective means of resolving citizens' tort claims against the federal government.<sup>38</sup> Without the FTCA, courts would not have jurisdiction to hear these claims because the federal government, as sovereign, would be immune from suit.<sup>39</sup> If a court finds at any time that the alleged tort does not fall within the parameters of the FTCA, it must dismiss the claim immediately as required by Federal Rule of Civil Procedure 12(h)(3).<sup>40</sup>

There are many exceptions to the FTCA, since Congress did not waive immunity for all torts.<sup>41</sup> One such exception is the assault and battery exception that retains governmental immunity for any claim that "arises

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34. *See id.*

35. *See id.*

36. 22 AM. JUR. 2d *Damages* § 788 (1996).

37. 28 U.S.C. §§ 1346, 2671–2680 (2000).

38. *Dalehite v. United States*, 346 U.S. 15, 25 (1953).

39. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

40. FED. R. CIV. P. 12(h)(3).

41. 28 U.S.C. § 2680 (2000).

out of” an assault or battery.<sup>42</sup> Although there is little legislative history for this particular exception, the limited history suggests that the government was concerned about the financial danger of liability for the intentionally tortious acts of its employees.<sup>43</sup>

*A. Legislative History and Procedural Context of the FTCA*

Before the passage of the FTCA, the federal government was immune from suit for torts committed by its employees by virtue of the doctrine of sovereign immunity.<sup>44</sup> The source of this doctrine is unclear; some say it springs from the Constitution while others insist that it is a child of English common law.<sup>45</sup> Regardless of its source, sovereign immunity has been widely criticized as unjust and the federal government has slowly been picking away at the concept by enacting legislation that waives it in certain circumstances.<sup>46</sup> One such piece of legislation is the FTCA.<sup>47</sup>

In response to a need for a simple way to compensate victims, in 1946 Congress passed the FTCA, 28 U.S.C. §§ 1346, 2671–2680, which provides federal district court jurisdiction over claims against the United States Government for personal injuries caused by certain types of government negligence.<sup>48</sup> The FTCA specifically allows for the recovery of damages for injury “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>49</sup> Prior to the FTCA’s passage the only redress for these injuries was a private bill passed by Congress, a process which was cumbersome and provided compensation for only a fraction of the claims made.<sup>50</sup> The FTCA was passed both to cure this

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42. *Id.* § 2680(h).

43. See *Panella v. United States*, 216 F.2d 622, 625 (2d Cir. 1954) (describing legislative history of § 2680(h) as “meager”).

44. See *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)).

45. Timothy J. Simeone, Comment, *Rule 11 and Federal Sovereign Immunity: Respecting the Explicit Waiver Requirement*, 60 U. CHI. L. REV. 1043, 1046 n.16 (1993).

46. See, e.g., *Blue Fox, Inc.*, 525 U.S. at 260.

47. See 28 U.S.C. §§ 1346, 2671–2680 (2000).

48. *Id.* § 1346.

49. *Id.*

50. See *Dalehite v. United States*, 346 U.S. 15, 25, 25 n.9 (1953); Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 4 (1946) (noting that “more than 2,000 private claim bills are introduced in each Congress, a substantial percentage of which are claims for property damage or personal injury . . . [T]he cost of passing a single private claim bill amounted to



perennial Congressional headache and to address the need for access to the courts for the mass of citizens injured by government negligence that were not served by the private bill procedure.<sup>51</sup>

A claim can be dismissed for lack of subject matter jurisdiction at any time if it is excepted from the FTCA.<sup>52</sup> Federal Rule of Civil Procedure 12(h)(3) states that when a lack of subject matter jurisdiction becomes apparent to the court, the court must dismiss the claim.<sup>53</sup> Because the FTCA is a grant of jurisdiction, claims that are barred by one of its exceptions must be dismissed at once.<sup>54</sup> Additionally, the government has only provided for bench trials in cases asserting tort liability of the federal government.<sup>55</sup> Thus, if a respondeat superior claim reaches trial in the guise of a negligent hiring, retention or supervision claim, the subtle distinction between these two doctrines will not be decided by an untrained jury.<sup>56</sup>

### B. *The Assault and Battery Exception to the FTCA*

The waiver of sovereign immunity contained in the FTCA is not absolute and the government has retained immunity from suit for many intentional torts, including claims for assault and battery by federal employees.<sup>57</sup> 28 U.S.C. § 2680(h) provides that the broad grant of jurisdiction in the FTCA<sup>58</sup> shall not apply to any claims “arising out of assault [and] battery.”<sup>59</sup> While this Comment deals exclusively with the assault and battery exception, the analysis herein may be applicable to one or more of the other exceptions.

The legislative history of the assault and battery exception to the FTCA, although sparse, implies that the government was concerned

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almost \$200” in 1942); H.R. REP. NO. 667, at 1 (1926) (noting that in the last congress (the 68th) “356 tort claims were presented to the House and only a small fraction of these became law”).

51. See *Indian Towing v. United States*, 350 U.S. 61, 68–69 (1955).

52. See FED. R. CIV. P. 12(h)(3) (mandating Federal Courts to dismiss cases for which they do not have subject matter jurisdiction).

53. See *id.*

54. See *id.*; 28 U.S.C. § 1346 (2000).

55. See 28 U.S.C. § 2402; see also GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT: CASES & MATERIALS* 72–79 (2000).

56. See 28 U.S.C. § 2402.

57. *Id.* § 2680. For example, Section 2680(h) contains exceptions for claims arising out of discretionary functions, the loss, miscarriage or negligent transmission of mail, and an exception for many intentional torts, including assault and battery. *Id.* §§ 2680(a), 2680(b), 2680(h).

58. *Id.* § 1346.

59. *Id.* § 2680(h).

about the danger of liability for intentional torts that could be exaggerated and easily proven.<sup>60</sup> In Senate Committee hearings in the 76th Congress on an immunity-waiving bill similar to the FTCA, the Justice Department's representative noted that the bill's assault and battery exception corollary excluded those types of torts that "would be difficult to make a defense against, and which are easily exaggerated."<sup>61</sup> Thus, it appears Congress did not want to be automatically liable each time one of the federal government's employees committed an assault and battery.

The paucity of discussion of the FTCA does not provide a basis for any firm conclusions as to Congress' intent regarding intentional torts caused by negligence.<sup>62</sup> As one commentator noted, the very sparseness of Congress' discussion of this exception implies that Congress simply divided the world of torts into those caused by negligence and those by intention and did not pause to ponder those intentional torts that were caused by antecedent governmental negligence.<sup>63</sup> In the course of Congressional hearings on a similar bill, the representative from the Department of Justice urging passage of the bill was questioned as follows:

Mr. Robsion. On that point of deliberate assault that is where some agent of the Government gets in a fight with some fellow?

Mr. Shea. Yes.

Mr. Robsion. And socks him?

Mr. Shea. That is right . . . .

Mr. Cravens. This refers to a deliberate assault?

Mr. Shea. That is right.

Mr. Cravens. If he hit someone deliberately?

Mr. Shea. That is right.

Mr. Cravens. It is not intended to exclude negligent assaults?

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60. See *Tort Claims Against the United States: Hearings Before a Subcommittee of the Committee on the Judiciary United States Senate*, 76th Cong. 39 (1942).

61. See *id.*

62. See *Pannella v. United States*, 216 F.2d 622, 625 (2d. Cir. 1954); David M. Zolensky, Comment, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803, 810 (1981).

63. See Zolensky, *supra* note 62, at 810.

Mr. Shea. No. An injury caused by negligence could be considered under the bill.<sup>64</sup>

This exchange suggests that Congress considered torts to be either intentional or caused by negligence. Based on this limited legislative history, it is unclear whether Congress contemplated or intended to bar assaults and batteries caused by the negligent hiring, retention or supervision of government employees.

In sum, the FTCA was clearly intended to provide a remedy for individuals harmed by the negligence of the federal government. The exceptions to the FTCA appear to have been intended to shield the government from unwieldy claims founded on intentional torts. Unfortunately, Congress' intent with regard to intentional torts proximately caused by governmental negligence largely remains a mystery.

### III. INTERPRETING THE SCOPE OF THE FEDERAL TORT CLAIMS ACT

Throughout the history of the assault and battery exception to the FTCA, courts have conflicted in their interpretations of its breadth.<sup>65</sup> Some courts, following a plurality of the U.S. Supreme Court in *United States v. Shearer*,<sup>66</sup> adopted a but-for analysis, reasoning that if the plaintiff's injury would not have been inflicted but-for an assault and battery by a government employee, then the claim arose out of an assault and battery and was barred.<sup>67</sup> This framework, however, conflicted with the Second Circuit's employee/non-employee analysis, which held that the assault and battery exception only applied to assaults and batteries committed by government employees, and not to assaults and batteries committed by non-employees.<sup>68</sup> Ultimately, the Supreme Court adopted this employee/non-employee framework in *Sheridan v. United States*<sup>69</sup>

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64. *Tort Claims: Hearings Before the Committee on the Judiciary House of Representatives*, 77th Cong. 33-34 (1942).

65. Compare *Thigpen v. United States*, 800 F.2d 393, 394 (4th Cir. 1986) (holding that the assault and battery exception barred any claim involving an assault and battery), with *Bennett v. United States*, 803 F.2d 1502, 1503-05 (9th Cir. 1986) (allowing a claim to proceed which alleged negligent hiring and retention of a federal employee who assaulted his students).

66. 473 U.S. 52, 54-57 (1985).

67. *Thigpen*, 800 F.2d at 394.

68. See *Panella v. United States*, 216 F.2d 622, 624-25 (2d Cir. 1954).

69. 487 U.S. 392, 400-01 (1988).

and modified it to include a distinction between employees acting within the scope of duty and those acting outside of the scope of duty.<sup>70</sup> This modification meant that if an employee committed an assault and battery outside of his or her scope of duty, and that assault and battery was also caused by some type of government negligence predicated on a duty owed the victim, the government could be held liable.<sup>71</sup>

The *Sheridan* Court declined to decide whether the federal government could ever be held liable for negligently hiring, retaining or supervising employees who commit assaults and batteries outside of their scope of duty.<sup>72</sup> Although most circuits have read the assault and battery exception to exclude claims for the negligent hiring, retention and supervision of federal employees who commit assaults and batteries,<sup>73</sup> the Ninth Circuit has maintained that such claims are allowed.<sup>74</sup>

#### A. *A Broad Reading of the Assault and Battery Exception: United States v. Shearer and the But-For Analysis*

Prior to the United States Supreme Court's decision in *Sheridan*, many courts broadly interpreted the FTCA's assault and battery exception.<sup>75</sup> This broad reading was in response to the opinion of a plurality of the Supreme Court in *United States v. Shearer*.<sup>76</sup> The *Shearer* plurality advanced a but-for analysis to the assault and battery exception.<sup>77</sup> The plurality reasoned that the exception's "arising out of" language meant that any claim which would not exist but-for an assault and battery was barred, regardless of the government's antecedent negligence or any independent duty owed to the victim.<sup>78</sup>

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70. *Id.*

71. *See infra* notes 129–42 and accompanying text.

72. *Sheridan*, 487 U.S. at 403 n.8.

73. *See* Jared M. Vidars, Comment, *Negligent Hiring, Supervision and Training—The Scope of the Assault and Battery Exception: Senger v. United States*, 39 B.C. L. REV. 452, 452 n.6 (1998).

74. *See, e.g.*, *Senger v. United States*, 103 F.3d 1437, 1442 (9th Cir. 1996); *Brock v. United States*, 64 F.3d 1421, 1425 (9th Cir. 1995); *Bennett v. United States*, 803 F.2d 1502, 1504 (9th Cir. 1986).

75. *See* *Hoot v. United States*, 790 F.2d 836, 838 (10th Cir. 1986); *Thigpen v. United States*, 800 F.2d 393, 395 (4th Cir. 1985); *Johnson by Johnson v. United States*, 788 F.2d 845, 851 (2d Cir. 1986).

76. 473 U.S. 52 (1986); *see* *Hoot*, 790 F.2d at 838; *Thigpen*, 800 F.2d at 395; *Johnson by Johnson*, 788 F.2d at 850.

77. *See Shearer*, 473 U.S. at 55.

78. *Id.* at 54–57.

In *Shearer*, the mother of an off-duty serviceman sued the government under the FTCA for negligent retention when another off-duty serviceman, Private Heard, killed her son.<sup>79</sup> Prior to this killing, Private Heard was convicted of manslaughter and sentenced to four years in prison while assigned to an army base in Germany.<sup>80</sup> The government was aware of Private Heard's prior conviction and of his violent history. Additionally, three of his superior officers had recommended that he be removed from service, but the government did nothing.<sup>81</sup> Further, the army did not evaluate Private Heard's mental state until after he had murdered the plaintiff's son.<sup>82</sup>

While the plurality focused on the FTCA's assault and battery exception, a majority of the U.S. Supreme Court decided *Shearer* based on the *Feres* doctrine.<sup>83</sup> The *Feres* doctrine stems from the Court's decision in *Feres v. United States*<sup>84</sup> and stands for the principle "that a soldier may not recover under the Federal Torts Claim Act for injuries which 'arise out of or are in the course of activity incident to service.'"<sup>85</sup> The majority of the Court stated that the *Feres* doctrine applied to the facts of the *Shearer* case and reasoned that finding otherwise would require courts to second-guess the decisions of commanding officers.<sup>86</sup>

A four-member plurality of the Court maintained that the claim was barred by the FTCA's assault and battery exception as well as the *Feres* doctrine.<sup>87</sup> The plurality read the assault and battery exception in Section 2680(h) broadly: "[the assault and battery exception] does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee."<sup>88</sup> In reaching this conclusion, the plurality interpreted the legislative history of the assault and battery exception to indicate that Congress expected that the federal government

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79. *Id.* at 53.

80. *Id.* at 53–54.

81. *United States v. Shearer*, 723 F.2d 1102, 1104 (3d Cir. 1983) *rev'd*, 473 U.S. 52 (1985).

82. *Id.*

83. *Shearer*, 473 U.S. at 57–59.

84. *Feres v. United States*, 340 U.S. 135 (1950).

85. *Shearer*, 473 U.S. at 57 (quoting *Feres*, 340 U.S. at 146 (1950)).

86. *Id.* at 52.

87. *Id.* at 54–56.

88. *Id.* at 55 (emphasis in original).

would not be liable for the intentional torts of its employees.<sup>89</sup> The plurality reasoned this reading of the assault and battery exception was confirmed by an amendment to the FTCA passed in 1974 that waived sovereign immunity for claims arising out of the assaults and batteries of law enforcement officers.<sup>90</sup> This legislation did not mention that the government would be liable for the negligent hiring, retention or supervision of a government employee.<sup>91</sup> Therefore, the plurality reasoned, the premise of this legislation was that unamended, the FTCA does not provide for government liability for these torts regardless of antecedent government negligence.<sup>92</sup>

The *Shearer* plurality acknowledged *Panella v. United States*,<sup>93</sup> a Second Circuit case which held that the assault and battery exception does not apply to the assaults and batteries of non-employees.<sup>94</sup> By acknowledging *Panella*, the plurality implicitly accepted the reasoning that the federal government is liable for a tort committed by a non-employee that is proximately caused by the government's negligence, although it is not liable for the same tort committed by a government employee preceded by identical negligence.<sup>95</sup> In essence, the plurality adopted a but-for test.<sup>96</sup> If the plaintiff would not have a claim but-for the federal employee committing an assault and battery, the government is immune from suit regardless of the government's negligence.<sup>97</sup>

In the wake of *Shearer*, some courts followed the plurality's lead and adopted a but-for test.<sup>98</sup> The Fourth Circuit adopted the but-for test in *Thigpen v. United States*.<sup>99</sup> The *Thigpen* court relied on *Shearer* and previous Fourth Circuit precedent to hold that the assault and battery exception "bars any claim that depends on the existence of an assault and battery."<sup>100</sup> The Second Circuit agreed in *Johnson by Johnson v. United*

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89. *Id.*

90. 28 U.S.C. § 2680(h) (2000).

91. *Shearer*, 473 U.S. at 55–56.

92. *Id.* at 56.

93. 216 F.2d 622 (2d Cir. 1954).

94. *Shearer*, 473 U.S. at 56–57 (citing *Panella*, 216 F.2d at 626).

95. *Id.*

96. *See id.* at 55.

97. *See id.*

98. *See Hoot v. United States*, 790 F.2d 836, 838 (10th Cir. 1986); *Thigpen v. United States*, 800 F.2d 393, 395 (4th Cir. 1986); *Johnson by Johnson v. United States*, 788 F.2d 845, 851 (2d Cir. 1986).

99. 800 F.2d 393 (4th Cir. 1986).

100. *Id.* at 395.

*States*,<sup>101</sup> stating that: “[t]he statute’s plain language, ‘arising out of,’ reflects an intent by Congress to bar a suit against the government for injuries *caused by* a government employee’s commission of an assault and battery.”<sup>102</sup> Finally, the Tenth Circuit embraced the but-for test in *Hoot v. United States*,<sup>103</sup> and opined that “[a]bsent the assault and battery perpetrated on Hoot by Firth, there would be no claim.”<sup>104</sup>

As set forth above, the *Shearer* plurality adopted a reading of the assault and battery exception that denies government liability if a plaintiff’s claim is in any way premised on an assault and battery. However, the *Shearer* plurality acknowledged that the government was liable for the negligently caused assaults and batteries of non-employees. In response to the *Shearer* plurality’s reasoning, the Second, Fourth and Tenth Circuits all adopted but-for tests for FTCA claims.

*B. A Narrower Exception: Sheridan v. United States and the Search for an Independent Duty*

At the same time that the but-for test was developed, some courts interpreted the assault and battery exception more narrowly.<sup>105</sup> These courts concluded that the plaintiff had a cause of action if the government owed the victim an independent duty and the assailant was not an employee or was acting outside of the scope of duty.<sup>106</sup> This interpretation of the assault and battery exception reads it in light of the scope of the FTCA’s waiver of immunity.<sup>107</sup> Because the FTCA only waives immunity for the negligent acts of government employees acting within their scope of duty,<sup>108</sup> only those claims which would provide a cause of action under this waiver are subject to the exception.<sup>109</sup> Therefore, the assault and battery exception does not apply to claims

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101. 788 F.2d 845 (2d Cir. 1986).

102. *Id.* at 850 (emphasis in original).

103. 790 F.2d 836 (10th Cir. 1986).

104. *Id.* at 839.

105. *See, e.g.*, *Gibson v. United States*, 457 F.2d 1391, 1394–97 (3d Cir. 1972); *Loritts v. United States*, 489 F. Supp. 1030, 1031–32 (D. Mass. 1980); *Bryson v. United States*, 463 F. Supp. 908, 912–13 (E.D. Pa. 1978).

106. *See, e.g.*, *Gibson*, 457 F.2d at 1394–97; *Loritts*, 489 F. Supp. at 1031–32; *Bryson*, 463 F. Supp. at 912–13.

107. *See Panella v. United States*, 216 F.2d 622, 624–25 (2d Cir. 1954).

108. 28 U.S.C. § 1346(b)(1) (2000).

109. *See Panella*, 216 F.2d at 624–25.

stemming from an assault and battery committed by a non-employee or by a government employee acting outside of his or her scope of duty.<sup>110</sup>

1. *The Origins of the Independent Duty Test: Panella v. United States*

The door to the independent duty test was first opened by the Second Circuit in *Panella v. United States* when the court acknowledged that the assault and battery exception does not apply to assaults and batteries by non-employees.<sup>111</sup> While “[i]t is true that [the assault and battery exception] can literally be read to apply to assaults committed by persons other than government employees,” the circuit court found this reading inconsistent with the entire the FTCA.<sup>112</sup> The Second Circuit recognized that the waiver of sovereign immunity only applies to negligent or wrongful acts or omissions “of any employee of the Government while acting within the scope of his office or employment.”<sup>113</sup>

The Second Circuit reasoned that an intentional tort committed by a non-employee does not itself give rise to government liability, because the FTCA only waives sovereign immunity for acts committed by government employees acting within their scope of duty.<sup>114</sup> Because the FTCA only grants federal district courts jurisdiction over the negligent acts of government employees, the assault and battery exception cannot apply to cases where the assault and battery is committed by a non-employee.<sup>115</sup> In such cases, the antecedent negligence of the government that proximately caused the assault and battery is the only remedy available because the FTCA does not provide a remedy, barred or otherwise.<sup>116</sup> Similarly, because there is no claim available for the assault and battery itself, the root of the claim against the government is based in negligence, not in assault and battery.<sup>117</sup>

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110. See *Sheridan v. United States*, 487 U.S. 392, 400–01(1988); *Panella*, 216 F.2d at 625.

111. See 216 F.2d at 624. The court relied on the language of 28 U.S.C. § 1346(b)(1), which grants federal district courts jurisdiction over torts committed by Federal Government employees. *Id.*

112. *Id.* at 623–25.

113. 28 U.S.C. § 1346(b) (2000).

114. *Panella*, 216 F.2d at 624.

115. See *id.*

116. See *id.*

117. *Id.* at 623.



2. *The Independent Duty Test Becomes the Law of the Land: Sheridan v. United States*

The Second Circuit's reasoning in *Panella* was adopted by the United States Supreme Court in *Sheridan v. United States*.<sup>118</sup> In *Sheridan*, a heavily intoxicated off-duty serviceman, Carr, was found by several naval corpsmen in a hospital building owned by the United States Navy.<sup>119</sup> The corpsmen attempted to take Carr to the emergency room, but fled when they discovered that Carr was carrying a rifle, and did not report the incident, or Carr's presence, to the proper authorities.<sup>120</sup> Later that evening Carr fired his rifle into the plaintiffs' automobile, injuring one of the plaintiffs and causing property damage.<sup>121</sup> Recognizing that it was facing a circuit split regarding the scope of the assault and battery exception,<sup>122</sup> the Court began its analysis by looking at the statute's language and acknowledged that the words "arising out of" could be broad enough to bar any claim if it was based in any way on an assault and battery.<sup>123</sup>

However, citing *United States v. Muniz*,<sup>124</sup> the *Sheridan* Court noted that there are instances where the existence of an assault or battery does not bar a claim against the federal government for negligence.<sup>125</sup> In *Muniz*, a federal prisoner was severely beaten by other inmates: he suffered a fractured skull and lost sight in his right eye.<sup>126</sup> Although the *Muniz* Court reversed the appellate court's dismissal of the claim, it did not specifically address the assault and battery exception.<sup>127</sup> In *Sheridan*, the Court held that *Muniz* stood for the proposition that the existence of an assault and battery is not an absolute bar to federal district court jurisdiction over a claim against the government for negligently allowing an assault and battery to occur.<sup>128</sup>

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118. *Sheridan v. United States*, 487 U.S. 392, 400-01 (1988).

119. *Id.* at 395.

120. *Id.*

121. *Id.*

122. *Id.* at 398.

123. *Id.*

124. 374 U.S. 150 (1963).

125. *Sheridan*, 487 U.S. at 398-99 (citing *Muniz*, 374 U.S. at 152).

126. *Muniz*, 374 U.S. at 152.

127. *Id.* at 153.

128. *See Sheridan*, 487 U.S. at 399.

The *Sheridan* Court suggested two possible interpretations of *Muniz*.<sup>129</sup> The narrower interpretation, which the Court adopted, reasoned that an assault and battery by a non-employee does not fall under the assault and battery exception.<sup>130</sup> The broader theory, which the Court neither adopted nor rejected, assumed that because Muniz had alleged an independent basis for government liability, namely the government's negligence, his claim did not arise solely out of the assault and battery but also out of the negligence of the prison officials.<sup>131</sup> By adopting the first theory, the *Sheridan* Court relied on the *Panella* court's distinction between assaults and batteries committed by employees and those committed by non-employees and moved the emphasis in the FTCA from "employee" to "acting within the scope of his office or employment."<sup>132</sup>

Applying this interpretation to the facts of *Sheridan*, the Supreme Court found that the assault and battery exception was inapplicable to the case at bar because Carr was not acting within the scope of his duties when he fired the shots into the plaintiffs' automobile.<sup>133</sup> Consequently, his actions did not independently give rise to government liability.<sup>134</sup> The Court also held, however, that the government could be liable for the independent negligence of the corpsmen who found Carr and did not report his presence to the appropriate authorities.<sup>135</sup> The Court observed that the government owed a duty to the plaintiffs independent of its employment relationship with the assailant.<sup>136</sup> This duty was based on the regulations prohibiting possession of firearms on base and on the corpsmen's voluntarily undertaking to care for an obviously intoxicated and armed person.<sup>137</sup>

In *Sheridan*, the Court also employed a traditional tort law analysis of duty and causation.<sup>138</sup> Although the Court did not discuss it explicitly, the corpsmen who found Carr in the hall were acting within the scope of their duty when they failed to report their discovery to the authorities,

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129. *See id.* at 399–401

130. *See id.* at 400.

131. *Id.* at 399.

132. *Id.* at 401.

133. *Id.* at 401–02.

134. *Id.*

135. *Id.* at 401–04.

136. *Id.* at 401 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)).

137. *Id.*

138. *See id.*

thus opening the government up to liability under the FTCA.<sup>139</sup> Despite the fact that the claim would not exist but-for the assault and battery, the Court did not find that the assault and battery exception barred the claim.<sup>140</sup> The Court reasoned that the government would be liable if the assault and battery had been committed by a non-employee and that it would be absurd to find no liability simply because the assailant was a government employee.<sup>141</sup> Since the *Sheridan* Court found that Carr's employment status was irrelevant to its decision, it declined to decide whether negligent hiring, supervision or retention might give rise to government liability for the injuries resulting from a foreseeable assault and battery.<sup>142</sup>

Justice Kennedy concurred in the judgment of the Court in *Sheridan*, but concluded that relying on the assailant's employment status or scope of duty was a flaw in the majority's reasoning.<sup>143</sup> Instead, according to Justice O'Connor's dissent, Justice Kennedy focused on the acts or omissions of the federal government.<sup>144</sup> Justice Kennedy observed that it is a basic precept of tort law that one injury can arise from multiple wrongful acts.<sup>145</sup> Justice Kennedy criticized the dissent's view, which advocated the *Shearer* plurality's but-for analysis,<sup>146</sup> arguing that this rationale would obliterate the multi-causal nature of many torts and give no legal significance to negligent acts that may have preceded the assault and battery.<sup>147</sup>

However, Justice Kennedy amputated this rationale as it applies to preceding acts of negligent hiring, retention or supervision.<sup>148</sup> He reasoned that in many cases it would be easy to assign blame for the intentional torts of employees to the prior negligence of supervisors and therefore circumvent the purpose of the exception.<sup>149</sup> Although he did not use the term "respondeat superior" in his concurrence, Justice Kennedy appeared to conflate that concept with negligent hiring, retention and

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139. *See id.*

140. *Id.* at 403.

141. *Id.*

142. *Id.* at 403 n.8.

143. *Id.* at 405 (Kennedy, J., concurring).

144. *Id.* at 404 (O'Connor, J., dissenting).

145. *Id.* at 405 (Kennedy, J., concurring).

146. *Id.* at 406.

147. *Id.*

148. *Id.* at 406-07.

149. *Id.* at 407.

supervision because he did not explain his assertion that proving negligent hiring, retention or supervision is substantially easier than proving any other type of negligence.<sup>150</sup> Instead, he simply asserted this proposition, implying that he was referring to respondeat superior, which is substantially easier to prove than negligence because it does not require a showing of duty, causation, breach and injury.<sup>151</sup> Although Justice Kennedy recognized that negligence and assault and battery could be distinct causes of a single injury, he was unwilling to make a distinction between negligent hiring, retention and supervision and respondeat superior.<sup>152</sup>

To summarize, the U.S. Supreme Court began its examination of the assault and battery exception to the FTCA with a plurality opinion narrowly drawing the boundaries on government liability. The Court has since loosened the strictures around the exception by recognizing that the government may be liable for the injuries caused by a federal government employee's assault and battery under certain circumstances. While the Court has not stated that negligent hiring, retention and supervision are some of those circumstances, neither have it closed the door on that possibility.

#### IV. THE CIRCUIT COURTS POST-*SHERIDAN V. UNITED STATES*: DISAGREEING WHETHER HIRING, RETENTION, AND SUPERVISION ARE INDEPENDENT DUTIES

In the wake of *Sheridan*, the majority of courts have adopted an independent duty test that excludes claims based on the government's negligent hiring, retention and supervision of its employees.<sup>153</sup> Under this test, the government is only liable if it owes a duty to the victim of the assault and battery, independent of its employment relationship with the assailant, and if the government's breach of that duty is a proximate cause of the victim's injuries.<sup>154</sup> This doctrine does not extend to include jurisdiction over claims for the negligent hiring, retention or supervision of employees who commit assaults and batteries outside of their scope of duty.<sup>155</sup> The Ninth Circuit, however, has recognized government liability

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150. *Id.*

151. See 22 AM. JUR. 2d *Damages* § 788 (1996).

152. *Sheridan*, 487 U.S. at 404–08.

153. See *Viders*, *supra* note 73, at 452.

154. See, e.g., *Harris v. United States*, 797 F. Supp. 91, 95 (D.P.R. 1992).

155. See, e.g., *Miami N. Inc. v. United States Dep't of Labor*, 939 F. Supp. 53, 56 (D. Me. 1996).

for the negligent hiring, retention and supervision of government employees where the government knew or should have known that the employee would likely commit an assault or battery and negligently hired, retained or supervised the employee.<sup>156</sup>

A. *A Duty Independent of the Employment Relationship Avoids the Assault and Battery Exception*

After the *Sheridan* decision, some district courts fashioned an independent duty test employing the *Sheridan* Court's reasoning.<sup>157</sup> Under this test, courts considered whether the government owed the plaintiff an independent duty unconnected to the government's employment relationship with the assailant.<sup>158</sup> If the government had some type of special relationship to the plaintiff, then, these courts held, the assault and battery exception was not a bar to a cause of action.<sup>159</sup>

The District of Columbia Circuit adopted this test in *Bembenista v. United States*.<sup>160</sup> In *Bembenista*, the plaintiff was sexually assaulted by a federal medical technician while in an unconscious or semi-conscious state.<sup>161</sup> Six months prior to the *Sheridan* decision, the district court hearing the claim dismissed it as barred by the assault and battery exception.<sup>162</sup> But, after *Sheridan*, an appellate court held the plaintiff could proceed under a theory that the government had breached its "special obligation of protective care" to the plaintiff.<sup>163</sup> The D.C. circuit court found that under District of Columbia law, the relationship between a patient and a hospital gave rise to an independent duty to protect patients from the foreseeable, injurious acts of third persons.<sup>164</sup> Further, the court stated the breach of this duty of care to Mrs. Bembenista was unrelated to the medical technician's employment status: no matter who assaulted Mrs. Bembenista, the government would be liable.<sup>165</sup> The *Bembenista* court did not consider whether the defendant was acting

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156. See, e.g., *Bennett v. United States*, 803 F.2d 1502, 1503-05 (9th Cir. 1986).

157. See *LaFrancis v. United States*, 66 F. Supp. 2d 335, 339 (D. Conn. 1999).

158. See *id.* at 339.

159. *Id.*

160. 866 F.2d 493 (D.C. Cir. 1989).

161. *Id.* at 495.

162. *Id.* at 497.

163. *Id.*

164. *Id.* at 498.

165. *Id.*

within the scope of his duty when he assaulted Mrs. Bembenista, perhaps judging that the answer was self-evident or irrelevant to the resolution of the issues.<sup>166</sup> Other courts have found that an independent duty exists where children were mistreated by their federally employed teacher,<sup>167</sup> infants were injured in a federal hospital,<sup>168</sup> and customers were sexually assaulted by a Postmaster while in the post office.<sup>169</sup>

*B. Negligent Hiring, Retention and Supervision Claims Barred by the Assault and Battery Exception Under the Independent Duty Framework*

Courts that have adopted the independent duty test have held that it stops short of allowing district court jurisdiction over claims for negligent hiring, retention and supervision.<sup>170</sup> Although the *Sheridan* Court did not preclude courts from finding jurisdiction based on negligent hiring, retention or supervision,<sup>171</sup> many courts have refused to extend the logic of *Sheridan* this far.<sup>172</sup> These courts have restricted their jurisdiction to those cases where a clear duty, independent of the employment relationship, exists between the United States and the victim of the assault and battery.<sup>173</sup>

In *Leleux v. United States*, the Fifth Circuit employed a narrow interpretation of the *Sheridan* Court's statement that government liability requires that the breach of an independent duty owed by the government to the victim was a proximate cause of the injury.<sup>174</sup> In *Leleux*, a high-school age navy recruit was seduced by an enlisted petty officer, Sistrunk, who worked in the recruitment office.<sup>175</sup> As a result of this encounter, the plaintiff acquired the genital herpes virus and sued the

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166. *Id.* at 498–99.

167. *Harris v. United States*, 797 F. Supp. 91, 93 (D.P.R. 1992).

168. *Gess v. United States*, 952 F. Supp. 1529, 1532 (M.D. Ala. 1996).

169. *Strange v. United States*, 114 F.3d 1189, 1997 WL 295589, at \*1 (6th Cir. 1997).

170. *See, e.g., Leleux v. United States*, 178 F.3d 750, 757 (5th Cir. 1999); *Guccione v. United States*, 878 F.2d 32, 33 (2d Cir. 1989); *Miami N., Inc. v. United States Dep't of Labor*, 939 F. Supp. 53, 56 (D. Me. 1996).

171. *Sheridan v. United States*, 487 U.S. 392, 403 n.8 (1988).

172. *See, e.g., Leleux*, 178 F.3d at 756; *Guccione*, 878 F.2d at 33; *Miami N., Inc.*, 939 F. Supp. at 56.

173. *See, e.g., Leleux*, 178 F.3d at 757; *Guccione*, 878 F.2d at 33; *Miami N., Inc.*, 939 F. Supp. at 56.

174. 178 F.3d 750, 757 (5th Cir. 1999).

175. *Id.* at 753.

federal government under the FTCA.<sup>176</sup> Although a compelling argument could be made that the government owes a duty of care to the young people it actively recruits, the circuit court determined that this was an employee-third party relationship with no special duty owed to the plaintiff.<sup>177</sup> Further, the Fifth Circuit found that any government negligence that existed was directly related to the government's employment relationship with Sistrunk and therefore barred by the assault and battery exception.<sup>178</sup> Thus, the circuit court held that the plaintiff's case was barred by the assault and battery exception because the government did not owe an independent duty to the plaintiff.<sup>179</sup>

Similarly, in *Franklin v. United States*,<sup>180</sup> the Tenth Circuit found that the lack of an independent duty could bar a claim under the FTCA.<sup>181</sup> In *Franklin*, a patient at a VA hospital in Oklahoma died after an operation was performed on him without his consent.<sup>182</sup> Analyzing general and Oklahoma tort law, the circuit court found that the performance of an operation without consent sounds in medical battery and not negligence.<sup>183</sup> Although the court cited *Sheridan*, it found that any duty owed the plaintiff was a direct result of the hospital employees' employment status.<sup>184</sup> Therefore, there was no duty owed the plaintiff independent of the hospital workers employment relationship with the federal government and *Sheridan* was inapplicable.<sup>185</sup> While the court found that the assault and battery exception would normally provide a bar to this case, a narrow exception authorizing government liability for torts committed by VA personnel allowed the case to go forward.<sup>186</sup>

Two other courts have also found that the *Sheridan* rationale does not extend to claims for negligent hiring, retention or supervision. In *Bajkowski v. United States*<sup>187</sup> a district court in the Eastern District of North Carolina held that the assault and battery exception barred a claim for negligent retention and supervision of an employee of the United

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176. *Id.*

177. *Id.* at 758.

178. *Id.* at 757-58.

179. *Id.* at 759.

180. 992 F.2d 1492 (10th Cir. 1993).

181. *See id.* at 1498-99.

182. *Id.* at 1495.

183. *Id.* at 1497.

184. *Id.* at 1499.

185. *Id.*

186. *Id.* at 1499-1502.

187. 787 F. Supp. 539 (E.D.N.C. 1991).

States Army.<sup>188</sup> The army re-enlisted the assailant despite his criminal record.<sup>189</sup> Three weeks before he attacked the plaintiff, the Army released the assailant pending a trial for rape.<sup>190</sup> The court held that if the assailant were not a member of the armed forces at the time of the attack, the government would have no duty to supervise him or monitor his behavior.<sup>191</sup> Therefore, the case did not fall within the scope of *Sheridan* and was barred by the assault and battery exception to the FTCA.<sup>192</sup>

Similarly, in *Malone v. United States*,<sup>193</sup> a district court in the Southern District of Georgia found that a claim for negligent supervision of an employee of the United States Army was barred by the assault and battery exception.<sup>194</sup> In *Malone*, the employee, Woods, had already violently raped another woman when he attacked the plaintiff.<sup>195</sup> After he was arrested for this crime, his commanding officers placed him under restricted status.<sup>196</sup> However, they transferred Woods to another location and the commanding officer in charge of Woods' restriction did not tell anyone who might have been able to stop Woods from leaving the base about his restricted status.<sup>197</sup> Woods violated this restriction, left the base, met the plaintiff in a bar and forcibly raped and sodomized her.<sup>198</sup> Despite this lax supervision of a known rapist, the court determined that a claim for negligent supervision was barred by the assault and battery exception to the FTCA because there was no affirmative, independent duty owed to the plaintiff outside of the federal government's employment relationship with the assailant.<sup>199</sup>

In sum, many courts have refused to extend the logic of *Shearer* to negligent hiring, retention and supervision. These courts have restricted their jurisdiction to those cases where a clear duty, independent of the employment relationship, exists between the United States and the victim of the assault and battery.

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188. *Id.* at 540.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 541–42.

193. 61 F. Supp. 2d 1372 (S.D. Ga. 1999).

194. *Id.* at 1380–82 (holding that plaintiff's claims also barred by both Georgia immunity and the *Mindes* rule that judicial review of military decisions should be avoided).

195. *Id.* at 1374.

196. *Id.* at 1376.

197. *Id.*

198. *Id.* at 1376–77.

199. *Id.* at 1380–81.



C. *Negligent Hiring, Retention, and Supervision Claims are Actionable Under the FTCA in the Ninth Circuit*

Even before *Sheridan*, the Ninth Circuit had interpreted the assault and battery exception to be inapplicable to cases involving negligent hiring, supervision or retention of a government employee.<sup>200</sup> In *Bennett v. United States*,<sup>201</sup> an early Ninth Circuit case, the court allowed a suit to go forward for negligent hiring and retention of a government employee.<sup>202</sup> In *Bennett*, the Bureau of Indian Affairs (BIA) hired a teacher for one of its boarding schools who had previously been arrested and charged with child molestation.<sup>203</sup> While he was at the BIA boarding school, the teacher kidnapped, assaulted and raped several students.<sup>204</sup> The teacher had admitted on his application that he had been arrested and charged with violating an Oklahoma statute outlawing “Outrage to Public Decency,” but the BIA did not investigate this admission.<sup>205</sup> Such an investigation would have revealed that the prior charges were for molestation similar to what had occurred at the BIA boarding school.<sup>206</sup> The government admitted that hiring and retaining the teacher was negligent, but argued that the claim was barred by the assault and battery exception to the FTCA.<sup>207</sup> The Ninth Circuit disagreed and held that the assault and battery exception was not a bar to liability.<sup>208</sup> Although the court noted the *Shearer* plurality’s conclusion that the assault and battery exception bars claims for negligent supervision of an employee who commits an intentional tort, it declined to follow this rationale.<sup>209</sup>

The *Bennett* court had several rationales for deciding that the assault and battery exception does not bar a claim for negligent supervision of a government employee who commits an assault and battery.<sup>210</sup> The *Bennett* court relied on Ninth Circuit precedent in *Jablonski v. United States*,<sup>211</sup> in which the court held that the assault and battery exception

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200. See, e.g., *Bennett v. United States*, 803 F.2d 1502, 1503–05 (9th Cir. 1986).

201. 803 F.2d 1502 (9th Cir. 1986).

202. *Id.* at 1504–05.

203. *Id.* at 1503.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1505.

209. See *id.* at 1503.

210. See *id.*

211. 712 F.2d 391 (9th Cir. 1983).

did not excuse government negligence.<sup>212</sup> In *Jablonski*, the court noted that one of the major policy reasons behind the intentional tort exceptions to the FTCA was to prevent the government from having to defend lawsuits for acts it was powerless to prevent.<sup>213</sup> Applying this rationale to the *Bennett* case, the court determined that the government should have known that the teacher posed a serious risk to the children at the BIA boarding school and therefore liability was not based on respondeat superior, and therefore an employee's act it was powerless to prevent, but on the government's own independent negligence.<sup>214</sup> Thus, the problem of being forced to defend lawsuits for acts beyond its power was not an issue.<sup>215</sup>

Further, the Ninth Circuit dismissed the *Shearer* plurality's notion that the government's immunity is waived only if the tortfeasor is a non-employee.<sup>216</sup> The *Bennett* court ruled that this conclusion was anything but certain.<sup>217</sup> The court discerned no evidence in the congressional record that Congress meant to open the government up to liability for negligently supervising non-employees but not its own employees.<sup>218</sup> Additionally, the court recognized a clear distinction between claims for respondeat superior, which are barred by the assault and battery exception, and claims based on the government's own negligence.<sup>219</sup> Finally, the court noted that the broad immunity suggested by the *Shearer* plurality was inconsistent with the overarching purpose of the FTCA: to provide redress for those who have been injured as a proximate result of government negligence.<sup>220</sup>

The Ninth Circuit continued to rely on this analysis after the *Sheridan* opinion. In *Brock v. United States*,<sup>221</sup> the Ninth Circuit held that the assault and battery exception did not bar a claim by a U.S. Forest Service employee who was sexually harassed and raped by her supervisor, McKinney, on assignment in the field.<sup>222</sup> After she was raped, she

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212. See *Bennett*, 803 F.2d at 1503–05.

213. See *id.* at 1503–04.

214. See *id.* at 1503 (citing *Jablonski ex rel. Pahls v. United States*, 712 F.2d 391 (9th Cir.1983)).

215. See *id.*

216. See *id.* at 1504.

217. See *id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. 64 F.3d 1421 (9th Cir. 1995).

222. *Id.* at 1425.

refused to go back into the field with McKinney and was transferred to a desk job where sexual harassment and unwanted touching by McKinney continued.<sup>223</sup> Eventually, the plaintiff was transferred to another department to avoid further contact with McKinney.<sup>224</sup> After filing a claim against the government for McKinney's behavior and for government negligence in failing to properly supervise him, although they knew of his behavior, she was subject to torment by her colleagues.<sup>225</sup> The Ninth Circuit refused to hold that the claims for negligent supervision were barred by the assault and battery exception to the FTCA.<sup>226</sup> The court recognized that the question remained open in the wake of *Sheridan*<sup>227</sup> and relied on Ninth Circuit precedent in *Bennett* to hold that claims for negligent hiring and supervision of employees who commit intentional torts are not barred by the assault and battery exception.<sup>228</sup>

The Ninth Circuit reaffirmed this conclusion most recently in *Senger v. United States*.<sup>229</sup> In *Senger*, a tow truck operator was attempting to tow a U.S. Postal Service employee's truck from the parking lot of the Main Post Office in Portland at the request of the Postal Service.<sup>230</sup> While doing this, he was assaulted by the car's owner, a Postal Service employee.<sup>231</sup> The court held that the plaintiff's claim that the post office inadequately supervised an employee for a business invitee was not barred by the assault and battery exception.<sup>232</sup> The Ninth Circuit reaffirmed the distinction between claims for respondeat superior, which are barred by the assault and battery exception, and claims for negligent supervision, which are not barred.<sup>233</sup>

As set forth above, the Ninth Circuit continues to hold that the assault and battery exception is not a bar to claims for negligent hiring, retention, and supervision despite opinions to the contrary. Many of the contrary opinions come from courts that have held that their jurisdiction

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223. *Id.* at 1422.

224. *Id.*

225. *Id.*

226. *Id.* at 1425.

227. *Id.* (citing *Sheridan v. United States*, 487 U.S. 392, 403 n.8 (1988)).

228. *Id.* at 1425.

229. 103 F.3d 1437 (9th Cir. 1996).

230. *Id.* at 1438.

231. *Id.*

232. *Id.* at 1442-43.

233. *Id.* at 1441.

is constrained to cases where a clear duty, independent of the employment relationship, exists between the government and the plaintiff. The Ninth Circuit reached the opposite conclusion by ruling that the intent behind the FTCA was to provide redress to citizens injured by governmental negligence, and therefore the assault and battery exception is not a bar to claims for negligent hiring, retention, and supervision. Further, the Ninth Circuit has distinguished between those claims, which are rooted in negligence, and those that are based solely on respondeat superior and that negligent hiring, retention, and supervision claims are allowed under the FTCA.

V. THE ASSAULT AND BATTERY EXCEPTION TO THE  
FEDERAL TORTS CLAIM ACT DOES NOT BAR CLAIMS  
FOR NEGLIGENT HIRING, RETENTION OR SUPERVISION

Synthesizing the language and history of the FTCA, the substance of a claim for negligent hiring, retention or supervision, and past precedent, reveals that the assault and battery exception does not deny federal district courts jurisdiction to hear such claims. Reading the assault and battery exception to bar federal district courts from hearing negligent hiring, retention, and supervision claims against the federal government substantially frustrates the overarching purpose of the FTCA to provide a remedy for the negligent acts of government officials.<sup>234</sup> Further, the negligent acts of federal employees in the hiring, retention and supervision of other federal employees are readily distinguishable from the intentional assaults and batteries themselves.<sup>235</sup> Because virtually all FTCA claims are heard before a judge, claims that truly are barred can be dismissed through the normal channels of federal civil procedure without the danger that a jury will confuse a claim for respondeat superior with negligence.<sup>236</sup> Finally, the United States Supreme Court's use of traditional tort law in *Sheridan* urges a reading of the assault and battery exception which allows federal district courts jurisdiction over claims based on a government employee's negligence in hiring, retaining or supervising another federal employee.<sup>237</sup>

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234. See *supra* notes 48–51 and accompanying text.

235. See *supra* Part I.

236. See *supra* note 55.

237. See *supra* notes 138–42 and accompanying text.

A. *Interpreting the Assault and Battery Exception to Bar only Respondeat Superior Claims is Consistent with its Legislative History and Language*

Interpreting the assault and battery exception in the context of its legislative history and the FTCA as a whole, it is clear that the exception's scope should be limited to claims for respondeat superior. The assault and battery exception's legislative history indicates that Congress intended to provide a mechanism for redress for citizens injured by the negligent acts of government employees.<sup>238</sup> Additionally, the FTCA only provides liability for the negligent acts of employees acting within their scope of duty.<sup>239</sup> Once employees act outside of that scope of duty, the FTCA no longer provides a remedy.<sup>240</sup> If the FTCA does not provide a remedy, then the assault and battery exception is irrelevant.<sup>241</sup> However, the FTCA does provide a remedy for the *negligence* of a federal employee in hiring, retaining and supervising another federal employee who commits an assault and battery. This is because such a claim is predicated on the government's negligence, not the assault and battery of the employee, for which the FTCA does not provide a remedy regardless of the assault and battery exception.<sup>242</sup> Therefore, the government is liable for the negligent acts of federal employees who supervise employees who commit an assault and battery outside of their scope of duty.<sup>243</sup> Finally, the ultimate purpose of the FTCA is to provide a remedy for citizens wronged by the negligence of government officials<sup>244</sup> and interpreting the assault and battery exception too broadly undermines this purpose.

The sparse legislative history associated with the assault and battery exception to the FTCA indicates that Congress intended to waive the government's immunity for negligent acts or omissions of the Federal Government.<sup>245</sup> One of the few mentioned underlying concerns driving the passage of the assault and battery exception was that the government did not want to have to litigate intentional torts that are difficult to

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238. See *supra* notes 60–64 and accompanying text.

239. See *supra* notes 129–34 and accompanying text.

240. See *supra* notes 111–17, 129–37 and accompanying text.

241. See *supra* notes 133–34 and accompanying text.

242. See *supra* notes 110, 114–17, 220 and accompanying text.

243. See *supra* note 134 and accompanying text.

244. See *supra* note 51 and accompanying text.

245. See *supra* notes 60–64 and accompanying text.

defend and easily exaggerated.<sup>246</sup> Negligent hiring, retention and supervision claims, on the other hand, are not more difficult to defend than other types of negligence claims for which the government has waived immunity.<sup>247</sup> Congress' concern, paired with the relative ease of defending negligence claims, exposes Congress's intent that the assault and battery exception is only a bar to claims for vicarious liability for the intentional torts of government employees. Claims for negligent hiring, retention and supervision require the plaintiff to prove the same elements of duty, breach, causation and harm as in any other negligence claim.<sup>248</sup> If Congress was concerned about the government's liability for more easily proven claims, then they were most likely referring to claims for respondeat superior liability for intentional torts which merely require a showing that an intentional tort was committed by an employee of the federal government within the employee's scope of employment.<sup>249</sup>

The later Congressional Amendment to the assault and battery exception allowing for government liability when federal law enforcement officers commit an intentional assault and battery does not alter the fundamental analysis of the exception. While the *Shearer* plurality reasoned that this amendment to the assault and battery exception demonstrated Congress' belief that the government would not be liable in any way when a federal employee commits an assault and battery, the plurality did not recognize that these assaults and batteries are the very few that will most likely be committed *in the scope of duty*.<sup>250</sup> This amendment to the assault and battery exception allows for liability when federal investigative or law enforcement officers are accused of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.<sup>251</sup> Congress detailed part of these officers' job description in the amendment, noting that law enforcement and investigative officers have the power to execute searches, to seize evidence, and to make arrests for violations of Federal law.<sup>252</sup> This inclusion evidences Congress' acknowledgment that these types of

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246. See Zolensky, *supra* note 63, at 811 n.43.

247. See *id.* at 811–12 (noting that while the element of intent in an intentional assault and battery is easily proven, proving that the negligence of an employee caused that assault and battery is not).

248. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

249. See RESTATEMENT (SECOND) OF AGENCY § 228, at 504 (1958); Zolensky, *supra* note 63, at 811.

250. See *supra* notes 90–92 and accompanying text.

251. 28 U.S.C. § 2680(h) (2000).

252. *Id.*

officers will be accused of on-the-job assaults and batteries.<sup>253</sup> Because these assaults and batteries are committed within the employee's scope of duty they are exempt from this Comment's analysis: these assaults and batteries are within the scope of the FTCA and were, prior to the amendment, barred by the assault and battery exception.<sup>254</sup> In contrast, assaults and batteries committed *outside* of the scope of duty are not within the ambit of the FTCA and therefore antecedent negligence that caused these assaults and batteries may subject the government to liability under the FTCA.<sup>255</sup> This amendment does not support the *Shearer* plurality's conclusion that the assault and battery exception bars claims for the negligent hiring, retention and supervision of government employees acting *outside* of their scope of duty.

Analyzing the assault and battery exception as part of a larger piece of legislation, it is clear that it only applies to respondeat superior claims for intentional torts committed within the scope of the employee's duty. As the U.S. Supreme Court noted in *Sheridan*, the FTCA only waives sovereign immunity for injuries caused by an "employee of the Government while acting within the scope of his office or employment."<sup>256</sup> Therefore, according to the Court, the assault and battery exception does not apply to assaults and batteries committed by employees acting outside of their scope of employment.<sup>257</sup> The *Sheridan* Court concluded that the assault and battery exception did not apply to the assault and battery in that case because the assailant was acting outside of his scope of duty.<sup>258</sup> The Court then determined that the government had breached a duty owed to the plaintiff to report persons who had unauthorized weapons on the base and that this breach was the proximate cause of the plaintiffs' injuries.<sup>259</sup> Similarly, if the government's negligent hiring, retention or supervision of an employee is the proximate cause of an assault and battery by a federal employee acting outside of his or her scope of duty, the assault and battery exception is irrelevant.<sup>260</sup> Once the assault and battery exception has been removed from the equation, the district courts have jurisdiction because

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253. *See id.*

254. *See supra* notes 132-34 and accompanying text.

255. *See supra* notes 129-42.

256. *Sheridan*, 487 U.S. 392, 398 (1988) (quoting 28 U.S.C. § 1346(b) (2000)).

257. *Id.*

258. *Id.* at 401-02.

259. *See id.* at 402.

260. *See supra* notes 132-34.

the claim is predicated on the government's negligence, not the employee's assault and battery.<sup>261</sup> To conclude otherwise would deny the premise relied on by the Supreme Court in *Sheridan* that the assault and battery exception does not apply to claims where the government employee acted outside of his or her scope of duty.<sup>262</sup>

Viewed in light of the overarching purpose of the FTCA, the ambiguous language of the assault and battery exception should be construed to allow district courts jurisdiction to hear claims for negligent hiring, retention and supervision. While the arising out of language could literally be read to deny federal district courts jurisdiction for any claim related to an assault or battery,<sup>263</sup> this language becomes ambiguous when an injury is proximately caused by both an intentional tort and negligence.<sup>264</sup> When this happens the injury could be said to arise out of negligence or the intentional tort and it is necessary to consider the intent of the entire FTCA to properly interpret the exception. While the main purpose of the FTCA was to replace the arduous private bill process used at the time to compensate plaintiffs for injury at the hands of the federal government,<sup>265</sup> a second and almost equally important purpose was to compensate plaintiffs who had been injured by the federal government's negligence.<sup>266</sup> This second purpose makes clear that the FTCA waives sovereign immunity for claims arising out of negligence but preserves it for claims arising out of intentional torts that were not caused by the independent negligence of the federal government. Taken as a whole, the FTCA and the legislative history of the assault and battery exception suggest that the exception should not be interpreted to deny government liability for negligent hiring, retention and supervision claims.

*B. The Assault and Battery Exception is Not a Bar to Actions Claiming Negligent Hiring, Retention and Supervision of Government Employees Because Such Torts are Analytically Distinct from the Assault and Battery by an Employee*

Claims founded on negligent hiring, retention and supervision of employees who act outside of their scope of duty should not be barred by

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261. See *supra* notes 132–34.

262. See *Sheridan*, 487 U.S. at 400.

263. *Shearer v. United States*, 473 U.S. 52, 55 (1985).

264. *Sheridan*, 487 U.S. at 398.

265. See *supra* note 40 and accompanying text.

266. *Dalehite v. United States*, 346 U.S. 15, 24–25 (1953).



the assault and battery exception to the FTCA because they are distinct from claims based solely on the intentionally tortious conduct of the employee.<sup>267</sup> Negligent hiring, retention and supervision claims are based on the independent negligence of the employer,<sup>268</sup> in this case the federal government, and thus do not arise solely out of the assault and battery of the employee. While courts purport to fear that claims that are actually based on vicarious liability will be couched in terms of negligent hiring, retention and supervision, the two torts are analytically distinct and any hidden respondeat superior claims can be dispensed with through the normal channels of the Federal Rules of Civil Procedure.<sup>269</sup>

1. *Negligent Hiring, Retention and Supervision Claims are based on the Independent Negligence of the Employer and are Readily Distinguished from Claims for Respondeat Superior*

Although the injury involved in a negligent hiring, retention and supervision claim can be the result of an intentional assault and battery, such claims are founded on the employer's independent negligence and not solely on the employee's assault and battery.<sup>270</sup> In most jurisdictions, in order to prove negligent hiring, retention or supervision, the plaintiff cannot just prove that the employee committed an intentional tort, but must prove that the employer knew, or reasonably should have known, that the employee was dangerous.<sup>271</sup> Further, as with any independent negligence claim, the plaintiff must prove that the employer's negligence proximately caused the injury.<sup>272</sup> Therefore, a claim for negligent hiring, retention and supervision is rooted in the independent negligence of the employer and arises out of that negligent act or omission.<sup>273</sup> Since the assault and battery exception only bars those claims which arise out of intentional torts, this exception should not bar claims based on the independent negligence of a federal government employee acting within

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267. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

268. *Id.*

269. *See, e.g.*, FED. R. CIV. P. 12(h)(3).

270. *See* Ellen M. Martin & Lee Ann Anderson, PRACTICING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW WORKPLACE CLAIMS, WRONGFUL TERMINATION, COLLATERAL TORTS, PRIVACY, RESTRICTIONS ON RIGHT TO COMPETE, REFERENCE CHECKS, AND INVESTIGATIONS 1118-19 (2001); 27 AM. JUR. 2d *Employment Relationship* § 472 (1996); Thomas M. Winn, III, *Labor and Employment Law*, 35 U. RICH. L. REV. 725, 734-36 (2001).

271. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

272. *Id.*

273. 28 U.S.C. § 2680(h) (2000).

his or her scope of duty when hiring, retaining or supervising another federal employee.<sup>274</sup>

Respondeat superior claims, which are based on vicarious liability and are barred by the assault and battery exception, are readily distinguishable from claims based on negligent hiring, retention and supervision.<sup>275</sup> Respondeat superior claims are founded entirely on the employee's intentionally tortious act and do not require any proof of negligence on the part of the employer.<sup>276</sup> Claims based on the theory of respondeat superior posit that the employer should be liable for the wrongful acts of his or her employee if that employee was acting on the employer's behalf, that is, within the employee's scope of duty.<sup>277</sup> Such claims arise out of the intentionally tortious conduct of the employee and have no basis in the employer's independent negligence.<sup>278</sup> In contrast, negligent hiring, retention and supervision claims are not based solely on the employee committing an assault and battery but have separate and distinct roots in the employer's negligence.<sup>279</sup>

## 2. *Courts Can Dismiss Negligent Hiring, Retention and Supervision Claims that are Revealed to be Claims for Respondeat Superior*

The risk that plaintiffs will successfully disguise their respondeat superior claims with allegations of negligent supervision is overstated. The assault and battery exception does not merely prevent a cause of action from arising, but denies the federal district courts subject matter jurisdiction for claims arising out of assault and battery.<sup>280</sup> Under Federal Rule of Civil Procedure 12(h)(3), respondeat superior claims that are disguised as negligent hiring, retention and supervision claims must be dismissed as soon as their true nature becomes clear.<sup>281</sup> Although the notice pleading requirements of the Federal Rules of Civil Procedure only require notice of the claims that the plaintiff is alleging, such pleadings still require the plaintiff to inform the defendant of the

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274. *Bennett v. United States*, 803 F.2d 1502, 1504 (9th Cir. 1986).

275. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

276. *Id.*

277. 22 AM. JUR. 2d *Damages* § 788 (1996).

278. *See id.*

279. 27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

280. 28 U.S.C. § 2680(h) (2000).

281. *See* FED. R. CIV. P. 12(h)(3).

allegations.<sup>282</sup> As a result, the lack of subject matter jurisdiction is often evident at the pleading stage of litigation if the pleadings do not allege any circumstances beyond the employee's tortious conduct.<sup>283</sup> Even if the litigation moves beyond the pleading stage, the government may make a motion for summary judgment to uncover whether any factual basis exists for the negligence claim.<sup>284</sup> Utilizing the rules of civil procedure would preserve the purpose of the assault and battery exception, to avoid litigating a claim arising out of assault and battery. It also would advance the overall purpose of the FTCA: to provide a forum for meritorious claims against the government for its own negligence.

Although one could argue that the fact finder could confuse the concepts of negligent hiring, retention and supervision with respondeat superior, this concern is practically non-existent in the context of FTCA litigation. While the distinctions between respondeat superior and negligent hiring, retention and supervision are clear in theory, it is true that the distinction may begin to blur for a jury faced with a sympathetic plaintiff, an employee who has done something wrong, and an employer with deep pockets. However, almost all FTCA cases are argued before a judge,<sup>285</sup> and therefore the danger of confusing the two doctrines is greatly reduced.

In sum, the negligent hiring, retention and supervision claims are not barred by the assault and battery exception to the FTCA. Such claims are analytically distinct from the federal employee's intentionally tortious actions and therefore cannot be disguised as a claim for respondeat superior. Any risk that these respondeat superior claims are masked as negligent hiring, retention, or supervision is negated by the fact-finding role played by the federal judge in FTCA claims. Because a judge and not a jury will determine the nature of the claim asserted, the judge can dismiss any meritless claims through the normal channels of civil procedure.

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282. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 5.7, at 258 (3d ed. 1999).

283. *See Bryson v. United States*, 463 F. Supp. 908, 912 (E.D. Penn. 1978) (noting that courts can and have examined the facts of a case to see if there is a claim evident beyond the assault and battery of the employee. If there is not, the courts simply dismiss the claim).

284. *See FRIEDENTHAL ET AL.*, *supra* note 282, at § 9.1, 452.

285. *See* 28 U.S.C. § 2402 (2000); *see also* SISK, *supra* note 55, at 72-79.

C. *Allowing Negligent Hiring, Retention and Supervision Claims when an Employee Acts Outside of his or her Scope of Employment is Consistent with Sheridan v. United States and Ninth Circuit Precedent*

The U.S. Supreme Court in *Sheridan* refused to interpret the “arising out-of” language of the assault and battery exception to bar any claim that would not exist but-for the intentional tort.<sup>286</sup> Instead, the Court adopted an interpretation based on principles of basic tort law.<sup>287</sup> The Court held that the government can be held liable for the breach of an independent duty owed to the plaintiff that causes an assault and battery by a government employee acting outside of his or her scope of duty.<sup>288</sup> The Court’s refusal to adopt this rationale implies that the FTCA’s assault and battery exception does not apply to federal employees’ negligent acts of hiring, retention or supervision of other employees who commit intentional torts outside of their scope of duty.

The Supreme Court’s traditional tort law analysis in *Sheridan* requires a reading of the assault and battery exception to grant jurisdiction to federal district courts to hear claims for the negligent hiring, retention and supervision of federal employees. The *Sheridan* Court determined that the assault and battery exception did not bar claims based on an employee’s intentional assault and battery while acting outside the scope of duty, if the government owed a duty to the victim that was independent of the employment relationship.<sup>289</sup> The Court concluded that because the employee in *Sheridan* was not acting within his scope of duty when he shot at the plaintiffs’ car, the FTCA would not have provided a remedy regardless of the assault and battery exception.<sup>290</sup> The *Sheridan* Court thus rejected the *Shearer* plurality’s insistence on a reading of the assault and battery exception that would bar any cause of action connected to an intentional assault and battery, and instead held that the plaintiff could proceed against the government based on its independent negligence.<sup>291</sup>

Although the *Sheridan* Court couched its analysis in terms of the employee acting outside the scope of duty, the Court ultimately held that

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286. *Sheridan v. United States*, 487 U.S. 392, 398–99 (1988).

287. *See id.*

288. *See id.* at 403.

289. *See id.* at 402–03.

290. *See id.* at 401.

291. *Id.* at 402–03.

the exception's arising out of language does not apply where the claim is based on a negligent act of the government independent of the intentional tort of the assailant.<sup>292</sup> Employing this analysis, it does not matter whether that duty was based on the employment relationship or on some other independent duty owed. If the federal government owes a duty to the plaintiff under the law of the forum state, then an injury caused by a breach of that duty should be actionable under the FTCA. The FTCA provides a remedy for the negligent acts of government employees<sup>293</sup> while the assault and battery exception exempts the government from liability for the solely intentional torts of its employees.<sup>294</sup> This exception does not apply if the assault and battery was made possible by the independent, negligent act of a government employee within the ambit of the FTCA.<sup>295</sup> Distinguishing between distinct duties owed based on whether they are independent of the employment relationship is arbitrary and relies on the faulty logic of the but-for analysis rejected by the *Sheridan* court.<sup>296</sup>

Finally, the Ninth Circuit's rationale in *Bennett v. United States* is a persuasive reason for allowing suits for the negligent hiring, retention and supervision of government employees who commit assaults and batteries outside of their scope of duty. First, these types of suits do not implicate the major policy concern motivating the assault and battery exception; they do not make the government liable for suits that are difficult to defend and for actions that it was powerless to prevent.<sup>297</sup> The premise behind the tort of negligent hiring, retention and supervision is that the employer knew or should have known that its employee was a threat to third parties and therefore could have prevented the employer's tortious act.<sup>298</sup> Second, the Ninth Circuit noted that there is no evidence in the legislative history of the FTCA that Congress intended to accept liability for the negligent supervision of non-employees but not its own employees.<sup>299</sup> If the government is liable for negligent supervision for one group of individuals, it is logically inconsistent to exempt the government from liability for the identical negligent supervision of a

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292. *Id.* at 401.

293. 28 U.S.C. § 1346 (2000).

294. *Id.* § 2680(h).

295. *Sheridan*, 487 U.S. at 398.

296. *Id.*

297. *See supra* notes 213–15 and accompanying text.

298. *See supra* note 30 and accompanying text.

299. *See supra* notes 216–18 and accompanying text.

different group of individuals. Third, as the Ninth Circuit noted, negligent hiring, retention and supervision claims are distinct from respondeat superior.<sup>300</sup> Finally, the court recognized that a broad interpretation of the assault and battery exception is inconsistent with the FTCA's purpose to provide a remedy to individuals injured by government negligence.<sup>301</sup> Ultimately, both Supreme Court and Ninth Circuit precedent urge a reading of the assault and battery exception that makes the government liable for the negligent hiring, retention, and supervision of employees who commit assault and battery.

## V. CONCLUSION

The FTCA's assault and battery exception should not be interpreted to bar federal courts from hearing claims for the negligent hiring, retention and supervision of government employees. Such a reading substantially frustrates one of Congress' central purposes in enacting the FTCA: providing a remedy for injuries caused by the negligent acts of government officials. Claims for negligent hiring, retention and supervision are rooted in the negligence of government officials. Although some courts may fear that allowing such claims would allow barred respondeat superior claims to slip through the cracks, this fear is unfounded. The federal district court judges who hear negligent hiring, retention and supervision claims can dismiss those that are revealed to be respondeat superior claims. Finally, allowing these claims is a natural extension of U.S. Supreme Court's logic in *Sheridan v. United States*. The Court recognized that the negligent acts of government employees open the government up to liability under the FTCA regardless of whether the injury was caused by an assault and battery by a government employee acting outside of his scope of duty.

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300. See *supra* note 219 and accompanying text.

301. See *supra* note 220 and accompanying text.

