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Spring 3-1-1990

## Vii. Federal Tort Claims Act

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### Recommended Citation

*Vii. Federal Tort Claims Act*, 47 Wash. & Lee L. Rev. 481 (1990).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol47/iss2/13>

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After evaluating the relevant statutory law, the Fourth Circuit concluded that applicable case law also supported the finding that Blue Cross should follow GAAP and reimburse the Hospital when the Hospital incurs a liability to pay a doctor for services rendered. The court cited *Villa View Hospital, Inc. v. Heckler*, 720 F.2d 1086, 1093 n.18 (9th Cir. 1983), in which the Ninth Circuit held that GAAP provided the guidance for determining when, under the Medicare Regulation, a provider incurs a reimbursable debt under a deferred compensation plan. The Fourth Circuit noted but did not embrace a contrary case that the Fifth Circuit decided. The Fourth Circuit, therefore, concluded that the Act, the Medicare Regulation, and the relevant case law all supported application of GAAP to determine proper reimbursement for costs incurred under a deferred compensation plan.

After outlining the body of law supporting the GAAP method, the court observed that the Secretary's regulatory interpretations deviated from the GAAP approach. According to the Secretary's interpretations, to obtain reimbursement during the period in which the Hospital incurred a debt the Hospital would have to place the salary deferrals either in an "acceptable type fund" or in the hands of a trustee. However, as the Hospital's savings accounts and certificates of deposit did not constitute an "acceptable type fund," Blue Cross could not reimburse the Hospital under the Medicare Regulation until the Hospital paid the salary reductions to the physicians. Because this outcome conflicted with the outcome that would have resulted if the Secretary had used the GAAP approach and because the court found that the statutory and case law favored GAAP, the court set aside the Secretary's regulatory interpretations. In support of its conclusion, the court explained that a doctor's choice to defer salary payments relates to the manner of payment and does not detract from the real liability that the hospital incurs. Accordingly, the Fourth Circuit affirmed the decision of the district court.

#### FEDERAL TORT CLAIMS ACT

In *Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989), *cert. dismissed*, 110 S. Ct. 1104 (1990), the United States Court of Appeals for the Fourth Circuit considered whether the doctrine established in *Feres v. United States*, 340 U.S. 135 (1950), bars medical malpractice and loss of consortium actions that an individual on the Army's Temporary Disability Retired List (TDRL) and his son have brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. sections 2671-2680 (1982). According to the court, Gary Kendrick (Kendrick) was injured in a motor vehicle accident on March 12, 1985, while serving as an Army sergeant on active duty. The court stated that military physicians treated Kendrick by prescribing Dilantin for a possible seizure disorder that they thought may have contributed to the accident. Kendrick continued Dilantin treatment until November 1985. According to the court, the Army placed Kendrick on the TDRL on July 31, 1985, because of Kendrick's continuing health problems.

The plaintiffs alleged that Kendrick began to experience symptoms of Dilantin toxicity in September 1985. The court noted that military physicians

medically evaluated Kendrick in early November 1985. As a result of that examination, Kendrick continued to receive the initially prescribed Dilantin treatment until November 6, 1985. According to the court, in June 1987 the Army gave Kendrick permanent retirement status with a fifty percent disability rating after later evaluations showed cerebellar dysfunction, probably related to Dilantin toxicity. The plaintiffs, Gary Kendrick and his son Shane Kendrick, sued the United States government, alleging that military physicians continued to prescribe Dilantin for Kendrick's seizure disorder without adequately monitoring the level of the drug in his blood. The plaintiffs contended that a toxic level of Dilantin proximately caused Kendrick's permanent brain damage.

The United States District Court for the District of South Carolina held that the plaintiffs' claims were incident to military service and, thus, the *Feres* doctrine barred the claims. Accordingly, the district court granted the government's motion for summary judgment. The plaintiffs appealed, arguing that *Feres* does not bar a servicemember's claim when the servicemember was not on active duty or subject to military control at the time of the injury. The plaintiffs contended that a servicemember on TDRL is not on active duty and is sufficiently free from military control to avoid the *Feres* bar. The plaintiffs alleged that the Dilantin toxicity occurred while Kendrick was on the TDRL, and consequently, the *Feres* doctrine should not bar the plaintiffs' claims.

To resolve the issue, the Fourth Circuit examined the policies underlying the United States Supreme Court's decision in *Feres*. The *Feres* doctrine holds that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen which arise out of or are in the course of activity incident to service." According to the Fourth Circuit, in deciding *Feres*, the Supreme Court emphasized three basic rationales: the federal nature of the relationship between members of the armed forces and the government; the existing alternative compensation schemes for military personnel; and the reluctance to damage military structure and discipline through court intervention. In applying these rationales to the case at bar, the Fourth Circuit court stated that, first, a uniform federal remedy was more appropriate for members injured in the armed forces than application of varying local tort law under the FTCA. Second, the court reasoned that to allow Kendrick's claim would provide him with double recovery because he already was receiving compensation under the military's disability compensation scheme. The court stated that allowing the claim would undermine the integrity of the military's no-fault compensation plan. Third, the court found that allowing tort claims against the military for service-related injuries could disrupt military discipline, order, and commitment. The Fourth Circuit thus reasoned that the district court's ruling that *Feres* barred Kendrick's claims was consistent with the Supreme Court's *Feres* rationales.

The Fourth Circuit also reasoned that *Feres* is concerned with when and under what circumstances the negligent act occurred, not when the injury occurred. The court noted that, in establishing the TDRL, Congress intended that personnel on the list still be considered members of the Armed

Forces because personnel on the TDRL remain subject to military law and discipline and are subject to return to active duty. In addition, the court noted that TDRL personnel were admitted to military hospitals only because of their military status. The court, therefore, concluded that an injury sustained as a result of negligent treatment while the servicemember is on the TDRL meets the "incident to service" test of *Feres*. As a result, *Feres* bars any claim under the Federal Tort Claims Act that is based on an injury sustained while on the TDRL.

The court in *Kendrick* further concluded that *Feres* clearly barred any claim that Kendrick had prior to his placement on the TDRL. According to the court, the negligent act of failure to monitor the Dilantin level began while Kendrick was on active duty. Accordingly, the court held that the *Feres* doctrine barred Kendrick's medical malpractice claim. The court held that *Feres* barred Kendrick's son's loss of consortium claim as well because that cause of action was derivative to Kendrick's claim that *Feres* barred. The Fourth Circuit, therefore, affirmed the decision of the district court.

In *Jarrett v. United States*, 874 F.2d 201 (4th Cir. 1989), the Fourth Circuit considered whether a cause of action exists under the Federal Tort Claims Act (FTCA), 28 U.S.C. sections 2671-2680 (1982), for the alleged wrongful termination of Social Security benefits. In *Jarrett* the appellant's deceased husband (Jarrett) had taken disability retirement in October 1980 due to a heart attack suffered in May of that year. Based on Jarrett's serious heart disease, the West Virginia Disability Determination Section (DDS), acting under an agreement with the Social Security Administration (SSA), granted Jarrett disability insurance benefits. The benefits began in October 1980. In June 1983, after a mandatory periodic review for continuing disability payments, DDS determined that Jarrett's disability no longer existed. The SSA affirmed the decision of DDS after randomly selecting Jarrett's case for a quality assurance review. Jarrett requested reconsideration of the decision. Jarrett also requested that his benefits continue until DDS concluded its reconsideration. DDS granted Jarrett's request for continuing payments. Upon reconsideration, DDS determined that the disability still existed. Thus, Jarrett retained his disability benefits. Jarrett, however, died of a heart attack two weeks after the DDS decision.

Mrs. Jarrett filed suit under the FTCA alleging a wrongful termination of Social Security benefits. Mrs. Jarrett claimed that the termination of benefits deprived Jarrett of life and property without due process of law. The appellant also argued that DDS did not give Jarrett a sequential evaluation of his claim as the Social Security Regulations require. The appellant further contended that the termination of benefits caused a deep depression in Jarrett that amounted to an intentional infliction of emotional distress. The intentional infliction of emotional distress, the appellant argued, proximately caused Jarrett's death.

The United States District Court for the Northern District of West Virginia denied Mrs. Jarrett's claims. The court held that the Social Security Act, 42 U.S.C. section 405(h) (1982), provides the exclusive remedy for any

claims arising under the Social Security Act. Because the court found that the plaintiff's claim arose under the Social Security Act, the court held that it lacked subject matter jurisdiction to hear the dispute.

The plaintiff appealed, arguing that the alleged causal link between the alleged wrongful termination of benefits and the death of Jarrett gave rise to a claim under the FTCA. The plaintiff argued that Congress granted the district courts exclusive jurisdiction over claims involving deaths that the wrongful acts of any employee of the federal government allegedly had caused while the employee was acting within the scope of the employee's duties. The United States contended that the dispute arose under the Social Security Act. Thus, the United States argued that section 405(h) of the Social Security Act provides the exclusive remedy.

To resolve the issue, the Fourth Circuit considered the effect of both 28 U.S.C. section 1346(b) (1982) and 42 U.S.C. section 405(h) (1982) on the jurisdiction of the district court to hear Mrs. Jarrett's claims. The court held that 28 U.S.C. section 1346(b) (1982) confers jurisdiction, but does not create a cause of action. The court noted that the United States, being sovereign, is immune from suit unless Congress specifically provides for a waiver of sovereign immunity through a cause of action. Absent a congressional provision for a cause of action, the court noted, district courts lack jurisdiction to hear a dispute against the United States. The court then found that, while the FTCA creates a waiver of sovereign immunity, section 405(h) limits the waiver. The court found that in section 405(h) Congress specifically denied relief through the FTCA for claims arising under title II of the Social Security Act. The court further found that Congress, under section 405(g) of the Social Security Act, provided judicial review of decisions that the Secretary of Health and Human Services had made. According to the court, Congress intended that judicial review of the Secretary of Health and Human Services' decisions constitute the sole judicial relief available to a claimant under the Social Security Act.

Therefore, the Fourth Circuit held that the district court did not have jurisdiction to entertain a tort claim arising under the Social Security Act. The court reasoned that to grant jurisdiction to the district courts over tort claims arising under the Social Security Act would contravene the clear intent and expressions of Congress. Thus, the appellant, because her action arose under the Social Security Act, must follow the sole remedy that the Act provides.

Next, the court denied the appellant's claim against the administrators of the benefits program. The court noted that in a similar case the United States Supreme Court had found that, absent congressional action, courts may not award money damages against federal officials for constitutional torts. The Supreme Court also found that the disability review program does not provide for monetary damages against officials who have denied benefits, allegedly in violation of the fifth amendment. The Fourth Circuit, relying on the Supreme Court's reasoning, held that, if Congress did not include the right to seek monetary damages from officials for their unconstitutional actions when Congress created the continuing disability review