UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

EDUARDO DIAZ-BERNAL, *et al.*	§	
	§	
Plaintiffs,	§	
	§	
v.	§	3:09-cv-1734-SRU
	§	
	§	
JULIE MYERS, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM IN SUPPORT OF UNITED STATES' PARTIAL MOTION TO DISMISS

INTRODUCTION

This suit stems from an Immigration and Customs Enforcement operation in New Haven, Connecticut. Plaintiffs, who were arrested in the operation, allege that individual ICE agents violated their constitutional rights and that the United States is liable for torts committed by the agents. This motion concerns Plaintiffs' claims that the United States negligently hired, trained, and supervised the agents who executed the operation.

Because the Federal Tort Claims Act's discretionary function

exception bars claims based on day-to-day personnel decisions, this Court lacks subject-matter jurisdiction over these three claims challenging ICE's personnel management choices. Circuit courts considering the issue have consistently held that the United States' hiring, training, and supervising practices are classic discretionary functions. ICE exercises judgment and choice in how it hires, trains, and supervises its employees, and Congress has directed, through the discretionary function exception, that courts cannot second-guess these policy-based personnel decisions. Accordingly, this Court cannot entertain Plaintiffs' claims of negligent hiring, training, and supervision and should therefore dismiss them for lack of subject-matter jurisdiction.

FACTS

This action involves ICE's efforts to identify and apprehend illegal aliens. Under a nationwide initiative to remove fugitive illegal aliens, ICE's Hartford regional office planned, coordinated, and led an operation to apprehend illegal aliens in New Haven. First Am. Compl.

(Doc. 15) ¶ 241. Plaintiffs allege that ICE's Hartford office began planning the operation in April 2007. *Id.* ¶ 222. Culling through over 5,000 administrative warrants, agents targeted thirty-three New Haven addresses. *Id.* ¶ 224. The Hartford office drafted a plan for the New Haven Operation, which the Boston regional office and ICE Headquarters approved. *Id.* ¶¶ 227-30.

After dawn on June 6, 2007, Hartford ICE agents executed the New Haven Operation and arrested and detained almost thirty suspected illegal aliens, including Plaintiffs. Plaintiffs allege that the agents entered their homes without search warrants or consent and that their arrest and detention was discriminatory and unconstitutional. *Id.* ¶¶ 1, 4, 6. They further allege that "senior and mid-level supervisory ICE personnel share direct responsibility for Plaintiffs' harms" because they inadequately trained and supervised the ICE agents and that ICE negligently hired the agents. *Id.* ¶¶ 18; 392-93.

According to Plaintiffs, the national program, inadequate training, and insufficient supervision resulted in "widespread constitutional violations . . . throughout the country." *Id.* ¶ 17. Plaintiffs allege that

ICE supervisory officials knew all this before the New Haven Operation, but authorized it nonetheless. *Id.*

Furthermore, Plaintiffs allege that ICE conducted the New Haven Operation "to punish" New Haven for enacting a citywide ID card program available to all residents, regardless of their immigration status. *Id.* ¶¶ 9-11.

Plaintiffs allege violations of the Fourth Amendment, the Fifth Amendment's Equal Protection Clause and right to Due Process, and the Tenth Amendment. *See generally*, *Id.* Under the FTCA, Plaintiffs allege assault and battery, false arrest, false imprisonment, trespass, unreasonable interference with the seclusion of another, abuse of process, civil conspiracy, and negligent hiring, training, and supervision. *Id.* ¶¶ 365-97.

ARGUMENT

This Court should dismiss Plaintiffs' claims of negligent hiring, training, and supervision because they are barred by the FTCA's discretionary function exception.

As sovereign, the United States cannot be sued without its consent, and the terms of its consent define a court's jurisdiction. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The United States has selectively waived its sovereign immunity through the FTCA. *Molzof v. United States*, 502 U.S. 301, 305 (1992). The FTCA generally authorizes suits for the wrongful acts or omissions of government employees acting within the scope of their employment if a private party would be liable where the act or omission occurred. *See* 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2674; *Berkovitz v. United States*, 486 U.S. 531, 535 (1988). But there are many exceptions to this general waiver, including the discretionary function exception.

The discretionary function exception exempts liability for claims "based upon the exercise or performance . . . [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure

to suit by private individuals." *United States v. SA. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). "If a claim falls within this exception, the court lacks jurisdiction to entertain the claim." *Fazi v. United States*, 935 F.2d 535, 537 (2d Cir. 1991).

The Supreme Court has created a two-part test to determine whether the discretionary function exception applies. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz*, 486 U.S. at 536-37; *In re: World Trade Ctr. Disaster Site, Litig.*, 521 F.3d 169, 195 (2d Cir. 2008). First, the challenged conduct must involve "an element of judgment or choice." *Gaubert*, 499 U.S. at 322. An element of judgment does not exist if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive." *Id.* at 322 (citing *Berkovitz,* 486 U.S. at 536) (quotation marks omitted). Second, the judgment must be based on policy considerations. *Id.* at 323; *Berkovitz,* 486 U.S. at 538; *In re: World Trade Ctr.*, 521 F.3d at 195. The second inquiry implements "Congress' desire to prevent judicial second-guessing of legislative and

administrative decisions grounded in social, economic, and political policy." *Berkovitz*, 486 U.S. at 536-37 (citing *Varig Airlines*, 467 U.S. at 814 (quotation marks omitted)). The subjective intent of the employee is irrelevant to the inquiry; rather, the correct question is whether "the actions taken . . . are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325.

Finally, discretionary actions are not limited to higher policy or the planning level. *Id.* The exception protects "day-to-day management decisions if those decisions require judgment as to which of a range of permissible courses is the wisest." *Fazi*, 935 F.2d at 538.

Hiring, training, and supervising employees are quintessential discretionary, policy-based acts that satisfy the two-part test. Plaintiffs' claims based on these actions must therefore be dismissed.

I. ICE's training decisions are protected by the discretionary function exception.

Congress has permitted federal agencies to establish their own training requirements. *See* 5 U.S.C. § 4118(c) ("This section does not authorize the Office to prescribe the types and methods of intra-agency

training or to regulate the details of intra-agency training programs."); *see also* 5 U.S.C. § 4103. In the case of the Department of Homeland Security, this authority has been specifically delegated from the Secretary of Homeland Security to the Assistant Secretary, and then re-delegated to the Office of Training and Development. *See Delegation of Auth. to the Assistant Secretary for the U.S. Immigration and Customs Enforcement* (Ex. 1); *Unified Training Strategy and Functions of the Office of Training and Development* (Ex. 2). At no point in this delegation process is the ultimate authority conferred by Congress limited in any way. *See generally,* Ex. 1 & Ex. 2.

A broader grant of judgment and choice in training decisions is hard to imagine—there are no statutory restrictions or even guidelines as to which training programs and procedures to employ. From this broad grant of authority, ICE has promulgated regulations establishing certain basic training programs. *See* 8 C.F.R. § 287.1(g). Plaintiffs do not allege that ICE agents failed to attend these basic training programs.

Because ICE's challenged actions—inadequate training policies and practices—are not controlled by any mandatory statutes or regulations,

the first part of the discretionary function test is met.

Plaintiffs' allegation that ICE agents did not attend "mandatory" training does not alter the conclusion that ICE had discretion in how it trains its agents. Plaintiffs allege that ICE violated a mandatory policy that ICE agents attend certain advanced training. *See* First Am. Compl. ¶¶ 288-90. Presumably, Plaintiffs allegation that specific training is mandatory refers to the Detention and Deportation Officers Field Manual. The field manual states that all agents assigned to National Fugitive Operations Program teams are required to attend the Basic Fugitive Operations Training Program.[1] Ex. 3 at 1. The requirement was enacted by then-Acting Director of ICE's Office of Detention and Removal Operations, Victor X. Cerda. *Id.*

As the First Circuit determined in *Irving v. United States*, 162 F.3d 154 (1st Cir. 1998), this type of informal agency rule cannot void the affirmative grant of discretion given by Congress and retained in promulgated regulations. In *Irving,* the plaintiff was injured in her workplace and sued the United States under the FTCA alleging that

[1] Although termed "Basic" Fugitive Operations Training, this training is a level above "basic immigration law enforcement training" as defined in 28 C.F.R. § 287.1(g).

OSHA inspectors failed perform their inspection duties thus causing her injuries. *Id.* at 157.

The court first examined the statutory framework surrounding OSHA's authority to inspect work places, and found that it placed "virtually no constraint" on the Secretary of Labor's discretion to conduct inspections "in any way that she deems fit." *Id.* at 162-63. Similarly, the regulations governing the performance of inspections did "not prescribe any specific regimen." *Id.* at 163.

Earlier, a panel of the First Circuit found that despite this statutory and regulatory regime, a factual inquiry was needed to learn "whether some less-formal protocol 'left the compliance officers with no policy-level discretion.'" *Id.* at 164. The en banc court firmly rejected this analysis. *Id.*

The court turned to *Gaubert* to determine when it should consult informal agency rules in the discretionary function analysis. In *Gaubert,* the Supreme Court noted that such rules aid the discretionary function analysis in two circumstances: (1) when "an agency promulgates regulations on some topics, but not on others" and (2) "when it relies on 'internal guidelines,'" not published regulations. *Id.*

at 164-65. These two situations contrast with an agency that establishes policy primarily through regulations, and those regulations "unambiguously define the nature of the challenged conduct." *Id.* at 165. In this latter circumstance, the discretionary function analysis need go no further than the regulations. *Id.*

Finding that the OSHA regulations flowed directly from the statute, squarely addressed the challenged conduct, and unambiguously granted discretion, the *Irving* en banc court concluded that it did not need to consult informal agency rules. *Id.*

The court further explained that its decision hewed to the principle that such informal agency sources "command less weight . . . because it matters who speaks." *Id.* at 166. The statements of the "*official policymaker*"—not others, even if they occupied "important agency positions"—determines what is agency policy. *Id.* (emphasis added). The court noted that Congress had granted the Secretary of Labor authority to make a function either discretionary or not. *Id.* It did not grant lower-level officials that authority, and therefore the court declined to attach significance to policy statements made at that level.

Irving's analysis applies here. As in *Irving,* Congress granted the

chief policymaker, the Secretary of the agency, complete and limitless discretion to establish policy with regard to the challenged conduct—here, training. The promulgated regulations do not limit this discretion. And the broad grant of discretion remains as it has been delegated through the agency.

Against this backdrop of unambiguous and virtually unlimited discretion, Plaintiffs claim that ICE violated a single requirement in a field manual made mandatory not by any official with delegated authority over training policy decisions, but by the acting-director of a sub-unit of ICE. As *Irving* determined, this field manual's directive does not affect the discretionary function determination for two reasons. First, the statutory and regulatory framework clearly and unambiguously grant ICE authority to discretion to determine how it trains its agents. Thus, ICE's informal rules, such as the field manual, are irrelevant to the discretion inquiry. Second, the requirement was not implemented by the official training policymaker; the head of the Detention and Removal Office simply cannot make a training policy discretionary or not. Accordingly, the first part of the discretionary function test is met.

The decisions ICE made establishing and managing its training programs also meet the second part of the discretionary function test, for two reasons. First, under *Gaubert*, because ICE established the training programs under statutes and directives which allow the exercise of discretion, it must be presumed that actions made under those authorities are grounded in policy. *See* 499 U.S. at 323. Second, courts have held that the establishment of training practices involves the weighing of multiple policy concerns.

In granting ICE authority to establish training programs, Congress gave ICE tremendous discretion in making training decisions. This creates the presumption that in making those decisions, ICE employees considered the same policies which led to the promulgation of the directives. *See id.* As stated in *Gaubert,* "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.*; *accord Fazi*, 935 F.2d at 538.

With the training programs challenged here, this presumption is well-founded. Courts have determined that the establishment of

training policies involves a raft of policy choices. As the D.C. Circuit has stated:

> The extent of training with which to provide employees requires consideration of fiscal constraints, public safety, the complexity of the task involved, the degree of harm a wayward employee might cause, and the extent to which employees have deviated from accepted norms in the past. Such decisions are surely among those involving the exercise of political, social, or economic judgment.

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997). Other circuit courts agree. *See*, *e.g.*, *Nurse v. United States,* 226 F.3d 996, 1001-02 (9th Cir. 2000); *Gager v. United States*, 149 F.3d 918, 921 (9th Cir. 1998); *K.W. Thompson Tool Co. v. United States*, 836 F.2d 721, 726-27 (1st Cir. 1988).

The training programs implemented by ICE are steeped in policy judgments. In determining how to train agents who apprehend often dangerous fugitive aliens the training program must often balance competing objectives and policies including: budgetary constraints, the mission of the agency, the individual safety of the agents, safety of the fugitive aliens, public safety, public relations, past practices, and future goals. Each of these decisions involve a policy judgment. The choices that ICE faces in determining its training policies and practices are

"susceptible to policy judgment" and thus satisfy the second part of the discretionary function test.

This Court lacks subject-matter jurisdiction over Plaintiffs' negligent training claims.

II. ICE's hiring and supervising decisions are protected by the discretionary function exception.

Plaintiffs have failed to allege that ICE violated any mandatory supervising and hiring policies. They allege not that ICE violated any policies, but that senior officials knew that inadequate supervision, inadequate training, and a quota policy caused "widespread constitutional violations." First Am. Compl. ¶ 17. According to Plaintiffs, ICE supervisory personnel "knew that inadequate supervision . . . would result in constitutional violations in this particular operation, but they did nothing to correct the problems." *Id.* ¶ 18; *see also* ¶¶ 287, 298, 305-08. The same allegations underlie the negligent hiring claim—ICE officials should have recognized inadequate hiring practices. *Id.* ¶¶ 392-93.

Plaintiffs, however, have failed to allege that ICE violated *any* policies mandating how ICE should supervise or hire its employees.

This matters because at the pleading stage Plaintiffs have "the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists." *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) and *Malik v. Meissner,* 82 F.3d 560, 562 (2d Cir. 1996)).

Plaintiffs' failure to allege that ICE violated mandatory hiring and supervising policies means that the first part of the discretionary function test is met. *See Gaubert*, 499 U.S. at 328 ("We first inquire whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations."); *see also K.W. Thompson Tool*, 836 F.2d at 727 (applying discretionary function exception because plaintiff did not allege violations of Clean Water Act or regulations issued under CWA); *Bolduc v. United States*, 402 F.3d 50, 61 (1st Cir. 2005) ("Where no specific action is required within a category of conduct and the government actors . . . have latitude to make decisions and choose among alternative courses of action, the conduct is discretionary."); *Saint-Guillen v. United States*, 08-cv-441, 2009 US Dist. LEXIS 89448 at *26-27 (E.D.N.Y. Sept. 30, 2009) ("The complaint does not allege any facts suggesting that defendant's hiring,

retention, training, and supervision practices fall outside the [discretionary function] exception.)." Accordingly, ICE's hiring and supervising practices are discretionary, satisfying the first part of the discretionary function test.

Circuit courts have uniformly determined that without mandatory regulations, decisions concerning hiring and supervising the federal workforce are policy-based and shielded from liability under the FTCA.

Gaubert provides the basis for these decisions. There, Plaintiff challenged federal regulators' supervision of a federally-insured savings and loan company. *Gaubert*, 499 U.S. at 320. Gaubert, the company's chairman of the board, sued the United States alleging negligence of federal officials participating in the day-to-day management of the company. *Id.* The federal officials hired consultants, gave advice, made recommendations, and mediated salary disputes. *Id.* at 328. Gaubert alleged that their involvement in the company's affairs was so pervasive that "the agency actually substituted its decision for those of the directors and officers of the association." *Id.*

Distinguishing between "policy decisions" and "operational actions," the district court determined that the challenged management decisions

were "operational" and fell outside the exception. *Id.* at 322. The circuit court reversed this part of the court's ruling. *Id.*

The Supreme Court affirmed, expressly abolishing the perceived distinction between "operational," or "management level," decisions and "policymaking" decisions. The Court explained, "[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest." *Id.* at 325. Transforming everyday policy judgments into actionable torts, merely because they were routine, contravened Court precedent. *Id.* at 334.

Adhering to *Gaubert's* teachings, numerous circuit courts addressing negligent supervision have determined that the discretionary function exception protects supervisory decisions. *See, e.g.*, *Nurse v. United States*, 226 F.3d at 1001-02 (negligent supervision claim against customs agents fell "squarely within the discretionary function exception." (citing *K.W. Thompson Tool*, 836 F.2d 721)); *Bolduc,* 402 F.3d 50 (determining discretionary function exception protected FBI's supervisory decisions); *Attallah v. United States*, 955 F.2d 776, 784 (1st Cir. 1992) ("how, and to what extent the Customs Service supervises its

employees certainly involves a degree of discretion and policy considerations of the kind that Congress sought to protect through the discretionary function exception.").

By the same analysis, multiple circuits have held that the discretionary function similarly bars claims based on the negligent hiring of employees. *See, e.g., O'Bryan v. Holy See,* 556 F.3d 361, 383-84 (6th Cir. 2009); *Crete v. City of Lowell*, 418 F.3d 54, 64-65 (1st Cir. 2005) (collecting cases) ("uniformly the federal circuit courts under the FTCA have found that employer decisions such as hiring, discipline, and termination of employees are within the discretionary function exception"); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995) (upholding dismissal of negligent hiring claim because it failed to "survive the discretionary function inquiry").

Although the Second Circuit has yet to address the application of the discretionary function exception to allegations of negligent hiring, training, or supervision, district courts in this circuit have had little problem applying the exception to bar such claims. In three recent FTCA cases, district courts have quickly dispensed with plaintiffs' claims for negligent hiring, supervising, and training. Two of the cases

dismissed all three claims *together*. *Saint-Guillen*, 2009 U.S. Dist. LEXIS 89448 at *26-27; *Li v. Aponte*, 05 Civ 6237, 2008 U.S. Dist. LEXIS 74725, *29-30 (S.D.N.Y. Sept. 16, 2008). The third case dismissed claims of negligent supervision and training. *Cuoco v. United States Bureau of Prisons,* 98 Civ 9009, 2003 U.S. Dist. LEXIS 16615, *19-20 (S.D.N.Y. Sept. 22, 2003).

This Court should determine that the hiring, training, and supervising decisions made by ICE employees are classic personnel decisions which the discretionary function exception prevents courts from second-guessing.

CONCLUSION

This court should dismiss Plaintiffs' claims of negligent hiring, training, and supervising for lack of subject-matter jurisdiction.

Dated: May 19, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2010, I electronically filed the foregoing ***Memorandum in Support of United States' Partial Motion to Dismiss*** with the clerk of court for the United States District Court for the District of Connecticut, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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