

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Herman v. United States

330 F. App'x 133 (9th Cir. 2009) · Decided May 18, 2009

SUMMARY

The Ninth Circuit affirmed summary judgment for the United States in an FTCA action arising from an employee's fall on a slippery floor at a Malmstrom Air Force Base fitness center. The court held that the evidence did not establish respondeat superior or premises liability, and that the United States was not vicariously liable for the alleged negligence of the independent janitorial contractor.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Per curiam; Paez; Smith; Wardlaw
JURISDICTION	Federal
DECIDED	May 18, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	The Hermans appealed the district court's grant of summary judgment to the United States in an action under the Federal Tort Claims Act.
STANDARD OF REVIEW	De novo review of the grant of summary judgment, viewing the evidence in the light most favorable to the appellants.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Delores Herman, Dale Herman v. United States

TOPICS

summary judgment premises liability respondeat superior vicarious liability appellate procedure

PRACTICE AREAS

Federal Tort Claims Act torts civil procedure government liability

QUESTIONS PRESENTED

- Whether the United States could be held liable under respondeat superior for the alleged negligence of an unidentified Air Force airman.
- Whether the United States breached its duty of ordinary care under a premises-liability theory.

3. Whether the United States could be held vicariously liable for the negligence of EMI under the independent-contractor doctrine.

HOLDINGS

1. The United States was not liable under respondeat superior because the Hermans presented insufficient evidence that the airman was acting within the scope of her employment when she commented on the slippery floor or that addressing the condition fell within her employment duties.
2. The United States was entitled to summary judgment on the direct premises-liability claims because it did not breach its duty to use ordinary care to maintain the fitness center in a reasonably safe condition.
3. The United States was immune from vicarious liability for EMI's alleged negligence because EMI was an independent contractor, and the contractual quality-assurance inspection right did not convert EMI into a government employee.
4. Summary judgment for the United States was proper because there were no genuine issues of material fact and the district court correctly applied the substantive law.

KEY QUOTATIONS

“The slippery floor was a known and obvious condition to Delores (as she created it), and the United States had no reason to anticipate the injury she suffered.” (at 135)

“The United States is also immune from vicarious liability under the independent contractor doctrine.” (at 135)

FACTUAL BACKGROUND

Delores Herman, an employee of janitorial contractor Environmental Management, Inc., fell on a slippery floor while working at the Malmstrom Air Force Base fitness center. The Hermans alleged negligence by an unidentified Air Force airman and liability based on premises liability, respondeat superior, and the negligence of EMI. EMI selected its own cleaning products and was responsible for the safety of its employees, while the United States retained only a contractual right to conduct quality-assurance inspections.

PROCEDURAL HISTORY

Delores Herman was injured after falling on a slippery floor while working at the Malmstrom Air Force Base fitness center. The Hermans sued the United States under the FTCA. The district court granted the United States summary judgment, and the Ninth Circuit affirmed after de novo review.

DISPOSITION

affirmed

CASES CITED

- Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir. 2007)

- Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004)
- Maguire v. State, 254 Mont. 178, 835 P.2d 755, 758-59 (1992)
- Richardson v. Corvallis Pub. Sch. Dist. No. 1, 286 Mont. 309, 950 P.2d 748, 755-57 (1997)
- Autery v. United States, 424 F.3d 944, 955-57 (9th Cir. 2005)

OPINION

PER CURIAM.

MEMORANDUM ** Delores and Dale Herman appeal the district court's grant of summary judgment in favor of the United States in their Federal Tort Claim Act ("FTCA") lawsuit arising from an injury that Delores suffered when she fell while working at the Malmstrom Air Force Base ("Malmstrom") fitness center. At the time, she was employed by Environmental Management, Inc. ("EMI"), a janitorial company that provides services at Malmstrom.

We have jurisdiction to hear the Hermans' appeal under 28 U.S.C. § 1291. Our review is de novo. Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir.2007). Viewing the evidence in the light most favorable to the Hermans, we conclude that there are no genuine issues of material fact and that the district court properly applied the substantive law. See Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir.2004).

We therefore affirm. The district court correctly found that there was insufficient evidence to hold the United States liable for Delores's injury under the theory of respondeat superior.¹ The only Air Force employee alleged to have acted negligently is an unidentified female airman who worked at the Malmstrom fitness center. Even assuming this airman was aware of the allegedly hazardous condition on the fitness center floor, the Hermans have adduced no evidence that the airman was on duty when she *135commented on the slippery floor, or that addressing the allegedly hazardous condition was within the scope of the airman's duties.

See 28 U.S.C. § 1346(b)(1); Maguire v. State, 254 Mont. 178, 835 P.2d 755, 758 (1992) ("Respondeat superior imposes liability on an employer for the wrongful acts of an employee which are committed within the scope of his employment.").

The nondelegable duty exception to the respondeat superior doctrine is not applicable here. See Maguire, 835 P.2d at 759 (limiting application of this exception "to instances of safety where the subject matter is inherently dangerous"). Nor is the United States liable under the theory of premises liability.

The United States did not breach its duty to use ordinary care in maintaining the Malmstrom fitness center in a reasonably safe condition. See Richardson v. Corvallis Pub. Sch. Dist. No. 1, 286 Mont. 309, 950 P.2d 748, 755-56 (1997).

The slippery floor was a known and obvious condition to Delores (as she created it), and the United States had no reason to anticipate the injury she suffered. See *id.* There is no evidence that the airman told anyone from EMI or the Air Force about the condition. Further, EMI selected its own cleaning products and was solely responsible for the safety of its employees.

The United States therefore was entitled to summary judgment on the Hermans' direct liability claims. See *id.* at 757 ("In general, negligence actions involve questions of fact, and, therefore are not susceptible to summary judgment. Yet, where reasonable minds cannot differ, questions of fact can be determined as a matter of law." (citation omitted)).

The United States is also immune from vicarious liability under the independent contractor doctrine. The United States cannot be held liable for EMI's negligence, if any, because EMI was an independent contractor. See 28 U.S.C. § 2671. That the United States retained a contractual right to conduct quality assurance inspections of EMI's custodial services did not convert EMI into the United States' employee.

See *Autery v. United States*, 424 F.3d 944, 955-57 (9th Cir.2005). None of the exceptions to the independent contractor doctrine is met. AFFIRMED. This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3..

In response to an inquiry from the district court at the outset of the summary judgment hearing, both parties confirmed that the record was complete and that no further evidence was available.