

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

|  |  |  |
|--|--|--|
| Edward J. Gladney,<br><br><p style="text-align: center;">Plaintiff,</p><br>v.<br><br>JT Shartle, et al.,<br><br><p style="text-align: center;">Defendants.</p> | <br><br><br><br><br><br><br><br><br><br> | No. CV 17-00427-TUC-DCB<br><br><br><br><p style="text-align: center;"><b>AMENDED<sup>1</sup> ORDER</b></p> |
|--|--|--|

Plaintiff Edward J. Gladney, who is currently confined in United States Penitentiary (USP)-Coleman in Coleman, Florida, brought this civil rights action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346 and 2671-2680. (Doc. 10.) Before the Court are Plaintiff’s Motion for Summary Judgment (Doc. 76) and Defendant’s Motion to Dismiss/Motion for Summary Judgment (Doc. 109). The Motions are fully briefed and ripe for ruling. (Docs. 114, 115, 122, 126.)<sup>2</sup>

**I. Background**

In her Second Amended Complaint, Plaintiff sues the United States of America and raises one claim for relief. (Doc. 10 at 3.) Plaintiff alleges that on May 19, 2016, while she was housed in the USP-Tucson in Tucson, Arizona, she was sexually assaulted by prisoner [REDACTED] between 9:01 a.m. and 10:05 a.m. (*Id.*) Plaintiff claims Defendant

<sup>1</sup> Amended *nunc pro tunc* solely for the purpose of disclosure.

<sup>2</sup> The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc), regarding the requirements of a response. (Doc. 108.)

1 negligently “failed to provide adequate officer monitoring of an out-of-bounds inmate and  
2 failed to adequately staff [the] housing unit with at least two officers as required.” (*Id.*)  
3 Plaintiff seeks monetary damages. On screening under 28 U.S.C. § 1915A(a), the Court  
4 determined that Plaintiff stated an FTCA claim and directed Defendant to answer. (Doc.  
5 12.)

6 Defendant moves for dismissal under Federal Rule of Civil Procedure 12(b)(1) on  
7 the grounds that Plaintiff’s claim is barred by the FTCA’s discretionary function exception  
8 and that Plaintiff failed to exhaust her administrative remedies “on any and all claims  
9 beyond the alleged claim of failure to monitor by the officer on duty in Plaintiff’s housing  
10 unit.” (Doc. 109 at 1.) In the alternative, Defendant moves for summary judgment on the  
11 merits of Plaintiff’s claim. (*Id.*) Plaintiff also moves for summary judgment. (Doc. 76.)

## 12 **II. Relevant Facts**

### 13 **A. Sexual Assault**

14 On May 19, 2016, Plaintiff was housed in the USP-Tucson B-2 Housing Unit. (*Id.*  
15 ¶ 1.) Prisoner ██████████ was housed in the D-1 Housing Unit. (*Id.* ¶ 2.) USP-Tucson  
16 is a designated Sex Offender Management Program (SOMP) facility, with the goals of  
17 assessment, treatment, and management of convicted sex offenders. (Doc. 90 (Pl.’s Supp.  
18 Statement of Facts) ¶ 36; Doc. 90-1 at 1–2 (Pl.’s Ex. 10); Doc. 102 (Def.’s Statement of  
19 Facts) ¶ 15.) SOMP facilities generally “maintain a significant proportion of sexual  
20 offenders in the population.” (Doc. 90-1 at 6 (Pl.’s Ex. 11).)

21 Plaintiff identifies herself as “transgender/feminine.” (Doc. 77 (Pl.’s Statement of  
22 Facts) ¶ 18.)<sup>3</sup> She asserts that she has “been outwardly homosexual since the year 2001,  
23 and [has] been outwardly transgender since July of 2013.” (Doc. 80 (Pl.’s Decl. ¶ 46).)  
24 Plaintiff states that she has “had feminine mannerisms since grade school” and the staff at  
25 USP-Tucson often addressed her as “M[a]am and Ms.” (*Id.* ¶ 47.)

---

26  
27  
28 <sup>3</sup> Plaintiff also presents evidence regarding a different prisoner who engaged in non-  
consensual sexual contacts with Plaintiff, but these events took place in May and June  
2017, and are not relevant to her claim before the Court; therefore, this evidence will be  
disregarded. (*See* Doc. 117; Doc. 120-1 at 50–56 (Pl.’s Exs. 22–25).)

1 On May 19, 2019, between the hours of 9:01 a.m. and 10:05 a.m., Housing Unit  
2 Officer (HUO) B. Westling was the only HUO on duty in the B-2 Housing Unit. (Doc. 77  
3 ¶ 3.) Plaintiff alleges that at some point on May 19, 2016, [REDACTED] entered the B-2 Unit and  
4 sexually assaulted her between the hours of 9:01 a.m. and 10:05 a.m. (Doc. 10 at 3; Doc.  
5 80 (Pl.'s Decl.) ¶ 13.) Plaintiff states that [REDACTED] asked for help cleaning his shoes. (*Id.* ¶  
6 17.) Plaintiff entered cell #107, and cleaned [REDACTED]'s shoes. (*Id.* ¶¶ 19–22.) When  
7 Plaintiff attempted to leave the cell, [REDACTED] placed a “make-shift knife” to Plaintiff’s back,  
8 pulled Plaintiff’s pants and underwear down, and inserted his finger into Plaintiff’s anus  
9 while masturbating. (*Id.* ¶¶ 24–30.) Afterwards, [REDACTED] put the knife away and threatened  
10 Plaintiff not to tell anyone, and Plaintiff pulled up her shorts and underwear and exited the  
11 cell. (*Id.* ¶¶ 31–32.)

12 On May 20, 2016, Plaintiff “reported the incident by sliding a note under the  
13 Counselor’s door[.]” (Doc. 80 ¶ 35.) In an Inmate Request to Staff dated May 19, 2016,  
14 Plaintiff stated:

15 [REDACTED] has been coming in this unit on a regular basis  
16 harassing me which was a reason I moved to B-1 a few months  
17 back. Today, he came in the unit between 9:00 a.m.-9:15 a.m.,  
18 and left at the 10 a.m. recall (10:15 a.m.). When he came into  
19 the unit, he went in cell #107 and called me in a few minutes  
20 later. He asked me to perform oral sex. I refused. At this point  
21 he became very hostile and threatened me. He then forced my  
shorts down and began masturbating to the point of ejaculation.  
Please keep him away from me. I am in fear of my life with  
him on this yard.

22 (Doc. 102-4 (Def.’s Ex. 3, Attach. A).)

23 Plaintiff was subsequently called into the Lieutenant’s office where she described  
24 the sexual assault “in great detail” to Lieutenants R. Reed and J. Van Devender and a prison  
25 psychologist. (*Id.* ¶¶ 36–37.) Plaintiff was given “a medical evaluation and psychological  
26 services,” and an investigation was initiated. (Doc. 102 ¶ 5.) At some point after Plaintiff  
27  
28

1 reported the incident, [REDACTED] was placed in the Special Housing Unit (SHU) pending  
2 investigation. (Doc. 77 ¶ 4.)<sup>4</sup>

3 On May 23, 2016, Plaintiff and [REDACTED] were interviewed separately. (Doc. 110 at 6  
4 (Def.'s Ex. 2, Attach. A).) [REDACTED] admitted to being in an unauthorized location ("out of  
5 bounds"), but he denied sexually assaulting Plaintiff. (*Id.*) Interviews were also conducted  
6 with other prisoners; no one witnessed the reported incident. (*Id.* at 7.) Plaintiff reported  
7 that [REDACTED] had been harassing her for approximately six months, but this was the first time  
8 she had reported [REDACTED]'s sexual harassment to USP-Tucson staff. (*Id.* at 8.) According  
9 to the investigation notes, medical evaluation notes, and psychology services notes,  
10 Plaintiff reported that [REDACTED] pulled her pants down and began to masturbate and that there  
11 was no physical contact or penetration during the incident. (Doc. 110 at 6, 8, 12.)

12 The USP-Tucson staff reviewed video of the B-2 Unit, but there was no footage  
13 showing what happened inside cell #107. (Doc. 102 ¶ 10.) There is no video footage  
14 showing [REDACTED] entering the B-2 Unit the day of the assault. (Doc. 77 ¶ 10.)

15 The investigation resulted in a determination that the incident was unsubstantiated.  
16 (Doc. 102 ¶ 11.) [REDACTED] was disciplined for being out of bounds, and he was transferred  
17 out of USP-Tucson shortly after Plaintiff reported the sexual assault. (*Id.* ¶¶ 12–13; Doc.  
18 77 ¶ 9.)

## 19 **B. Administrative Claim**

20 Plaintiff completed an administrative tort claim ("Form 95") on September 15,  
21 2016; it was received by the Bureau of Prisons (BOP) on October 24, 2016. (Doc. 102-4  
22 at 7 (Def.'s Ex. 3, Attach. B).) In the claim, Plaintiff alleged that:

23 On May 19, 2016, between the hours of 9:01 a.m. and 10:05  
24 a.m., [REDACTED], who was assigned to be housed on D-1 unit  
25 (south side) ventured "out of bounds" to my assigned unit B-2  
26 (north side) and sexually harassed and assaulted me. The  
officer posted in my unit (B-2), Correctional Officer B.

---

27  
28 <sup>4</sup> The SHU is a housing unit where prisoners are securely separated from the general  
prisoner population to ensure the safety, security, and orderly operation of the prison.  
(Doc. 77 ¶¶ 6–7.)

1 Westling, willfully or otherwise negligently failed to monitor  
2 inmates who did not belong in the unit (B-2).

3 (*Id.*)

4 Plaintiff’s claim was investigated, and in a response dated March 10, 2017, Plaintiff  
5 was informed that the “[i]nvestigation fail[ed] to disclose any evidence of negligence or  
6 other conduct for which the United States is liable. You have failed to establish that you  
7 sustained a loss or personal injury as a result of staff negligence in this matter.  
8 Accordingly, your claim is denied.” (*Id.* at 9 (Def.’s Ex. 3, Attach. C).) Plaintiff was also  
9 informed that she had six months from the date the response was mailed to bring a lawsuit.

10 (*Id.*)

11 **C. Relevant Policies**

12 **1. USP-Tucson Housing Unit Staffing**

13 “Staffing at Bureau of Prisons facilities is based on the security level of the  
14 institution, the unique mission and layout of the institution, and the Bureau of Prisons[’]  
15 allocation of financial and human resources across the 122 prisons it operates.” (Doc. 102  
16 ¶ 30.) Between 2013 and 2016, the BOP staffing allocation for HUOs at high security  
17 facilities, such as USP-Tucson, provided for one officer on each unit during each of the  
18 three shifts: morning (12:00 a.m. to 8:00 a.m.), day (8:00 a.m. to 4:00 p.m.), and evening  
19 (4:00 p.m. to 8:00 a.m.) (*Id.* ¶ 31.) The staffing allocation also allowed for a second HUO  
20 to be scheduled in each unit during the evening shift and on weekends. (*Id.*; Doc. 110 at  
21 23.)

22 In 2006, the BOP sought a budget increase “to provide for a second correctional  
23 officer in each unit, on each shift, at High-Security institutions, like USP Tucson.” (*Id.*  
24 ¶ 32.) Once Congress approved the budget increase, the BOP updated its staffing  
25 guidelines to provide for two HUOs on each shift at all high-security facilities. (*Id.*; Doc.  
26 110 at 21, 23, 27.) The Master Agreement between the BOP and the Council of Prison  
27 Locals requires that “quarterly rosters must be posted prior to the upcoming quarter, so  
28 [that] bargaining unit staff can bid for assignments and shifts and submit requests for

1 leave.” (Doc. 102 ¶ 33.) In compliance with the Master Agreement, “the additional post  
2 created by the updated staffing guidelines had to be added to the roster and posted for the  
3 bargaining unit staff bidding process.” (*Id.*) As such, the updated staffing guidelines did  
4 not go into effect at USP-Tucson until the second quarter change on June 15, 2016. (*Id.*)

## 5 **2. BOP Program Statements (PS)**

6 According to PS 5500.14,<sup>5</sup> BOP facilities conduct five “official counts” every 24  
7 hours. (*Id.* ¶ 36.) At USP-Tucson, official counts took place at around 12:01 a.m., 3:00  
8 a.m., 5:00 a.m., 10: a.m., 4:00 p.m., and 10:00 p.m. (*Id.*) During official counts, all  
9 prisoners are locked in their cells while two staff members check each cell to make sure  
10 that the assigned prisoners are present and alive by “positively observing human flesh”  
11 when counting each prisoner. (*Id.*; PS 5500.14 § 300(4).)

12 Under PS 5500.14, “census checks” are conducted to identify prisoners in  
13 unauthorized and unassigned areas. (Doc. 102 ¶ 37.) A census check is not an official  
14 count or a total head count and must be conducted during each work period, morning and  
15 evening. (*Id.*; PS 5500.14 § 304.) “Institutions will set guidelines and procedures for  
16 conducting the census check in an Institutional Supplement.” (PS 5500.14 § 304(1).) At  
17 the relevant time, USP-Tucson morning census checks occurred after the 7:50 a.m. work  
18 call and before the 9:00 a.m. open move. (Doc. 102 ¶ 37.) On the morning of May 19,  
19 2016, the census check took place at 8:40 a.m. and showed no unauthorized prisoners  
20 present and no prisoners absent without leave. (*Id.*)

21 With the exception of the official counts and census checks, PS 5500.14 does not  
22 contain any further parameters for scheduling or conducting monitoring in BOP housing  
23 units.

---

24  
25  
26 <sup>5</sup> Complex Captain Darrin McWhorter asserts that a copy of PS 5500.14 was  
27 included as Attachment J to his declaration, but the exhibit is not included in the Court’s  
28 records. (See Doc. 102-3 at 9 (McWhorter Decl. ¶ 35).) However, a copy of PS 5500.14  
is available to the public at [https://www.bop.gov/policy/progstat/5500\\_014.pdf](https://www.bop.gov/policy/progstat/5500_014.pdf). A court  
“may take judicial notice of court filings and other matters of public record.” *Reyn’s Pasta  
Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006).

1 PS 3420.11(6) states that BOP “[e]mployees are required to remain fully alert and  
2 attentive during duty hours.”<sup>6</sup> Additionally, PS 1210.24(7) provides that “[b]reach of  
3 security or safety . . . resulting in escape or serious injury” constitutes a Classification 2  
4 case of employee misconduct, and “[r]efusal to follow instructions or procedures . . . [and]  
5 failure to properly supervise or control persons in custody” constitutes a Classification 3  
6 case of employee misconduct.<sup>7</sup>

### 7 3. Federal Statutes and Regulations

8 Pursuant to 18 U.S.C. § 4042(a)(2), the BOP is generally required to “provide  
9 suitable quarters and provide for the safekeeping, care, and subsistence” of prisoners in its  
10 custody. However, the statute does not contain any specifications for how BOP is to satisfy  
11 this duty. *See* 18 U.S.C. § 4042(a)(2).

12 Additionally, under the Prison Rape Elimination Act (PREA) National Standards,  
13 an “agency shall ensure that each facility it operates shall develop, document, and make its  
14 best efforts to comply on a regular basis with a staffing plan that provides for adequate  
15 levels of staffing, and, where applicable, video monitoring, to protect inmates against  
16 sexual abuse.” 28 C.F.R. § 115.13. Further, “[i]n calculating adequate staffing levels and  
17 determining the need for video monitoring,” correctional facilities must consider:

- 18 (1) Generally accepted detention and correctional practices;
- 19 (2) Any judicial findings of inadequacy;
- 20 (3) Any findings of inadequacy from Federal investigative  
21 agencies;
- 22 (4) Any findings of inadequacy from internal or external  
oversight bodies;
- 23 (5) All components of the facility’s physical plant (including  
24 “blind-spots” or areas where staff or inmates may be isolated);

---

25  
26  
27 <sup>6</sup> A copy of PS 3420.11 is available to the public at  
[https://www.bop.gov/policy/progstat/3420\\_011.pdf](https://www.bop.gov/policy/progstat/3420_011.pdf).

28 <sup>7</sup> A copy of PS 1210.24 is available to the public at  
[https://www.bop.gov/policy/progstat/1210\\_024.pdf](https://www.bop.gov/policy/progstat/1210_024.pdf).

- 1 (6) The composition of the inmate population;
- 2 (7) The number and placement of supervisory staff;
- 3 (8) Institution programs occurring on a particular shift;
- 4 (9) Any applicable State or local laws, regulations, or
- 5 standards;
- 6 (10) The prevalence of substantiated and unsubstantiated
- 7 incidents of sexual abuse; and
- 8 (11) Any other relevant factors.

8 (*Id.*)

9 **III. Subjection Matter Jurisdiction**

10 “Federal courts are courts of limited jurisdiction. They possess only that power  
11 authorized by Constitution and statute . . . .” *Kokkonen v. Guardian Life Ins. Co. of Am.*,  
12 511 U.S. 375, 377 (1994) (internal citations omitted). Under Federal Rule of Civil  
13 Procedure 12(b)(1), a defendant may seek dismissal of an action for lack of subject matter  
14 jurisdiction. A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction can  
15 be either a facial or factual attack. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
16 (9th Cir. 2004). “In a facial attack, the challenger asserts that the allegations contained in  
17 a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* Dismissal is  
18 appropriate if the complaint on its face fails to allege facts sufficient to establish subject  
19 matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546  
20 F.3d 981, 984–985 (9th Cir. 2008). “By contrast, in a factual attack, the challenger disputes  
21 the truth of the allegations that, by themselves, would otherwise invoke federal  
22 jurisdiction.” *Meyer*, 373 F.3d at 1039. When addressing a factual attack on jurisdiction,  
23 a court may review evidence beyond the complaint. *Id.* The plaintiff has the burden of  
24 proving that the court has subject matter jurisdiction. *Tosco Corp. v. Cmtys. for a Better*  
25 *Env’t*, 236 F.3d 495, 499 (9th Cir. 2001), *overruled on other grounds by Hertz Corp. v.*  
26 *Friend*, 559 U.S. 77 (2010).

27 ...

28 ...



1           **A. Exhaustion**

2           A plaintiff may not bring an FTCA claim until the plaintiff has exhausted all  
3 administrative remedies. *McNeil v. United States*, 508 U.S. 106, 113 (1993). Courts  
4 strictly construe this requirement because “[s]overeign immunity is an important limitation  
5 on the subject matter jurisdiction of federal courts. The United States, as sovereign, can  
6 only be sued to the extent it has waived its sovereign immunity.” *Vacek v. United States*  
7 *Postal Serv.*, 447 F.3d 1248, 1250–1251 (9th Cir.2006). “[Courts] have repeatedly held  
8 that the exhaustion requirement [of the FTCA] is jurisdictional in nature and must be  
9 interpreted strictly . . . . Any such waiver must be strictly construed in favor of the United  
10 States.” *Id.* As such, § 2675(a) of the FTCA provides that:

11           An action shall not be instituted upon a claim against the United States . . . unless  
12 the claimant shall have first presented the claim to the appropriate Federal agency  
13 and his claim shall have been finally denied by the agency in writing and sent by  
14 certified or registered mail.

15           28 U.S.C. § 2675(a).

16           Here, Defendant argues that “Plaintiff has failed to exhaust her administrative  
17 remedies with respect [to] any and all claims other than a failure to monitor by the officer  
18 on duty[.]” (Doc. 109 at 11.) The only allegations Plaintiff brought in her Second  
19 Amended Complaint are that Defendant (1) “failed to provide adequate officer monitoring  
20 of an out-of-bounds inmate” and (2) “failed to adequately staff [the] housing unit with at  
21 least two officers as required.” (Doc. 10 at 3.) It is undisputed that in her September 15,  
22 2016 administrative tort claim, Plaintiff only complained that she was sexually assaulted  
23 as result of the on-duty officer failing to monitor the prisoners in the B-2 Unit. (Doc. 102-  
24 4 at 7 (Def.’s Ex. 3, Attach. B).) Plaintiff did not mention inadequate staffing in her  
25 administrative tort claim. (*See id.*) Plaintiff’s administrative tort claim was denied on  
26 March 10, 2017. (*Id.* at 9 (Def.’s Ex. 3, Attach. C).) There is no evidence that Plaintiff  
27 filed any other administrative tort claims regarding the May 19, 2016 sexual assault or  
28 inadequate staffing or that she exhausted any other claims. On these facts, the Court finds  
that the only claim Plaintiff exhausted is her claim that she was sexually assaulted due to

1 Defendant's failure to provide adequate monitoring of her housing unit. All other claims  
2 will be dismissed for failure to exhaust.

3 **B. FTCA/Discretionary Function Exception**

4 **1. Legal Standard**

5 "The FTCA provides a limited waiver of the sovereign immunity of the United  
6 States for torts committed by federal employees acting within the scope of their  
7 employment." *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000) (citing *Valdez*  
8 *v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995)). Under the FTCA, the United States  
9 may be held civilly liable for the torts of its employees "in the same manner and to the  
10 same extent as a private individual under like circumstances." 28 U.S.C. § 2674. To state  
11 a claim under the FTCA, a plaintiff "must show the government's actions, if committed by  
12 a private party, would constitute a tort" under state law. *Love v. United States*, 60 F.3d  
13 642, 644 (9th Cir. 1995); 28 U.S.C. § 1346(b) (a plaintiff must allege that the United States  
14 "would be liable to the claimant" as "a private person" "in accordance with the law of the  
15 place where the act or omission occurred"). In other words, a plaintiff must allege a state  
16 law tort claim. *F.D.I.C. v. Meyer*, 510 U.S. 471, 445, 477–78 (1994). Certain state law  
17 claims, however, are excluded from the FTCA—for example, libel, slander,  
18 misrepresentation, false arrest, and malicious prosecution. *See* 28 U.S.C. § 2680(h).

19 Also, the FTCA does not apply to claims involving "an act or omission of an  
20 employee of the Government . . . [that is] based upon the exercise or performance or the  
21 failure to exercise or perform a discretionary function or duty on the part of a federal agency  
22 or an employee of the Government, whether or not the discretion involved be abused." 28  
23 U.S.C. § 2680(a). Thus, the FTCA may not apply to acts that "involv[e] an element of  
24 judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Green v. United*  
25 *States*, 630 F.3d 1245, 1249 (9th Cir. 2010) (if the discretionary function exception applies,  
26 sovereign immunity is reinstated).

27 The government bears the burden of showing that the discretionary function  
28 exception applies. *Bear Medicine v. U.S. ex rel. Sec'y of the Dep't of the Interior*, 241 F.3d

1 1208, 1213 (9th Cir. 2001). To make that showing, the government must prove that each  
2 of the allegedly wrongful acts, by each allegedly negligent actor, is covered by the  
3 discretionary function exception. *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174  
4 (9th Cir. 2002) (“when determining whether the discretionary function exception is  
5 applicable, ‘[t]he proper question to ask is not whether the Government as a whole had  
6 discretion at any point, but whether its allegedly negligent agents did in each instance’”) (quoting *In re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir. 1995)).

8 For the discretionary function exception to apply, the challenged action must satisfy  
9 a two-part test. *Valdez*, 56 F.3d at 1179. First, the court must determine “whether a federal  
10 statute, regulation, or policy mandated a specific course of action, or whether the  
11 government actor retained an element of judgment or choice with respect to carrying out  
12 the challenged action.” *Green*, 630 F.3d at 1250. If so, the court proceeds to determine  
13 whether that judgment was based on considerations of public policy. *Id.* (internal citations  
14 and quotations omitted). If both prongs are satisfied, then the challenged action “is immune  
15 from suit—and federal courts lack subject matter jurisdiction—even if the court thinks the  
16 government abused its discretion or made the wrong choice.” *Id.*

## 17 2. Discussion

18 Plaintiff’s claim against Defendant is grounded on the inadequate monitoring of her  
19 housing unit on the day she was sexually assaulted. Defendant argues that this claim is  
20 barred by the discretionary function exception to the FTCA. (Doc. 109 at 12.)

21 As mentioned previously, federal law imposes a duty on the BOP to “provide  
22 suitable quarters and provide for the safekeeping, care, and subsistence of all persons  
23 charged with or convicted of offenses against the United States.” 18 U.S.C. § 4042(a)(2).  
24 However, courts have held that although § 4042 imposes a general duty to house and care  
25 for prisoners, it does not mandate a specific manner in which to carry out that duty. *See*  
26 *Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir.1998); *Calderon v. United*  
27 *States*, 123 F.3d 947, 950 (7th Cir. 1997). Likewise, the PREA National Standards provide  
28 a list of several factors for prison officials to consider when adequately staffing BOP

1 facilities and for determining the need for video monitoring, thus giving officials broad  
2 discretion when making such decisions. 28 C.F.R. § 115.13. And, BOP PS 5500.14  
3 mandates that official counts and census checks take place at certain times, but outside of  
4 those times, the protocols for monitoring housing units are left to the discretion of the  
5 facility. Plaintiff points to PS 3420.11 and 1210.24 to argue that monitoring of her housing  
6 unit did not involve an element of judgment or choice. (Doc. 122 at 11.) But those Program  
7 Statements do not provide any specific parameters or protocols for monitoring housing  
8 units. Thus, Defendant has satisfied the first prong of the discretionary function analysis,  
9 and Plaintiff has failed to present evidence to create a question of fact that the monitoring  
10 of her housing unit did not involve a discretionary governmental function. Further,  
11 “[w]hen a statute, regulation or agency guideline allows a government agent to exercise  
12 discretion, it must be presumed that the agent’s acts are grounded in policy when exercising  
13 that discretion.” *Weissich v. United States*, 4 F.3d 810, 814 (9th  
14 Cir.1993) (citing *Gaubert*, 499 U.S. at 324). Plaintiff has not overcome this presumption,  
15 thus the second prong of the analysis has been satisfied as well.

16 Although Plaintiff’s allegations of sexual assault are troubling, decisions by  
17 governmental officials as to the day-to-day security needs of a prison, including the number  
18 of officers to employ to supervise a given area, where to place video cameras if they are to  
19 be used at all, and tactical choices made surrounding the movement of prisoners within an  
20 institution are judgment calls and choices based on policy determinations that seek to  
21 accommodate safety and security goals in addition to finite agency resources.<sup>8</sup> Thus, such  
22 decisions fall within the realm of discretionary governmental decisions that Congress  
23 intended to protect from exposure to suit by private individuals. *See Cohen*, 151 F.3d at  
24 1345 (discretionary function exception precludes suit based on allegedly improper  
25 decisions in classifying prisoners and placing them in institutions, even if result is one  
26 prisoner attacking another prisoner); *Calderon*, 123 F.3d at 951 (discretionary function

---

27  
28 <sup>8</sup> Thus, even if Plaintiff had exhausted the portion of her FTCA claim regarding inadequate staffing, it would be barred by the discretionary function exception for the same reasons.

1 exception precludes FTCA claim by federal prisoner injured in assault by another prisoner).  
2 “Balancing the need to provide inmate security with the rights of the inmates to circulate  
3 and socialize within the prison involves considerations based upon public  
4 policy.” *Calderon*, 123 F.3d at 951 (citing *Bell v. Wolfish*, 441 U.S. 520, 547–48  
5 (1979) (holding that prison administrators should be afforded wide-ranging deference in  
6 implementing and executing policies because discretion is needed to preserve internal  
7 discipline and maintain institutional security)).

8 Plaintiff argues that she was sexually assaulted by a prisoner who was “out of  
9 bounds” and that the on-duty officer should not have allowed the other prisoner to enter  
10 Plaintiff’s housing unit. But as the Court discussed above, day-to-day security  
11 considerations, including monitoring the housing unit for out of bounds inmates, are  
12 precisely the type of policy decisions that are within the discretion of Defendant. Because  
13 the Court finds that the decisions involved here were discretionary and that the discretion  
14 was grounded in public policy considerations, the discretionary function exception to the  
15 FTCA protects Defendant from suit, even if Defendant abused its discretion or was  
16 negligent in the performance of its discretionary function. *See Calderon*, 123 F.3d at  
17 951. Accordingly, because the Court is without subject matter jurisdiction in this case, the  
18 Court will dismiss Plaintiff’s claim.<sup>9</sup>

19 **Accordingly,**

20 **IT IS ORDERED:**

21 (1) Plaintiff’s Motion for Summary Judgment (Doc. 76) is **denied**.

22 ////

23 ////

24 ////

25 ////

26 ////

---

27  
28 <sup>9</sup> Because the Court lacks subject matter jurisdiction over Plaintiff’s claim, it will not address the remainder of Defendant’s arguments presented in its Motion for Summary Judgment.

1 (2) Defendant's Motion to Dismiss/Motion for Summary Judgment (Doc. 109)  
2 is **granted** as discussed herein, and the Clerk of Court must terminate the action and enter  
3 judgment accordingly.

4 Dated this 18th day of October, 2019.

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



---

Honorable David C. Bury  
United States District Judge