

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action # 05-10192

ONE STAR CLASS SLOOP SAILBOAT
BUILT IN 1930 WITH HULL NUMBER
721, NAMED "FLASH II",

Defendant.

KERRY SCOTT LANE,

Claimant.

**CLAIMANT'S MOTION FOR RECONSIDERATION
OF THE COURT'S ORAL RULING GRANTING SUMMARY JUDGMENT
IN FAVOR OF THE GOVERNMENT ON THE ISSUE OF
THE DISCRETIONARY FUNCTION EXCEPTION TO THE
FEDERAL TORT CLAIMS ACT**

Claimant, Kerry Scott Lane, M.D., through undersigned counsel, hereby moves this Honorable Court to reconsider its oral ruling, made during a telephonic conference on or about May 15-17, 2007¹ – that the government was immune from damages under the Federal Tort Claims Act under the discretionary function exception, 28 U.S.C. § 2680(a). As grounds for this motion Claimant states the following:

1. The government raised its discretionary function argument for the first time during the hearing on the cross-motions for summary judgment, held before this Court on May 3, 2007. At

¹ The telephonic status conference does not appear in the docket.

the close of that hearing, the government asked permission to file additional memoranda. The Court stated the government was free to do so, but stated that it should be done quickly because the Court would not await further filings before ruling on the cross-motions for summary judgment.

2. On May 10, the government filed its Supplemental Memorandum which devoted three pages to the discretionary function exception, briefing the legal authorities on the exception only in the broadest of terms. Fearing the Court would be ruling on the pending motions before she had a chance to respond, Claimant's counsel hurriedly filed a response on May 11, but frankly could not make sense of the very complicated discretionary function exception.

3. Subsequent research on this issue led Claimant to believe that the agency conduct fell into one of the exceptions to the exception – the mandatory duty rule of *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (“the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.”) Accordingly, Claimant asked the government to provide a copy of the Department of Justice Manual *A Guide to Interlocutory Sales and Expedited Settlement* (2003). The government refused to provide discovery of this document, saying it was for internal use only, and this Court would not force the government to turn it over, stating instead that the court could make an adverse inference from the refusal.

4. With the government continuing to refuse to provide the document, Claimant's counsel put the word out among the defense bar, and in the weeks since the trial, one of her colleagues managed to obtain the document by simply making a phone call to the Justice

Department.² As expected, the *Guide to Interlocutory Sales* shows that the Marshal Service violated its mandatory duties – imposed by federal statute as well as internal policy – in selling the sailboat through Guernsey’s auction house without a minimum reserve, for a tenth of its appraised value.

WHEREFORE, for the reasons set out in the attached Memorandum, Claimant requests that this Court reconsider and reverse its previous oral ruling that the government can hide behind sovereign immunity for its actions by virtue of the discretionary function exception.

Respectfully submitted,
Kerry Scott Lane, MD,

By his attorneys,

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² The Justice Department sent the document as a PDF file, but it is too large to efile, so Claimant is efilng relevant excerpts from the Guide, and will email the entire Guide in its original PDF format to the courtroom deputy.