IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

WILLIAM T. WARD, Plaintiff,	)	
v.	)	Civil Action No. 82-0100-A
UNITED STATES OF AMERICA, Defendant.	)	

MEMORANDUM

This matter comes before the court on defendant's motion for summary judgment and plaintiff's motion for partial summary judgment under Fed. R. Civ. P. 56. For reasons stated below and from the bench on June 25, 1982, the court denies both motions.

In this case plaintiff Ward sues for damages due to injuries arising out of a car crash allegedly caused by one Lieutentant Colonel Robert Warren. Warren retired from active duty in the Army in 1974 and joined the National Guard in 1975. On October 29, 1980, while serving full time in the Guard (pursuant to 32 U.S.C. § 503, which provides for periodic training of Guard personnel), Warren attended an all-night party held for a departing member of his unit, at which he consumed alcohol until at least 4 a.m. He went to work at 8 a.m., and at 12:45 p.m. on October 30, he headed off for Ft. Myer to have insignia sewn on his uniforms. He turned into the wrong lane on Route 110, a divided highway by the Pentagon, and struck plaintiff Ward's car.

Ward sues under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which provides that the United States will be liable for the negligence "of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." [Emphasis added.] A district court must apply "the whole law of the State where the act or omission occurred." United States v. Richards, 369 U.S. 1, 11 (1961)(emphasis added).

Other relevant federal statutes are the "Driver's Act," 28 U.S.C. § 2679(b), which provides that someone who suffers personal injuries due to the operation of an auto by an employee of the United States while the employee is acting within the scope of his employment may sue only the government and not the employee; and 28 U.S.C. § 2671, which defines "acting within the scope of his office or employment" as "acting in line of duty," when a member of the military is the alleged tortfeasor.

The U.S. argues that on the undisputed facts, Warren could not have been acting in the line of duty when the accident occurred. The government's reasons are 1) the accident occurred during his lunch half-hour, 2) he was driving his own car, and 3) the military regulations state that "[e]ach officer is responsible for insuring that his...uniform and insignia are in conformance with [Army regulations]." (Exhibit 7, "Wear and Appearance of Army Uniforms and Insignia," ¶ 2-2.)

Being "on one's own time" is of course only one factor used to determine whether one has acted within the line of duty. Moreover, the government has submitted an affidavit of one Colonel Henry R. Callos, in which Callos states that "there is no way that one can travel by car from the D.C. Armory to Fort Meyer[sic] and return during the half-hour alloted [sic] for lunch." (Exhibit 9, ¶ 8.) Thus, the government's own affidavit creates an unresolved factual question whether Warren was indeed on his lunch break when he struck Ward. (Warren had the discretion to choose when to take his lunch break.) Arguably Warren was on lunch break for the first thirty minutes he was away. Since he struck Ward at the beginning of his trip, he was probably (but not indisputably) within the half-hour that counted as lunch-break time. For purposes of this summary judgment motion, however, the court cannot conclude that Warren was on his lunch break.

As for the third reason offered by the government, the regulations do indeed state that maintenance of the uniform and insignia is an officer's responsibility, but this does not mean that the officer is not performing a required military function

when he attends to his regalia. In fact, it means just the opposite: it is a military duty to maintain insignia properly. The court cannot rule that an officer is not acting "in the line of duty" when he undertakes steps to maintain his insignia as the military regulations require.

Thus, only the second reason offered by the government, driving one's own vehicle, remains in support of its motion. Under Virginia law, this is one factor used to determine whether an employee is acting within the scope of his employment. See, e.g., Strohkorb v. United States, 268 F. Supp. 526 (E.D. Va. 1967)(duty officer drove own car home to eat dinner). By itself, however, driving one's own car does not render wholly impermissible an inference that one has acted within the scope of employment. See Barber v. Textile Machine Works, 178 Va. 435, 17 S.E.2d 359 (1941); Thomas v. Wingold, 206 Va. 967, 147 S.E.2d 116 (1966). Thus the court will deny defendant's motion by the accompanying order.

As for plaintiff's motion, Virginia law provides that the question whether an agent is acting within the scope of his authority is a factual matter to be presented to a jury under proper instructions. Neff Trailer Sales, Inc. v. Dellinger, 221 Va. 367, 269 S.E.2d 386 (1980). The undisputed facts which plaintiff marshalls in support of his motion are not so compelling as to require a court to rule that Warren was acting in the line of duty as a matter of law, and thereby remove the issue from a jury, if a jury were available to plaintiff in this case. (Of course, under the Federal Tort Claims Act, a plaintiff is not entitled to a jury trial.) Thus, plaintiff is not entitled to partial summary judgment on the issue of "acting within the scope of employment," and must submit the issue to the court at trial. Therefore the court denies plaintiff's motion by the order accompanying this memorandum.

DATE: _____

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UNITED STATES DISTRICT JUDGE