TIANSHU LI, Plaintiff, - against - ISMAEL APONTE, and UNITED STATES OF AMERICA, Defendants.

05 Civ. 6237 (NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 74725

September 15, 2008, Decided
September 16, 2008, Filed

SUBSEQUENT HISTORY: Opinion withdrawn by, Remanded by *Tianshu Li v. Aponte, 2009 U.S. Dist. LEXIS 59741 (S.D.N.Y., May 5, 2009)*

COUNSEL: [*1] For Plaintiff: Derek T. Smith, Esq., Akin & Smith, LLC, New York, New York.

For Defendants: Peter M. Skinner, Assistant United States Attorney, New York, New York.

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINION BY: NAOMI REICE BUCHWALD

OPINION

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Tianshu Li ("Li") brought this action alleging various common law and constitutional tort claims under the Federal Tort Claims Act ("FTCA") and the federal and New York state constitutions, all stemming from her arrest by postal officer Ismael Aponte ("Aponte"). This opinion addresses (i) Aponte's motion to dismiss the FTCA claims against him for lack of subject matter jurisdiction under *Fed R. Civ. P. 12(b)(1)* any common law tort claims asserted against him, (ii) the defendants' motion for summary judgment under *Fed R. Civ. P. 56* with respect to the remaining claims, and (iii) Li's motion to amend the *ad damnum* clause of her complaint to increase the amount of damages sought ' in connection with her FTCA claims. For the reasons set forth below, Aponte's motion to dismiss is granted, the defendants' motion for summary judgment is granted in part and denied in part, and Li's motion to amend [*2] the complaint is granted in part and denied in part.

BACKGROUND

[1]

1 The parties were permitted to conduct fact and expert discovery for seventeen months before we granted to leave to file the instant motions on August 22, 2007. Unless otherwise indicated, the following facts are taken from the parties' statements pursuant to *Local Civil Rule 56.1*. As described, the facts are either undisputed or interpreted in the light most favorable to the plaintiff.

On December 16, 2004, Tianshu Li was walking her dog, a small Lhasa Apso named Shelby, in midtown Manhattan. She stopped by the Franklin Delano Roosevelt Station Post Office ("FDR Post Office") [2] and walked with Shelby through one of the glass entrance doors, not noticing [3] the prominent signs on each door stating "No Pets Allowed, Service Dogs Only." [4]

2 Def. R. 56.1 Stat. P 15; Pl. Reply R. 56.1 Stat. P 11; Li's Dep. 52:21-24.
3 Pl. Reply R. 56.1 Stat. P 12.
4 Def. R. 56.1 Stat. P 16.

Whether Shelby was, in fact, a service animal is a matter of contention. According to the Postal Operations Manual, a service animal is one "used to assist persons with disabilities," and "may be any species, breed, or size and may or may not be licensed, certified, [*3] or marked as a service animal." [5] A service animal "can assist persons with a wide range of disabilities, whether a disability is visible or not, including physical and mental disorders." [6] Although Li had been awarded social security disability benefits in June 2004 following an administrative finding that she had severe Chronic Fatigue Syndrome ("CFS") and Depressive Disorder, she did not exhibit any visible signs of disability. [7] Nor was Shelby wearing an article of clothing that might have visibly identified her as a service animal (and nor was she li-

censed as one). [8] However, Li claims that Shelby encouraged her to exercise regularly and provided her with companionship, activities she ordinarily struggled with because of the fatigue brought about by her conditions. [9]

5 Memorandum of Law in Opposition to the Defendants' Summary Judgment Motion to Dismiss ("Opp'n Mem."), Exhibit A at 26.
6 Opp'n Mem. Ex. A at 26.
7 Def. R. 56.1 Stat. P 4; Pl. Reply R. 56.1 Stat. P 5. At that time, Li was unable to work; she was chronically disabled; she was considered disabled under Social Security regulations; she did not have the stamina or physical energy to interact at social levels; her fatigue [*4] rendered her unable to do any type of activity most of the time; and her chronic physical illness caused her emotional strain and depression. Def. R. 56.1 Stat. P 4.
8 *Id.* P 20.
9 Pl. Reply R. 56.1 P 10; Def. R. 56.1 Stat. P 4.

Ismael Aponte, a postal officer stationed inside the FDR Post Office at the time, noticed Li and her dog walking towards the escalator to the second floor. [10] Aponte, believing that Shelby was not a service dog, stopped Li and stated "You can't bring the dog upstairs." [11] "I just have [an] urgent letter that I have to drop off to the box upstairs, take ten seconds to go up and down," Li responded, "would you be kind enough to keep an eye on my little dog? I'll be right back." Aponte shook his head. Li noticed a nearby pillar to which she could tie Shelby's leash, and asked Aponte if she could briefly leave her dog in the lobby while she went upstairs. Again, Aponte said "No." [12]

10 *Id.* P 18.
11 *Id.* P 21; Pl. Reply R. 56.1 Stat. P 12; Li's Dep. 71:24-72:3. Aponte did not ask whether Li was disabled or whether Shelby was a service dog, and nor did Li offer this information. Def. R. 56.1 Stat. P 20; Aponte's Dep. 17:15-20, Aug. 9, 2006.
12 Def. R. 56.1 Stat. P 21; Pl. Reply [*5] R. 56.1 Stat. P 12; Li's Dep. 72:4-8, 76:11-15.

Aponte then suggested that Li drop her letter in the mailbox on the street outside. [13] Li explained that her letter was urgent, and that it would be delivered more quickly if dropped in the upstairs box. "I don't need to go up," Li said, "I'll just wait here for somebody who's going up to drop it off for me." Li and Aponte stood together in front of the up escalator in silence, [14] while Li waited for another customer to arrive. Eventually, a middle-aged woman entered the lobby. "Excuse me ma'am," Li called out, "would you be kind enough to bring a letter up to drop off at the mailbox? It's already got a stamp on it."

13 Def. R. 56.1 Stat. P 22. The parties dispute the manner of Aponte's request, relying on various inconsistent portions of Li's deposition. Li claims that the request was phrased as a question: "Why don't you put your letters in the outside mailbox?" Pl. Reply R. 56.1 Stat. P 12; Li's Dep. 78:10-11, 79:20-22, 81:9-11. Defendants contend that the request was an instruction, citing to Li's testimony, "And he also told me to drop off the letter outside in the mailbox." Li's Dep. 72:21-22; Def. R. 56.1 Stat. P 22.
14 Def. R. 56.1 [*6] Stat. PP 22, 23; Pl. Reply R. 56.1 Stat. P 12; Li's Dep. 73:5-8.

According to Li, before she could offer the letter to the woman, Aponte grabbed her above the elbows with two hands and started pushing her toward the doors. [15] Li was shocked and began screaming, "What are you doing? What are you doing? I'm just trying to send a letter to someone." [16] Intent on removing Li, Aponte ordered "Get out of here!" [17] As the scuffle continued, the woman to whom Li had tried to hand the letter proceeded up the escalator, and a second, elderly woman approached. Li's left arm was tightly grasped by Aponte, so Li reached out with her right arm to pass the letter to the woman, while at the same time trying to shake Aponte's grip loose with her left arm. The elderly woman, apparently not wanting to get involved, also continued past the struggle and up the escalator.

15 Def. R. 56.1 Stat. PP 23, 24; Pl. Reply R. 56.1 Stat. PP 12, 13; Li's Dep. 88:5-9. Aponte had apparently decided that Li's toy dog was a threat to customers in the lobby. Pl. Reply R. 56.1 Stat. P 8.
16 Def. R. 56.1 Stat. P 25; Pl. Reply R. 56.1 Stat. P 14; Li's Dep. 97:15-17.
17 Def. R. 56.1 Stat. P 26. The deposition says: "He said something [*7] like get out of here, or something like that." Li's Dep. 93:7-11.

Aponte then declared, "That's it. You're not going anywhere." He grabbed Li's right arm and then jerked both of her arms behind her back. In Li's account of the facts, Aponte then pushed her into a column abutting the glass entranceway and then muscled her up against the glass wall. Securing Li's hands behind her back with a tight grip, Aponte dragged her through the doors and out into the street.

Li claims that, once outside, Aponte threw her against a concrete column and her glasses flew off as her head struck the column. Aponte then pulled Li back and pinned her tightly up against the street-side of the glass

wall. With one hand gripping both of Li's hands behind her back, and the other hand grasping Li's neck, Aponte dragged Li to the ground. [18] Digging his knee into Li's back to keep her in place -- pinned face-down on the ground -- Aponte retrieved his walkie-talkie from his belt and called for assistance. [19] Several officers soon arrived at the scene and brought Li to her feet. [20] Sergeant Jose Rodriguez ("Rodriguez"), a Postal Police supervisor, approached and informed her, "You're free to go. We're not arresting [*8] you." [21]

18 Def. R. 56.1 Stat. PP 26-30; Pl. Reply R. 56.1 Stat. PP 14-16; Li's Dep. 102:15-17, 116:7-12.

19 Def. R. 56.1 Stat. P 30; Pl. Reply R. 56.1 Stat. P 16. Notably, defendants' *Rule 56.1* statement provides a somewhat different account of this part of the incident. Although it also states that Aponte pulled Li to the ground, it asserts that "During Aponte's struggle with Li, he did not punch, kick, knee, elbow, handcuff, arrest or use a weapon against her." Def. R. 56.1 Stat. P 31.

20 *Id.* P 32; Pl. Reply R. 56.1 Stat. P 17. Li was on the ground for approximately five to ten minutes. Pl. Reply R. 56.1 Stat. P 16.

21 Def. R. 56.1 Stat. P 32; Pl. Reply R. 56.1 Stat. P 17; Li's Dep. 136:22-137:2. Li did not complain of pain to Rodriguez, nor did she appear to Rodriguez to be in any pain. Def. R. 56.1 Stat. P 32.

Li was upset at her treatment, however, and insisted on making a statement. Though Li claims that she felt significant pain at the time, she managed to walk the half-block to the Postal Police Office without difficulty. [22] After Li had hand-written a two-page statement, Rodriguez offered to call her an ambulance, but she declined. As she was walking out the door to leave, Li passed [*9] out briefly, leaned against the door, but managed to keep her feet. [23] Li walked the two blocks to her home, [24] then lay down and rested until the early evening. [25] Around 5:00 P.M., Li took a taxi to the emergency room of New York Presbyterian Hospital, complaining of generalized aches, lower back pain and dizziness. [26] Though the Li was diagnosed with little more than bruising and "soft tissue injury," she spent the night at the hospital and left the following morning with instructions to take Tylenol and apply ice followed by warm compresses. [27]

22 *Id.* P 33; Pl. Reply R. 56.1 Stat. P 18; Li's Dep. 137:3-7, 140:6-19. Li was not bleeding, and did not request medical attention. Def. R. 56.1 Stat. P 33.

23 *Id.* P 34; Pl. Reply R. 56.1 Stat. P 19.

24 Def. R. 56.1 Stat. P 35; Pl. Reply R. 56.1 Stat. P 19. At this point, Li was bruised on her arm, and had general pain in her back, head, neck and arms. Pl. Reply R. 56.1 Stat. P 19. However, Li had no further specific injuries -- she was not cut or bleeding, and had no trouble walking home. Def. R. 56.1 Stat. P 35; Pl. Reply R. 56.1 Stat. P 19.

25 Def. R. 56.1 Stat. P 36, 38; Pl. Reply R. 56.1 Stat. P 20, 21.

26 Def. R. 56.1 Stat. P 38, 39; Pl. Reply [*10] R. 56.1 Stat. P 21, 22.

27 Def. R. 56.1 Stat. P 40.

Li's condition subsequently declined. In the spring of 2005, she could only walk out of her apartment with a cane and aided by a support person. By the end of the summer of 2005, Li's spinal disc had herniated and began to pinch a nerve, causing her excruciating pain. The pain rendered Li bedridden, and prevented her from showering herself or even turning in bed. Li's Chronic Fatigue Syndrome also worsened. [28]

28 Pl. Reply R. 56.1 Stat. P 24; Li Aff. P 12-13, Dec 13, 2006. A February 23, 2005 MRI showed a bulging disc in Li's back, while a February 6, 2006 MRI showed both that bulging disk as well as a different, herniated disc. Li Aff. P 13.

Postal Inspection Service's Use of Force Continuum

The Postal Inspection Service's training manual prescribes the manner in which postal officers are required to respond to threats or non-compliance by customers. This so-called "use of force continuum" has six levels of control corresponding to six levels of resistance that an officer may encounter. Under the first two levels of force on the continuum, the officer merely asserts authority through his presence and the use of verbal commands. The continuum [*11] then escalates to "soft empty hand techniques," which include "escort" holds and the use of pressure points. The fourth level is "hard empty hand techniques," which include impact strikes with the hand, foot, elbow or knee and "take down" maneuvers, i.e. the use of force to bring a subject to a prone position on the ground. The final two steps permit the use of an intermediate weapon, such as a baton, followed by deadly force. [29]

29 Def. R. 56.1 Stat. P 10.

The use of force continuum is governed by the "one plus one" philosophy -- officers may respond to the level of force presented with force at the next highest level on the continuum. Thus, if a subject presents low-level physical non-compliance, such as standing motionless when instructed to move, postal officers may respond with soft empty hand techniques, such as an "escort hold." Similarly, if a subject presents "defensive resis-

tance," such as pushing away, pulling away or blocking, postal officers may respond with hard empty hand techniques, such as impact strikes with a hand or foot or "take down" maneuvers. Depending upon the totality of the circumstances, postal officers may escalate as rapidly as necessary through the use [*12] of force continuum. [30]

30 *Id.* P 11.

Postal officers are generally permitted to use any technique that satisfies the overarching "one-plus-one" philosophy governing the continuum. That is, an officer may respond with any action that is comparable to, i.e. has the same potential for injury as, the techniques specified at a permissible level on the continuum. [31] In relevant application here, pushing a subject against a wall has the same potential for injury as the "hard empty hand technique" level of control and, thus, is permitted in response to a subject pulling away. [32]

31 *Id.* P 13.
32 *Id.* P 14.

DISCUSSION

Li's complaint fills the landscape with causes of action, some without any basis in law. Nevertheless, we believe that the complaint fairly alleges several FTCA claims arising under the common law of New York, including false arrest, malicious prosecution, assault, battery, negligent hiring, retention, and supervision and intentional infliction of emotional distress. Li has also asserted unspecified implied rights of action arising under the federal and New York constitutions. *See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*; *Brown v. State of New York, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).* [*13] We first review the applicable legal standards and then turn to the substance of the parties' motions.

I. Legal Standards

In resolving a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(1)*, the district court may consider evidence beyond the allegations enumerated in the complaint. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 121 n.1 (2d Cir. 1998).* The burden rests on the party asserting jurisdiction to prove subject matter jurisdiction "by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005).* A case is properly dismissed under *Rule 12(b)(1)* when "the district court lacks statutory or constitutional power to adjudicate it." *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).*

A motion for summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56 (c).* In deciding a motion for summary judgment, the evidence submitted must be viewed in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* While credibility [*14] determinations, weighing evidence, and drawing legitimate inferences from facts are functions that the Court must leave to the jury, if the nonmoving party does not present evidence from which a reasonable jury could return a favorable verdict, then summary judgment is appropriate. *See, e.g., Golden Pac. Bancorp. v. F.D.I.C., 375 F.3d 196, 200 (2d Cir. 2004).*

II. FTCA Claims Against Aponte

Under the FTCA, a suit against the United States is the exclusive remedy for damages "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *28 U.S.C. § 2679(b)(1).* Although this section does not apply to alleged violations of federal constitutional or statutory rights, *see id. § 2679(b)(2)*, it does provide government employees with immunity against common law tort claims. *Rivera v. United States, 928 F.2d 592, 608 (2d Cir. 1991).*

Here, the Attorney General has certified that Aponte was a government employee acting within the scope of his employment at the time of the incident giving rise to Li's claims. [33] We recognize that the Attorney General does not have the "final word" on whether a federal officer [*15] is immune from suit, *see, e.g., Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007)*, but decline to review the certification because Li has not disputed its validity, *see, e.g., McHugh v. University of Vermont, 966 F.2d 67, 74 (2d Cir. 1992).* Accordingly, to the extent the complaint asserts FTCA claims against Aponte, they are properly dismissed for lack of subject matter jurisdiction.

33 Skinner Decl. P 16, Ex. P.

III. FTCA Claims Against United States

Proceeding under the FTCA, Li has asserted a number of claims of false arrest, assault and battery, malicious prosecution, negligence and intentional infliction of emotional distress. [34] We address the merits of the defendants' motions as they relate to each of these claims *seriatim.*

34 The government's liability under the FTCA is limited to "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." *28 U.S.C. § 1346(b) (1988)*. Because the acts at issue in this case all occurred in New York, we apply New York law to Li's FTCA claims. *See Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994)*.

A. False Arrest and Imprisonment

The United States [*16] is entitled to summary judgment on Li's false arrest and imprisonment claim because the undisputed facts and circumstances of Li's arrest [35] support a finding of probable cause for a violation of the prohibition against dogs on postal property.

35 The United States has conceded for the purposes of this motion that Aponte's actions constituted not merely an investigative *Terry* stop, but an arrest requiring probable cause.

To prove false arrest under New York law, the plaintiff must show: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. *Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994)*. [36] Only the last of these elements is disputed. The government claims that Aponte had probable cause to arrest Li, a complete defense to an action for false arrest. *Zanghi v. Inc. Vill. of Old Brookville, 752 F.2d 42, 45 (2d Cir. 1985)*. Probable cause exists "when the arresting officer has knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed [*17] by the person to be arrested." *Singer v. Fulton County Sheriff, 63 F.3d 110, 118 (2d Cir. 1998)*. A finding of probable cause is made based on the "totality of the circumstances." *Illinois v. Gates, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1982)*.

36 Under New York law, no distinction is drawn between false arrest and false imprisonment. *See Posr v. Doherty, 944 F.2d 91, 96 (2d Cir. 1991)* (citing *Jacques v. Sears, Roebuck & Co., 334 N.Y.S.2d 632, 638, 30 N.Y.2d 466, 472-73, 285 N.E.2d 871 (N.Y. 1972))*.

There is no dispute that, by all objective measures available at the time, Li appeared to be an able-bodied woman and Shelby an ordinary pet. Consequently, a reasonable juror could conclude only that Aponte had probable cause to arrest Li on the basis of Shelby's presence in the FDR post office, which violated *39 C.F.R. § 232.1(j)*, the prohibition against dogs on postal property, and *39 C.F.R. § 232.1(d)*, the rule requiring conformity with signs.

Li counters with the argument that Shelby was a service dog excepted from the normal rules governing the presence of dogs on postal property. Whether Shelby was, in fact, a service dog is irrelevant because the absence of any objective indicia of Shelby's protected status [*18] supports Aponte's probable cause determination. Shelby was not the size and breed ordinarily associated with service dogs; nor was it wearing an article of clothing that might have identified it as such. Li exhibited no apparent sign of disability in the course of her interaction with Aponte and did not protest his instructions on the ground that Shelby was a service dog. To the contrary, Li appeared willing to leave Shelby behind as she proceeded up the escalators, negating the suggestion that Shelby was integral to Li's functionality. Under the circumstances, we are left with the firm conviction that Aponte had a reasonable basis to conclude that Shelby was not a service animal. *See Illinois v. Gates, 462 U.S. 213, 244 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)* ("[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.").

Li also argues that Aponte should not have arrested her without asking whether Shelby was a service dog. This argument appears to rest on the proposition that, even where an officer has information sufficient to support an inference of an offense being committed, probable cause does not exist if the officer could discover, [*19] upon further inquiry, information that negates that inference. Li cites no authority to support this proposition, however, and, indeed, the law in the Second Circuit is to the contrary. *See Panetta v. Crowley, 460 F.3d 388, 398 (2d Cir. 2006)* ("Once an officer has probable cause, he or she is 'neither required nor allowed' to continue investigating, sifting and weighing information." (citing *Krause v. Bennett, 887 F.2d 362, 372 (2d Cir. 1989))*); *Jaegly v. Couch, 439 F.3d 149, 153 (2d Cir. 2006)* ("An arresting officer is not required to explore and eliminate every plausible claim of innocence before making an arrest.") . Of course, the facts known to Aponte could not give rise to a certainty that Shelby's presence was unlawful -- according to the Postal Operations Manual, a service dog may be unlabeled, of any breed and size, and may assist with a disability that is not visible. Nevertheless, "[t]he fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause," *United States v. Fama, 758 F.2d 834, 838 (2d Cir. 1985)*, because "probable cause requires only a probability or substantial chance" that an offense is being committed. *Illinois, 462 U.S. at 244 n.13*.

Accordingly, [*20] because Aponte had probable cause to arrest Li, the motion for summary judgment as to Li's claims of false arrest and imprisonment is granted. [37]

37 The United States argues that Aponte had probable cause to arrest Li for other conduct in violation of *39 C.F.R. § 232.1*, governing conduct on postal property; *N.Y.P.L. § 195.05*, obstruction of governmental administration; and *N.Y. Penal Law § 240.20*, disorderly conduct. Because we have found that Aponte had probable cause to arrest Li for bringing Shelby into the FDR Post Office, we find it unnecessary to decide whether he additionally had probable cause to arrest Li for any other unlawful acts.

B. Assault and Battery Claims

We find that material issues of fact preclude an award of summary judgment to the United States on the common law assault and battery claims brought pursuant to the FTCA.

As against law enforcement personnel, assault and battery claims under New York law parallel the familiar *Fourth Amendment* standard governing the use of force incident to a lawful arrest. *See Posr v. Doherty, 944 F.2d 91, 94-95 (2d Cir. 1991)*; *see also Kramer v. City of New York, No. 04 Civ. 0106(HB), 2004 U.S. Dist. LEXIS 21914, 2004 WL 2429811, at *11 (S.D.N.Y. Nov. 1, 2004)*; [*21] *Cosby v. City of White Plains, No. 04 Civ. 5829(CLB)(GAY), 2007 U.S. Dist. LEXIS 23770, 2007 WL 853203, at *6 (S.D.N.Y. Feb. 9, 2007)*. [38]

38 "[S]ome New York courts have suggested that, under New York law, any touching during an unlawful arrest is a battery." *Stokes v. City of New York, No. 05 Civ. 0007(JFB)(MDG), 2007 U.S. Dist. LEXIS 32787, 2007 U.S. Dist. LEXIS 32787, at *51 n.11 (E.D.N.Y. May 3, 2007)*. However, having found that Li's arrest was based on probable cause, and thus lawful, we need not consider this theory of recovery.

To sustain a claim for excessive force under the *Fourth Amendment*, a plaintiff must first present sufficient evidence to establish that "the alleged use of force is 'objectively sufficiently serious or harmful enough' to be actionable." *Cunningham v. Rodriguez, No. 01 Civ. 1123(DC), 2002 U.S. Dist. LEXIS 22660, at *10 (S.D.N.Y. 2002)* (*quoting United States v. Walsh, 194 F.3d 37, 47 (2d Cir. 1999)*). "[A] de minimis use of force will rarely suffice to state a constitutional claim." *Romano v. Howarth, 998 F.2d 101, 105 (2d Cir. 1993)*. Although an injury need not be permanent or severe to survive summary judgment, *see Robison v. Via, 821 F.2d 913, 927 (2d Cir. 1987)*, "de minimis injury can serve as conclusive evidence [*22] that de minimis force was used," *Carr v. Deeds, 453 F.3d 593, 606 (4th Cir. 2006)* (citation omitted).

Although Li's immediate injuries were undoubtedly minor, we find that they were not *de minimis* as a matter of law. Li insists that the incident caused her a tremendous amount of pain in her shoulder, head, neck and lower back. She also reports feeling dizzy and losing her balance when her head struck the cement column during the arrest. Although such subjective complaints could rarely, if ever, pass muster, the officers summoned by Aponte noticed bruising on Li's left upper arm. [39] Medical records from the emergency room at New York Presbyterian Hospital likewise indicate a "small hematoma" on her left upper arm as well as generalized "soft tissue injury." [40] Bruising alone is sufficient to preclude summary judgment on the ground that the force employed was *de minimus. See Robison, 821 F.2d at 924-25* (plaintiff who alleged only bruises lasting a "couple weeks, maybe" was entitled to submit excessive force claim to jury); *Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir. 1999)* (reversing dismissal of excessive force claim where the only evidence of injury plaintiff intended to offer was his [*23] own testimony of a bruised shin and swelling over his left knee); *Maxwell v. City of New York, 380 F.3d 106, 108-09 (2d Cir. 2004)* (reversing district court's dismissal of excessive force claim where plaintiff alleged shoulder pain, a scrape to her forehead, and was later diagnosed with post-concussive syndrome); *see also Gomez v. City of New York, 05 Civ. 2147 (GBD)(JCF), 2008 U.S. Dist. LEXIS 41455, at *23 (S.D.N.Y. May 28, 2008)* (denying summary judgment where plaintiff suffered multiple abrasions and bruises that lasted approximately one week); *cf. Rincon v. City of New York, No. 03 Civ. 8276(LAP), 2005 U.S. Dist. LEXIS 4335, at *4-*5 (S.D.N.Y. Mar. 21, 2005)* (granting summary judgment where plaintiff was treated only for swelling in right leg and wrist); *Cunningham, 2002 U.S. Dist. LEXIS 22660, at *5* (finding injuries to be *de minimis* where an initial medical examination found "no injuries or complaints," despite complaints of pain a week later). [41] Even setting aside the evidence of Li's injuries, repeatedly pushing and pressing an arrestee against a column is within the bounds of actionable conduct. *Cf. Robison, 821 F.2d at 924-25* (sustaining excessive force claim where the [*24] arresting officer twisted the plaintiff's arm, "yanked" her, and threw her up against a car, causing only bruising).

39 Def. R. 56.1 Stat. P 37.

40 Pl. Resp 56.1 P 18; Li's Dep. 202:19-21. To the extent Li alleges a subsequent worsening in health due to aggravation of her CFS, we note that, while potentially relevant to a damages calculation, this fact is not legally relevant to determining reasonable force. "'What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (how-

ever severely) a pre-existing condition . . . .'" *Lederman v. Giuliani, 98 Civ. 2024(LMM)(JCF), 2007 U.S. Dist. LEXIS 41490, at *11 (S.D.N.Y. June 5, 2007)* (quoting *Rodriguez v. Farrell, 280 F.3d 1341, 1353 (11th Cir. 2004)*); *Cunningham, 2002 U.S. Dist. LEXIS 22660, at *5* (finding injuries to be *de minimis* where an initial medical examination found "no injuries or complaints," despite complaints of pain a week later).

41 The defendants rely heavily on *Williams v. City of New York, No. 05 Civ. 10230(SAS), 2007 U.S. Dist. LEXIS 55654 (S.D.N.Y. July 26, 2007)* (plaintiff's scrapes and bruises found *de minimis*) to support their assertion that Li's injuries are not cognizable [*25] as a matter of law. However, *Williams* set aside as non-precedential a recently issued summary order of the Second Circuit, in which the court noted that an excessive force claim survives a *de minimus* challenge when "the only injury alleged is bruising." *Hayes v. New York City Police Dep't, 212 Fed. Appx. 60, 62 (2d Cir. 2007).* Although we agree that *Hayes* itself is not binding, the authority cited by the Second Circuit for that proposition is not as easily dismissed. *See, e.g., Maxwell, 380 F.3d at 108-09*; *Robison, 821 F.2d at 927.*

Having found that the force exercised by Aponte was not *de minimis,* the next step is to ask whether the facts, taken in the light most favorable to Li, show that the use of force was not objectively reasonable. *Cowan v. Breen, 352 F.3d 756, 761 (2d Cir. 2003)* (*citing Saucier v. Katz, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272, (2001)).* To determine whether the amount of force used is reasonable, the district court must take into consideration the "totality of the circumstances faced by the officer on the scene," *Lennon v. Miller, 66 F.3d 416, 425 (2d Cir. 1995),* including factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the [*26] safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight," *Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).*

Accepting Li's version of events, Aponte began the confrontation by grabbing Li and starting to shove her toward the door. In response to Aponte's tight grip on her arm, Li tried to shake her arm loose. This single act of physical noncompliance undeniably justified the use of some force to secure Li's arms. But given Li's claim that she did not offer any further resistance, or give Aponte any reason to fear for his safety, Aponte did not have "license to use force without limit." *Sullivan v. Gagnier, 225 F.3d 161, 166 (2d Cir. 2000).* For purposes of the instant motion, the defendants do not dispute the claim that *after* Aponte had secured Li's arms behind her back, he "pushed Li into a column that abutted the glass wall" of the post office, pressed her firmly against that wall, then "dragged her out the door" and pushed her into a second column outside, at which point Li's glasses fell off from the impact of her head striking the column. With Li pressed against the street-side of the glass wall, Aponte pinned her to the ground, [*27] face down. As a 5'3" female, Li could not have been a particularly threatening figure (especially to Aponte, an experienced martial artist). Nor, again construing the facts favorably toward Li as we must, did the initial offense present any significant danger, imminent or otherwise, to any customers or Aponte. Construing the facts favorably toward Li, the resistance was brief, reflexive and non-violent; there is nothing in Li's version of events that justifies the escalation of force by shoving Li against a column and wall, after Aponte had already secured her arms behind her back. *See, e.g., Robison, 821 F.2d at 924-25* (sustaining excessive force claim on summary judgment where the plaintiff attempted to flee in her car and the officer dragged her out then pushed her against the car door); *Gomez, 2008 U.S. Dist. LEXIS 41455, at *23* (sustaining excessive force claim on summary judgment where the plaintiff physically resisted arrest but did not attempt to assault the officers or flee, and the officers threw the plaintiff to the ground).

Accordingly, the government's motion for summary judgment as to Li's common law assault and battery claims is denied. [42]

42 The government contends that, [*28] even if Aponte's use of force was excessive, it may seek the benefit of the qualified immunity conferred upon Aponte under New York law. We disagree. In FTCA actions, the United States is held liable "to the same extent as a private individual under like circumstances." *28 U.S.C. § 2674.* Accordingly, the Second Circuit has held that the limited immunity New York police officers enjoy when carrying out their official duties in good faith is not applicable to FTCA claims against federal officers. *Castro v. United States, 34 F.3d 106, 111 (2d Cir. 1994)* (holding that "private individuals do not possess the immunities of governmental officials" and thus "[i]n a suit against the United States under the FTCA . . . . qualified immunity will not immunize the United States from liability . . . ."); *see also Hyatt v. United States, 968 F. Supp. 96, 107-108 (E.D.N.Y. 1997)* (declining to afford higher protection of Illinois Tort Immunity Act to FTCA claims against federal officials).

C. Malicious Prosecution

Li's malicious prosecution claim is dismissed as utterly baseless. Clearly, to state a claim for malicious prosecution, the defendant must have, *inter alia*, commenced or continued a criminal [*29] proceeding against the plaintiff. *Russo v. New York, 672 F.2d 1014, 1018 (2d Cir. 1982)*. Aponte did not commence or continue a criminal proceeding against Li; indeed, no criminal proceeding was brought against Li at all.

D. Negligence in Hiring, Training and Supervising

Li's common law claims against the United States for negligent hiring, training and supervision are barred by the "discretionary function" exception of the FTCA.

The FTCA's waiver of immunity does not extend to any claim "based upon the exercise or performance or the failure to exercise or perform 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)*. Personnel decisions of the United States generally fall within the discretionary function exception to the FTCA. *See Cuoco v. United States Bureau of Prisons, No. 98 Civ. 9009(WHP), 2003 U.S. Dist. LEXIS 16615, 2003 WL 22203727, at *6 (S.D.N.Y. Sept. 22, 2003) Kenna v. United States, 927 F. Supp. 62, 64-67 (E.D.N.Y. 1996)*; *see also Suter v. United States, 441 F.3d 306, 312 n.6 (4th Cir. 2006)*; *Nurse v. United States, 226 F.3d 996, 1001-02 (9th Cir. 2000)*; *Burkhart v. Washington Metro. Area Transit Auth., 324 U.S. App. D.C. 241, 112 F.3d 1207, 1217 (D.C. Cir. 1997)*; [*30] *Tonelli v. United States, 60 F.3d 492 (8th Cir. 1995)*; *K.W. Thompson Tool Co. v. United States, 836 F.2d 721, 727 (1st Cir. 1988)*. Accordingly, Li's negligence claims against the United States are dismissed. [43]

> 43 Li appears to argue that because Aponte misconstrued a mandatory postal regulation, the discretionary function exception does not apply to her negligence claims against the United States. Obviously, the issue here turns on the Government's discretion in hiring, training and supervising employees; Aponte's discretion or lack thereof in following postal regulations is irrelevant.

E. Intentional Infliction of Emotional Distress

We agree with the government that the intentional infliction of emotional distress ("IIED") claim fails as a matter of law because the conduct complained of falls within the scope of her false arrest and excessive force claims, and, in the alternative, that Li has failed to adduce any facts in support of her IIED claim.

Initially, we note that the Second Circuit has not clearly resolved the issue of whether, under New York law, duplicative IIED claims are barred, nor, if so, the degree to which an IIED claim must "overlap" other torts to be deemed duplicative. [*31] *See Worytko v. County of Suffolk, 03 Civ. 4767, 2007 U.S. Dist. LEXIS 46963, at *17 (E.D.N.Y. June 28, 2007)* (*citing Bender v. City of New York, 78 F.3d 787, 791-92 (2d Cir. 1996)*). Nevertheless, where, as here, the alleged tortious conduct falls entirely within the ambit of traditional tort liability -- where the plaintiff alleges no facts whatsoever beyond those necessary to sustain claims of false arrest and excessive force -- we believe New York state courts would not entertain a separate claim for IIED. *See Fischer v. Maloney, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978)* ("[I]t may be questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability . . . ."); *see, e.g., Druschke v. Banana Republic, Inc., 359 F. Supp. 2d 308, 315 (S.D.N.Y. 2005)* (rejecting emotional distress claim as duplicative of false arrest claims); *Herlihy v. Metropolitan Museum of Art, 214 A.D.2d 250, 263, 633 N.Y.S.2d 106, 114 (1st Dep't 1995)* (rejecting emotional distress claim because allegedly tortious conduct was within ambit of defamation claim).

Even if [*32] we were to find Li's IIED claim sufficient to state a separate cause of action, we would grant summary judgment to the defendants. Under New York law, a claim for intentional infliction of emotional distress requires a showing of (1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress. *Stuto v. Fleishman, 164 F.3d 820, 827 (2d Cir. 1999)* (*citing Howell v. New York Post Co., 81 N.Y.2d 115, 121, 612 N.E. 2d 699, 596 N.Y.S.2d 350 (N.Y. 1993)*). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id. at 828* (*citing Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 448 N.E.2d 86 (N.Y. 1983)*); *Restatement (Second) of Torts, § 46 cmt. d* (1965). Although the force Aponte allegedly used in effecting Li's arrest was not *de minimis* as a matter of law, it plainly did not rise to such a level that it could [*33] be regarded as extreme and outrageous. Nor does Aponte's mistake in attributing an ordinary meaning to the term "service dog" approach the requisite level of conduct.

Accordingly, Li's IIED claim is dismissed as duplicative or, in the alternative, for failure to allege facts sufficient to state a cause of action for IIED.

IV. *Fourth Amendment Bivens* Claims

A. False Arrest

In Section III.A. *supra*, we found that Aponte had probable cause to arrest Li, and thus granted the government's motion for summary judgment as to Li's common law tort claims for false arrest and imprisonment. Because probable cause is also an absolute defense to claims of false arrest under the Federal Constitution, *see Lewis v. United States, 388 F. Supp. 2d 190, 195-96 (S.D.N.Y. 2005)*, we likewise grant Aponte's summary judgment motion as it relates to Li's constitutional false arrest claim.

B. Excessive Force

In Section III.B. *supra*, we denied the motion for summary judgment as to Li's common law tort claim of excessive force. Because the same *Fourth Amendment* standards apply to Li's constitutional claim for excessive force, we cannot say as a matter of law that Aponte's use of force was not excessive.

However, Aponte [*34] may still be shielded from liability if he is entitled to qualified immunity. A government actor performing a discretionary task is entitled to immunity if either "'(a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law.'" *See Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250 (2d Cir. 2001)* (*quoting Salim v. Proulx, 93 F.3d 86, 89 (2d Cir. 1996)*; *Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)* ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."). Qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force." *Saucier v. Katz, 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)* (internal quotation marks omitted). As the court in *Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005)* explained,

> *Brosseau* leaves open two paths for showing that officers were on notice that they were violating a "clearly established" constitutional right--where the violation was sufficiently "obvious" under the general [*35] standards of constitutional care that the plaintiff need not show "a body" of "materially similar" case law, and where the violation is shown by the failure to adhere to a "particularized" body of precedent that "squarely governs the case here."

Id. at 579 (*citing Brosseau, 543 U.S. at 199-200*).

Here, Aponte's violation of the general standards articulated in *Graham* is sufficiently "obvious" that Li need not show any more particularized precedent. *See, e.g., Sullivan v. Gagnier, 225 F.3d 161, 165 (2d Cir. 2000)* (in the context of an arrest involving physical resistance, "[t]he force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer."); *see also Mickle v. Morin, 297 F.3d 114 (2d Cir. 2002)* (reversing district court's grant of summary judgment on excessive force claim where plaintiff was grabbed "from behind without warning or provocation" even though she "had not engaged, and did not engage, in any violent conduct"; "did not curse at the officers;" and "did not attempt to strike any of them"); *Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004)* (plaintiffs [*36] had created issue of fact by alleging that police officers responded to passive resistance techniques by "lifting and pulling plaintiffs . . . in a way that caused lasting damage," "throwing [a plaintiff] face-down to the ground," "dragging [another plaintiff] face-down by his legs," "placing a knee" on a plaintiff's neck to tighten his handcuffs while he was lying face-down, and "ramming" a plaintiff's head into a wall); *Robison, 821 F.2d at 923-24* (allegations that police yanked arrestee out of a car, threw her against it, and pinned her arm behind her back were sufficient to withstand summary judgment).

As discussed *supra*, Li was arrested for a minor offense, she posed no threat to Aponte or anyone else, she did not attempt to flee, and once her arms were secured behind her back, she offered only passive resistance. Alhough Aponte's initial response of grabbing both of her arms and securing them behind her back may have been appropriate, Aponte's subsequent conduct -- repeatedly pushing Li against walls and columns of the post office, dragging her to the ground, and pinning her there with his knee in her back -- might well not be found reasonable if Li's version of the facts is fully [*37] credited. Aponte would presumably contend that Li's physical resistance persisted even after her arms were secured behind her back, but that disputed contention presents issues of fact that we cannot resolve at the summary judgment stage.

C. Malicious Prosecution

Li's final *Fourth Amendment* claim is for malicious prosecution. As we noted *supra* Section III.C., no criminal proceedings were initiated against Li, and thus her malicious prosecution claim clearly fails. *See Kinzer v. Jackson, 316 F.3d 139, 143 (2d Cir. 2003)* (noting that to state a claim for malicious prosecution under New York Law, a criminal proceeding must be commenced or continued).

V. Other Federal Constitutional Claims

Li blithely asserts claims under the *Fifth, Sixth, Eighth* and *Fourteenth Amendments* to the United State Constitution. Each of these is patently frivolous.

In examining whether Li's *Fifth Amendment* claim is actionable under *Bivens*, we look to analogous *§ 1983* law. *See Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995)* ("Because [*§ 1983* and *Bivens* actions] share the same 'practicalities of litigation,' federal courts have typically incorporated *§ 1983* law into *Bivens* actions."). The Second Circuit has held that [*38] "the *Fourth Amendment* provides the source for a *§ 1983* claim premised on a person's arrest." *Singer v. Fulton County Sheriff, 63 F.3d 110, 115 (2d Cir. 1995)*; *see also Graham, 490 U.S. at 395* (holding that all claims that law enforcement officers have used excessive force in the course of an arrest should be analyzed under the *Fourth Amendment*, not under a "substantive due process" analysis); *Albright v. Oliver, 510 U.S. 266, 273-74, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)* (arrests without probable cause implicate the *Fourth Amendment*, not substantive due process rights); *Fulton v. Robinson, 289 F.3d 188, 195 (2d Cir. 2002)* (malicious prosecution claims brought under *§ 1983* must show violation of a *Fourth Amendment* right). Accordingly, Li's *Fifth Amendment* claim is dismissed.

The *Sixth Amendment* claim is baseless given that there is no evidence of any criminal proceedings being initiated against Li. *U.S. Const, amend. VI* ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.").

Likewise, Li's *Eighth Amendment* claim must be dismissed because the use of allegedly excessive force occurred in the context of an arrest. *See Graham, 490 U.S. at 395* ("Where, [*39] as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the *Fourth Amendment* . . . .").

Lastly, because Aponte was undoubtedly a federal law enforcement officer, and not a state actor, Li cannot state a claim under the *Fourteenth Amendment. See U.S. Const, amend. XIV § 1*; *Rendell-Baker v. Kohn, 457 U.S. 830, 837-38, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982)*; *Ramirez v. Obermaier, No. 91 Civ. 7120 (RPP), 1992 U.S. Dist. LEXIS 16563, 1992 WL 320985, at *4 (S.D.N.Y. Oct. 28, 1992)* (dismissing *Fourteenth Amendment* claims brought against a United States Attorney because "the *Fourteenth Amendment* by its terms applies to acts of states and not directly to acts of the federal government or of federal officials.").

VI. New York State Constitutional Claims

We need not decide whether Li's state constitutional rights have been violated, because we are not persuaded that the New York state courts would recognize an implied right of action under the New York constitution against a federal officer. [44]

> 44 The complaint contains a number of vague and conclusory allegations concerning violations of Li's rights under the New York state constitution. [*40] We have construed any state constitutional claims alleged in the complaint as falling under *article I, section 12 of the New York constitution*, the counterpart to the *Fourth Amendment's* search and seizure provision.

Although the New York Court of Appeals has acknowledged that damages may be sought against the state of New York for violations of the equal protection and search and seizure guarantees of the New York State Constitution, there was never any suggestion in the seminal case establishing that proposition, *Brown v. State of New York, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996)*, that the implied right of action recognized therein extended liability to federal officials. *See, e.g., Lewis v. United States, 388 F. Supp. 2d 190 (S.D.N.Y. 2005)* (dismissing New York state constitutional claims against federal officer on this ground). Moreover, *Brown's* application has been repeatedly limited to situations in which a plaintiff lacks an alternative remedy for violations of constitutionally protected interests, *see, e.g., Coakley v. Jaffe, 49 F. Supp. 2d 615, 628-29 (S.D.N.Y. 1999)* (holding that the plaintiff had no right of action under the New York State Constitution because "any violation [*41] of plaintiff's right to be free from unreasonable searches or seizures can be vindicated through" the plaintiff's viable *Fourth Amendment* claim), *aff'd, 234 F.3d 1261 (2d Cir. 2000)*, but it has long been the rule that federal officials are individually liable for damages flowing from their intrusions upon *Fourth Amendment* rights. *See Bivens, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619*; *see Hightower v. United States, 205 F. Supp. 2d 146, 148 (S.D.N.Y. 2002)* (construing state constitutional claims as *Bivens* claims). Aponte's status as a federal officer and the availability of a parallel remedy for violations of the right to be free from unrea-

sonable searches and seizures compel the dismissal of Li's state constitutional claim.

VII. Motion to Amend the Ad Damnum Clause

The FTCA's waiver of sovereign immunity does not extend to actions seeking damages in excess of the amount sought in the plaintiff's administrative claim. *28 U.S.C. § 2675(b)*. The only exception to this rule applies "where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." [*42] *Id.* The Second Circuit has warned that the requirement of newly discovered evidence or intervening facts must be construed "strictly." *See O'Rourke v. Eastern Air Lines, Inc., 730 F.2d 842, 856 (2d Cir. 1984)*. An amendment to the complaint that would increase the amount of damages beyond what was sought in the administrative complaint is justified only when the changed circumstances are "truly unexpected and unforeseen and thus not reasonably capable of detection at the time the administrative claim was filed." *Mallard v. Menifee, No. 99 Civ. 0923(SAS), 2000 U.S. Dist. LEXIS 6082, 2000 WL 557262, at *6 (S.D.N.Y. May 8, 2000)*; *see also O'Rourke, 730 F.2d at 856* (noting that amendment may be permitted if the plaintiff demonstrates that "an unexpected change occurred . . . in a medical diagnosis."); *Barrett v. United States, 622 F. Supp. 574, 594 (S.D.N.Y. 1985)*.

On February 7, 2005, Li signed an administrative claim for relief seeking $ 1 million for injuries allegedly suffered as a result of the altercation with Aponte. On February 23, 2005, Li underwent an MRI of the spine and an arthrogram of the left shoulder that revealed, *inter alia*, spinal disc herniation at C5-6, a bulging disc at L4-5, and a tear in her [*43] biceps tendon. Li's doctors performed a second MRI of the lumbar spine on February 6, 2006, revealing a second herniation at L5-S1.

Li insists that everything she learned about her injuries after February 23, 2005 constitutes "newly discovered evidence." As the government correctly points out, there is simply no record evidence suggesting that the results of Li's first MRI and arthrogram were not reasonably discoverable before Li presented her claim to the Postal Service. We have every reason to believe that, if Li had simply requested the relevant medical testing before filing her claim, the results would have been the same. Sanctioning Li's decision to prematurely file her complaint would invite plaintiffs to race to file their administrative claims without conducting any due diligence into the extent of their injuries, precisely the result that *section 2675(b)* sought to avoid. Therefore, Li's motion to amend her *ad damnum* clause based on the results of the February 23, 2005 MRI is denied.

The government concedes that the results of the second MRI were not foreseeable, but argues instead that Li "has presented no evidence" [45] of the relationship between the herniation at L5-S1 and [*44] Aponte's alleged use of excessive force. *See 28 U.S.C. § 2675(b)* (stating requirement that the new evidence or intervening fact must "relat[e] to the amount of the claim" presented to the federal agency). To the contrary, Li's expert has opined that:

> [W]ithin a reasonable degree of Chiropractic certainty, the assault on Ms. Li caused a latent injury or weakening to her spinal disc at L5-S1 and that it was not until many months later that her L5-S1 disc had ruptured causing her the excruciating pain that she now has as well as her urinary incontinence. [46]

While we express no opinion on whether Li's expert's conclusions are persuasive or, for that matter, admissible, *see, e.g., Diaz v. Shalala, 59 F.3d 307, 314 (2d Cir. 1995)* (recognizing the "subordinate status" of chiropractic opinion under the regulations governing the award of Social Security benefits), at this stage Li has made a sufficient record to justify the amendment of her complaint to reflect an additional injury. Nonetheless, we think the preferable procedure is to grant the motion and schedule a *Daubert* hearing after which the Government may renew its motion to dismiss and/or for summary judgment based on a lack of causal [*45] connection between the injury appearing in the February 2006 MRI and the incident giving rise to this lawsuit.

45 Defendant United States of America's Memorandum of Law in Opposition to Plaintiff's Motion to Increase the Ad Damnum Clause of Her Complaint at 6.

46 Affidavit of Bruce J. Paswall P 31.

CONCLUSION

For the foregoing reasons, Li's FTCA claims against Aponte are dismissed. Summary judgment to the defendants is granted on all of Li's remaining claims except for the common law assault and battery claims asserted against the United States and the parallel excessive force claim brought against Aponte under *Bivens*. Li's motion to amend is granted only insofar as it pertains to damages flowing from the herniation revealed by the February 2006 MRI and with the *Daubert* caveat discussed above. The parties are directed to appear for a pre-trial conference in courtroom 21A on October 16, 2008 at 3:00 P.M.

IT IS SO ORDERED.

Dated: New York, New York
September 15, 2008
/s/ Naomi Reice Buchwald

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE