UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHARLEE ARCHAMBAULT, individually and as PERSONAL REPRESENTATIVE OF THE ESTATE OF JACOB ARCHAMBAULT, Plaintiff, v. UNITED STATES OF AMERICA, JOSHUA ATMAN and JAY ROMERO SR., individually and in their official capacity as police officers for the ROSEBUD SIOUX TRIBAL LAW ENFORCEMENT SERVICES, and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	3:22-cv-3002-RAL **BRIEF IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS**

The United States, by and through its counsel of record, moves to dismiss the claims against it for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and to dismiss the claims against the Unknown Supervisory Personnel of the United States for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

FACTUAL ALLEGATONS OF THE COMPLAINT

Plaintiff, Charlee Archambault, seeks damages for alleged constitutional violations resulting in the death of her son Jacob Archambault. Jacob Archambault, a/k/a Jacob Spotted Tail, was shot and killed in an incident involving Rosebud Sioux Tribe ("RST" or the "Tribe") Officers Joshua Atman [*sic*] and Jay Romero Sr. [*sic*].[1] Ms. Archambault asserts claims under

[1] The correct names of the tribal officers are Joshua Antman and Jay A. Romero.

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) and 42 U.S.C. § 1983.[2]

Ms. Archambault brings this action against the United States, Joshua Antman and Jay A. Romero, individually, and in their official capacity as police officers for the RST Law Enforcement Services, and Unknown Supervisory Personnel of the United States, individually. (Docket 1 at p. 1.) Ms. Archambault alleges that Officers Antman and Romero acted as police officers under color of federal and state law. (Docket 1 at p. 2 ¶ 6.)[3]

In Count I, Ms. Archambault brings a Bivens claim against the defendants in their individual capacities seeking compensatory damages for Jacob Archambault's pain and suffering and loss of value of life. Ms. Archambault alleges that Officers Antman and Romero, while acting under the color of federal law and as federal employees, used "excessive, unreasonable, and unwarranted force" violating Jacob Archambault's rights under the Fourth and Fifth Amendments of the United States Constitution. (Docket 1 at pp. 6-9 ¶¶ 40-55.)

In Count II, Ms. Archambault brings a claim under 42 U.S.C. § 1983 against the defendants in their individual capacities seeking compensatory damages for Jacob Archambault's pain and

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[2] Ms. Archambault does not assert a claim under the Federal Tort Claims Act ("FTCA"). The complaint, however, states that "[t]his action is timely pursuant to 28 U.S.C.A. § 2401(b) in that it was presented to the appropriate agency within two years of accrual." (Docket 1 at p. 2 ¶ 8.) Pursuant to § 2401(b), prior to filing an FTCA action, a claimant must present an administrative tort claim in writing to the appropriate Federal agency "within two years after such claim accrues." A search of Department of Interior records was performed and there is no record of receipt of an administrative tort claim relating to Ms. Archambault's claims. Polk Decl. at ¶¶ 4-5. "A federal district court does not have jurisdiction over an FTCA claim unless it was 'first … presented to the appropriate federal … agency within two years of when the claim accrued.'" Allen v. United States, 590 F.3d 541, 544 (8th Cir. 2009) (quoting Walker v. United States, 176 F.3d 437, 438 (8th Cir. 1999).

[3] The paragraphs in the complaint are misnumbered. Therefore, citations to the complaint are by page number and paragraph.

suffering and loss of value of life. Ms. Archambault alleges that Officers Antman and Romero, while acting under "color of law," used excessive force and deprived Jacob Archambault of protected rights under the Fourth and Fourteenth Amendments. (Docket 1 at pp. 9-10 ¶¶ 54-56.)

In Count III, Ms. Archambault brings a claim under 42 U.S.C. § 1983 against the defendants collectively seeking compensatory damages for deprivation of her familial relationship with her son and funeral and burial expenses. Ms. Archambault alleges that Officers Antman and Romero, while acting under "color of law," used "unreasonable, unjustified, and deadly force" which caused the death of Jason Archambault. (Docket 1 at pp. 10-11 ¶¶ 57-60.)

In Count IV, Ms. Archambault brings a claim under 42 U.S.C. § 1983 against the defendants collectively seeking compensatory damages on behalf of Jacob Archambault for pain and suffering. Ms. Archambault alleges that Officers Antman and Romero "unjustifiably shot and killed" Jacob Archambault violating his protected rights under the Fourth and Fourteenth Amendments of the United States Constitution. (Docket 1 at p.11 ¶¶ 61-66.)

STANDARD OF REVIEW

I. Rule 12(b)(1) Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden of establishing by a preponderance of the evidence that the court possesses subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Federal courts have limited jurisdiction and the law presumes that a cause of action lies outside this jurisdiction. Id.

When considering a motion pursuant to Federal Rule of Civil Procedure 12(b)(1), this Court may look at matters outside the pleadings. Osborn v. United States, 918 F.2d 724, 728 n. 4 (8th Cir. 1990). Under a 12(b)(1) motion:

> the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.

Id. at 730.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge the facial sufficiency of the pleadings or the truth of the jurisdictional allegations. Stalley v. Cath. Health Initiatives, 509 F.3d 517, 520–21 (8th Cir. 2007) (citing Osborn, 918 F.2d at 729 n.6). In a facial attack, the standard of review is the same standard applied to motions brought pursuant to Federal Rule of Civil Procedure 12(b)(6). Id. at 521. That is, a court must "accept as true all factual allegations in the complaint, giving no effect to conclusory allegations of law," and must determine whether the plaintiff has asserted "facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." Id. (citations omitted). In contrast, "[w]hen a district court engages in a factual review, it inquires into and resolves factual disputes." Faibisch v. Univ. of Minnesota, 304 F.3d 797, 801 (8th Cir. 2002) (overruled in part on other grounds by Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004)). In this case, the United States makes a facial attack on the jurisdictional allegations of the complaint.

II. Rule 12(b)(6) Standard

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper when a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S.544, 570 (2007)). "A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). A complaint "does not need detailed factual allegations … [but] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.; see also Abdullah v. Minnesota, 261 F. App'x 926, 927 (8th Cir. 2008) (noting that a complaint must contain either direct or inferential allegations regarding all material elements necessary to sustain recovery under some viable legal theory).

ARGUMENT

I. The United States is not a proper party to a Bivens action and Count 1 of the complaint as alleged against the Unknown Supervisory Personnel of the United States should be dismissed for lack of subject matter jurisdiction.

Count I alleges a Bivens claim against the defendants in their individual capacities. "A *Bivens* claim is a cause of action brought directly under the United States Constitution against a federal official acting in his or her individual capacity for violations of constitutionally protected rights." Buford v. Runyon, 160 F.3d 1199, 1203 n. 6 (8th Cir. 1998).

The complaint names unknown supervisory personnel of the United States as defendants in their individual capacities.[4] Ms. Archambault, however, fails to plead facts that would allow a reasonable inference that the unknown supervisory personnel directly participated in the alleged constitutional violations. There is no respondeat superior liability under Bivens, and the defendants are liable only for their personal actions. Id. at 1203 n. 7 (citing Schutterle v. United States, 74 F.3d 846, 848 (8th 1996) (stating named individuals "must have been *actively involved*

[4] The complaint also names Officers Antman and Romero in their individual and official capacities. The United States Attorney's Office represents the United States in this action and does not represent the tribal defendants sued in their individual capacities or the Tribe.

in the alleged constitutional violation to support *Bivens* liability.")); Estate of Rosenberg v. Crandell, 56 F.3d 35, 37-38 (8th Cir. 1995) (holding that a charge of inadequate training or supervision of subordinates is insufficient to state a Bivens claim).

Count 1 as alleged against the unknown supervisory personnel of the United States should be dismissed because the complaint pleads no affirmative facts upon which to base jurisdiction under Bivens. Here, it is further noted that a Bivens action cannot be prosecuted against the United States and its agencies because of sovereign immunity. Buford, 160 F.3d at 1203 ("It is well settled that a *Bivens* action cannot be prosecuted against the United States and its agencies because of sovereign immunity."; Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982) ("Bivens and its progeny do not waive sovereign immunity for actions against the United States"). Indeed, based upon a review of the complaint, there is no legal theory or fact to support the naming of the United States as a defendant in this case premised on the alleged constitutional violations.

II. The United States cannot be sued under 42 U.S.C. § 1983 and Counts 2 through 4 of the complaint as alleged against the Unknown Supervisory Personnel of the United States should be dismissed for failure to state a claim.

To state a 42 U.S.C. § 1983 claim, a plaintiff must allege that: (1) he was deprived of a right secured by the Constitution or laws of the United States, and (2) the deprivation was caused by one acting under color of state law. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155-56 (1978). Section 1983 claims apply only to state, not federal actors. McNally v. Pulitzer Pub. Co., 532 F.2d 69, 75 n. 7 (8th Cir. 1976) ("42 U.S.C. § 1983 is inapplicable to persons acting under color of federal law."). Accordingly, the federal government and its officials cannot be sued under 42 U.S.C. § 1983. Jachetta v. United States, 653 F.3d 898, 908 (9th Cir. 2011) ("We find no evidence … that Congress intended to subject federal agencies to § 1983 and § 1985 liability."); Hindes v. FDIC, 137 F.3d 148, 158 (3d Cir. 1998) ("We find no authority to support the conclusion

that a federal agency is a 'person' subject to section 1983 liability, whether or not in an alleged conspiracy with state actors."); Hoffman v. HUD, 519 F.2d 1160, 1165 (5th Cir. 1975) ("[A] federal agency is … excluded from the scope of section 1983 liability."); Accardi v. United States, 435 F.2d 1239, 1241 (3d Cir. 1970) ("The United States and other governmental entities are not 'persons' within the meaning of Section 1983.").

To survive a Rule 12(b)(6) motion to dismiss, Ms. Archambault must plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. In this case, Ms. Archambault fails to allege *any* facts from which this Court might reasonably infer that the defendants were state actors, that they ever acted pursuant to any state authority, or that they ever acted in concert with any state actors.[5] See West v. Atkins, 487 U.S. 42, 49 (1988) ("The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'") (quoting United States v. Classic, 313 U.S. 299, 326 (1941). Further, the unknown supervisory personnel of the United States are, by definition, federal actors as opposed to state actors. Thus, Ms. Archambault has not stated a plausible claim under 42 U.S.C. § 1983 as to *any* of the defendants.

Additionally, claims under 42 U.S.C. § 1983 alleged against the unknown supervisory personnel of the United States should be dismissed because the complaint pleads no affirmative facts upon which to base jurisdiction. As previously stated, Ms. Archambault fails to plead facts that would allow a reasonable inference that the unknown supervisory personnel directly

[5] To the contrary, based on the allegations in the complaint, all parties were tribal actors on tribal land, and Officers Antman and Romero were enforcing tribal law. See Boney v. Valline, 597 F.Supp.2d 1167, 1177 (D. Nev. 2009) (tribal officers enforcing tribal law not subject to Bivens action).

participated in the alleged constitutional violations. Liability under 42 U.S.C. § 1983 cannot be based on a theory of respondeat superior. Whitson v. County Jail, 602 F.3d 920, 928 (8th Cir. 2010) ("In a § 1983 case, an official 'is only liable for his … own misconduct' and is not 'accountable for the misdeeds of [his] agents' under a theory such as respondeat superior or supervisor liability.") (quoting Iqbal, 556 U.S. at 677).

Count 2 of the complaint alleges a violation of 42 U.S.C. § 1983 against the defendants in their individual capacities. Counts 3 and 4 of the complaint allege a violation of 42 U.S.C. § 1983 against the defendants collectively, which would include the United States as a named defendant. As noted above, the federal government and its officials cannot be sued under 42 U.S.C. § 1983. Therefore, this Court lacks subject matter jurisdiction over Ms. Archambault's § 1983 claims against the United States, and the complaint against the United States should be dismissed. Counts 2 through 4 of the complaint as alleged against the Unknown Supervisory Personnel of the United States in their individual capacities should also be dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

For the reasons stated above, the complaint against the United States and the Unknown Supervisory Personnel of the United States should be dismissed.

Dated this 25th day of April, 2022.

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