

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

**REPLY BRIEF IN SUPPORT OF THE
UNITED STATES' MOTION TO
DISMISS**

I. Factual Allegations of the Complaint.

Counts three and four of the complaint failed to expressly state whether the defendants were sued in their official or individual capacities. In response to the United States' motion to dismiss, Plaintiff Charlee Archambault summarizes her claims as follows: Count one asserts a *Bivens* claim against the defendants in their individual capacities. Counts two and three assert claims under 42 U.S.C. § 1983 against the defendants in their individual capacities. Count four asserts a claim under 42 U.S.C. § 1983, however, Ms. Archambault does not expressly state whether the defendants are sued in their official or individual capacities.¹

¹ The United States Attorney's Office represents the United States in this action and does not represent defendants sued in their individual capacities.

II. The Complaint Against the United States Should Be Dismissed for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1).

“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) (emphasis added). “*Bivens* and its progeny do not waive sovereign immunity for actions against the United States.” *Laswell v. Brown*, 683 F.2d 261, 268 (8th Cir. 1982).

Additionally, the United States and its agencies 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.”).

In response to the government’s motion to dismiss, Ms. Archambault fails to explain why the United States is a named defendant. More importantly, this Court lacks subject matter jurisdiction over *Bivens* and § 1983 claims against the United States. Therefore, the complaint against the United States should be dismissed.

II. The Complaint Against the Unknown Supervisory Personnel of the United States Should Be Dismissed for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6).

Government officials may not be held liable in a *Bivens* or § 1983 action for the unconstitutional conduct of their subordinates under a theory of respondeat superior. “Because

vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government official defendant, through *the official's own individual actions*, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (emphasis added); *see also Buford*, 160 F.3d at 1203 n. 7 (stating *Bivens* actions cannot be premised on respondeat superior liability and defendants are liable for their personal acts only). “[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.” *Ashcroft*, 556 U.S. at 677. In this case, Ms. Archambault fails to plead facts that would allow a reasonable inference that the Unknown Supervisory Personnel directly participated in the alleged constitutional violations. *See Darby v. Greenman*, 14 F.4th 124, 129-130 (2d Cir. 2021) (affirming dismissal of § 1983 complaint against Doe Defendants for failure to state a claim).

Furthermore, “[i]t is generally impermissible to name fictitious parties as defendants in federal court, but ‘an action may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery.’ ” *Perez v. Does 1-10*, 931 F.3d 641, 646 (8th Cir. 2019) (quoting *Est. of Rosenberg by Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995)). The allegations in the complaint regarding the Unknown Supervisory Personnel are insufficient to satisfy the exception to the general prohibition against fictitious parties. The complaint does not sufficiently allege who the Unknown Supervisory Personnel are, what they allegedly did, their position, or any other facts that would permit the Unknown Supervisory Personnel to be noticed or identified through discovery.²

² Based on a review of the complaint, it is unclear whether the Unknown Supervisory Personnel are BIA employees or tribal employees acting under a 638 contract. Tribal employees acting pursuant to a 638 contract are federal employees only for purposes of the Federal Tort Claims Act (FTCA). *See* 25 U.S.C. § 2804(f)(1)(A) (providing that while acting pursuant to a section 638 contract, “a person who is not otherwise a Federal employee shall be considered to be ...an

Finally, Ms. Archambault fails to plead 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. *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)). 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).

In response to the government’s motion to dismiss, Ms. Archambault argues that under the Indian Law Enforcement Reform Act, the Secretary of the Interior may charge and authorize employees of the Bureau of Indian Affairs with law enforcement responsibilities to “when requested, assist ... any Federal, tribal, State, or local law enforcement agency in the enforcement or carrying out of the laws or regulations the agency enforces or administers.” 25 U.S.C. § 2803(8). Ms. Archambault, however, fails to cite to any facts from which this Court might reasonably infer that the defendants were charged or authorized to assist any State enforcement agency. To the contrary, based on the allegations in the complaint, all parties were tribal actors on tribal land enforcing tribal law.

employee of the Department of the Interior” for purposes of the FTCA). A *Bivens* action is not brought under the FTCA. Further, a *Bivens* remedy should not be extended to tribal law enforcement officers solely based on a 638 contract. *See Egbert v. Boule*, No. 21-147, 2022 WL 2056291, *8 (U.S. June 8, 2022) (no *Bivens* action may lie where “there is any rational reason (even one)” to defer to Congress’s judgment); *Boney v. Valline*, 597 F. Supp. 2d 1167, 1183-1186 (D. Nev. 2009) (declining to extend *Bivens* action against tribal law enforcement officer).

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 23rd day of June, 2022.

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