

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLEE ARCHAMBAULT,
individually and as PERSONAL
REPRESENTATIVE OF ESTATE
OF JACOB ARCHAMBAULT,

Plaintiff,

v.

UNITED STATES OF AMERICA,
JOSHUA ANTMAN and JAY ROMERO
SR., individually and in their official
capacity as police officers for ROSEBUD
SIOUX TRIBAL LAW ENFORCEMENT
SERVICES, and UNKNOWN SUPERVISORY
PERSONNEL OF THE UNITED STATES,
individually,

Defendants.

3:22-cv-3002-RAL

**REPLY BRIEF OF JOSHUA ANTMAN
IN SUPPORT OF
MOTION TO DISMISS**

Plaintiff has responded to the motion and memorandum to dismiss filed by defendant Antman in the present case. This reply by defendant Antman will address the arguments made by plaintiff in the order set forth in her brief.

PRELIMINARY STATEMENT

Plaintiff asserts that counts I, II, and III are all brought against Antman in his individual capacity and no specification is made as to official or individual capacity as to count IV. Plaintiff's complaint at ¶ 6 maintains that Antman and Romero were sued in both their individual and official capacity alleging that both defendants "were employed by and acting as police officers under color of state and federal law for the Rosebud Sioux Tribal Law Enforcement." In

count I of the complaint alleging a Bivens claim plaintiff asserts that Antman and Romero were acting under color of federal law as employees of the United States. In count II, denominated as a wrongful death claim, it is asserted that Antman and Romero were acting under color of law and deprived plaintiff of various constitutional rights; count III is labeled as a deprivation of familial relationship by Antman and Romero acting under color of law; and count IV is labeled as a violation of civil rights protected by various constitutional provisions.

It is asserted by plaintiff that defendant Antman's claim is, first, that Bivens claims cannot be made against tribal officers and that, secondly, § 1983 does allow for a cause of action by tribal officers. The second contention makes no sense and Antman never conceded that § 1983 could be made against tribal officers.

BACKGROUND

Plaintiff has set forth a version of the facts giving rise to the present action and defendant Antman has submitted an affidavit in support of his motion to dismiss setting out the facts of the case. Defendant Antman relies upon the facts set forth in his affidavit.

Factually, no argument can be made that Antman or Romero were either federal officers or that they were enforcing federal laws. First, the call came to dispatch from a family member complaining of a family dispute. Second, Antman was responding to the call and knew that decedent had an outstanding warrant for his arrest. Third, Antman tried to stop the vehicle, after a female occupant with a child exited from decedent's vehicle. Fourth, decedent eluded Antman and Romero and drove in a reckless manner endangering members of the public. There is not one single fact that supports the proposition that Antman or Romero were enforcing federal law.

If the contrary conclusion is reached, i.e., that Antman and Romero were enforcing

federal law, a terrible precedent would be set. Virtually any action taken by a tribal officer could then be deemed to be an enforcement of federal law.

ARGUMENT

A. Sovereign Immunity

Plaintiff's argument as to sovereign immunity makes it clear that defendant Antman and Romero are sued in their individual capacities. Otherwise, both would be protected by the sovereign immunity of the Rosebud Sioux Tribe. Sued individually, however, makes it even more apparent that any suit should be brought in the Rosebud Sioux Tribal Court.

Plaintiff in making the argument on sovereign immunity asserts that because Antman and Romero were employed by the Tribe under a contract under 25 U.S.C. § 5321, successor to previous but same contracts under P.L. 93-638, the Indian Self Determination and Education Assistance Act, they were federal officers. Such is not the case. See *Snyder v. Navajo Nation*, 381 F3d 892 (9th Cir. 2004) (deeming tribal members employed under the Self Determination Act to be federal employees for purpose of the tort liability did not make them federal employees for other purposes); *Wide Ruins Community School, Inc. v. Stago*, 281 F.Supp.2d 1086 (D. Ariz. 2003) (only federal aspect of tribal employee after conversion of school from the BIA to the tribe was coverage under the Federal Tort Claims Act); *FGS Constructors, Inc. v. Carlow*, 823 F.Supp. 1508 (D.S.D. 1993) (Self Determination Act only imputes negligence of tribal employees to the United States). In the present case, Antman and Romero were only enforcing tribal law, not federal or state law. That they were employed under a contract under 25 U.S.C. § 5321 does not make them federal employees. They were no more federal employees or exercising federal authority than a state police officer assisting a tribal officer on the reservation would be

deemed a tribal officer.

Plaintiff cites 28 U.S.C. § 2679 (b) (2) (A) for the proposition that a Bivens claim can be brought against a tribal official. This is wrong. First, 2679 (b) (2) (A) by its clear language only applies to federal, not tribal employees. Second, it deals with constitutional violations. Constitutional provisions do not apply to tribal officials. *Talton v. Mayes*, 163 U.S. 376 (1896). Third, the Supreme Court in *Egbert v. Boule*, on June 8, 2022, 2022 U.S. LEXIS 2829 at 28-29 said “And, more recently, we have indicated that if we were called to decide Bivens today, we would decline to discover any implied causes of action in the constitution. See *Ziglar*, 137 S.Ct. 1843.” Fourthly, plaintiff was not left without a remedy necessitating a Bivens claim because she could have brought a claim under the Federal Tort Claims Act, but declined, or the Rosebud Sioux Tribal Court. See *Stanko v. Oglala Sioux Tribe*, 916 F3d 694, 699 (8th Cir. 2019).

B. 42 U.S.C. § 1983

Plaintiff does not address the motion to dismiss made by Antman and Romero addressing her actions under § 1983. Defendant Antman relies upon his arguments made in his memorandum and the memorandum of Romero arguing that § 1983 only applies to state and not tribal actors. Not addressing those arguments, plaintiff must be deemed to have abandoned his claims under § 1983 in counts II, III, and IV.

CONCLUSION

For all the above reasons in this reply and for the reasons set forth in Antman’s memorandum in support of his motion to dismiss, and for the relevant arguments in the memorandum of the United States and Romero, the motion to dismiss should be granted.

Dated: June 24, 2022.

/s/ Terry L. Pechota

Terry L. Pechota

Attorney for Joshua Antman

1617 Sheridan Lake Road

Rapid City, South Dakota 57702

605-341-4400

tpechota@1868treaty.com

CERTIFICATE OF SERVICE

On the 24th of June, 2022, I caused to be served a true and correct copy of the Reply Brief of Joshua Antman In Support Of Motion To Dismiss upon the following persons by electronic transmission:

John Hinrichs
Heiderpreim, Purtell, Siegel, Hinrichs

Jeffrey Beck
Beck Law, Prof. LLC

Michael S. Hoffman
Assistant U.S. Attorney

Justin Bell
May, Adams, Gerdes, and Thompson

/s/ Terry L. Pechota

Terry L. Pechota