FILED
United States Court of Appeals
Tenth Circuit

August 28, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SCOTT WILLIAMS,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; KENNETH BRUNER,

Defendants - Appellees.

No. 18-4172
(D.C. No. 1:18-CV-00006-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **LUCERO**, **MATHESON**, and **MORITZ**, Circuit Judges.

Scott Williams appeals the dismissal of his civil action against Kenneth Bruner and the United States. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In February 2016, Mr. Williams was suspended from his job with a contractor at a military testing and training area in Utah because he had been indicted for unlawfully exporting goods, making a false statement in a document, and converting

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

federal property. According to Mr. Williams, on October 19, 2016, Mr. Bruner, a federal employee at Hill Air Force Base, sent an email to hundreds of people, including Mr. Williams's co-workers and others at the testing and training area. The email claimed Mr. Williams had committed treasonous acts.[1] Mr. Williams believes Mr. Bruner made similar statements at workplace meetings, and he insists Mr. Bruner knew or should have known the statements were false.

On July 27, 2017, the charges against Mr. Williams were dismissed without prejudice. Five months later, Mr. Williams sued Mr. Bruner in Utah state court for "Defamation/Slander/Libel per se," alleging Mr. Bruner's statements were made outside the scope of his employment, damaged Mr. Williams's reputation, and caused lost employment opportunities. Aplt. App. at 15.

On January 8, 2018, the United States Attorney for the District of Utah filed a certification under 28 U.S.C. § 2679(d). It stated that, based on Mr. Williams's allegations, Mr. Bruner acted within the scope of his employment. The case thus became an action against the United States under the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 2679(d)(2).

The government removed the case to federal court, moved to substitute the United States as the defendant, and moved to dismiss because the FTCA does not waive sovereign immunity for defamation. *See* § 2680(h) (barring "[a]ny claim arising out of," *inter alia*, "libel" or "slander"). Mr. Williams filed a First Amended

[1] Mr. Williams alleged that Mr. Bruner shared the email with at least one other person on July 26, 2017—approximately one month after Mr. Williams was fired.

Complaint, which added a due process claim under 42 U.S.C. § 1983 and a false light claim.[2] He also filed an opposition memorandum to the motion to dismiss, insisting the government's motion was moot due to his additional allegations and claims.

The district court granted the government's motion for substitution and substituted the United States "as the sole defendant in this case." Aplt. App. at 38. The government then filed a motion to dismiss the First Amended Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. The motion argued the government had not waived sovereign immunity from constitutional torts and that § 2680(h) barred the false light claim. Mr. Williams countered that the due process claim was viable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and that the false light claim was not subject to § 2680(h). Following a hearing, the court dismissed the First Amended Complaint but allowed Mr. Williams to file an amended complaint raising a *Bivens* claim.

Mr. Williams filed a Second Amended Complaint. It alleged only a *Bivens* claim against the United States and against Mr. Bruner in both his individual and

[2] The § 1983 claim seems out of place because there are no allegations in the amended complaint against a defendant acting under color of state law. It cites § 1983 in its Jurisdiction and Venue section. In the Parties section, it lists as a defendant only Mr. Bruner, "an employee of Hill Airforce Base," a federal installation. It titles the Causes of Action section as "Violations of Rights Secured by the Fifth and Fourteenth Amendments to the United States Constitution (42 U.S.C. 1983 B Defendant City of Vernal)," but the City of Vernal is not listed as a defendant anywhere else in the document.

official capacities. Mr. Bruner and the government moved to dismiss under Fed. R. Civ. P. 12(b)(6). They asserted that (1) sovereign immunity barred the *Bivens* claim against the government and Mr. Bruner in his official capacity; (2) Mr. Williams failed to adequately plead a constitutional claim based on defamation; and (3) Mr. Bruner was entitled to qualified immunity in his individual capacity. Following a hearing, the court granted the motion to dismiss based on the first two contentions.

II. **DISCUSSION**

Mr. Williams raises appeal issues about the First and Second Amended Complaints. As to the former, he contends the district court (1) left unresolved his individual capacity claims against Mr. Bruner and (2) procedurally erred by converting the motion to dismiss into one for summary judgment without giving the parties advance notice. As to the Second Amended Complaint, Mr. Williams contends he sufficiently pled a *Bivens* claim for deprivation of a constitutionally protected liberty interest. For the reasons stated below, we affirm the district court's dismissals.

Our standard of review for dismissals under Rule 12(b)(1) is de novo. *See Ingram v. Faruque*, 728 F.3d 1239, 1243 (10th Cir. 2013). Such motions can raise "a facial or a factual attack on the court's subject matter jurisdiction." *Id.* at 1242 (internal quotation marks omitted). With "a facial attack, the district court must accept the allegations in the complaint as true," but with a factual attack, the court

may consider materials outside the complaint "to resolve disputed jurisdictional facts." *Id.* (internal quotation marks and alterations omitted).

"We review a Rule 12(b)(6) dismissal de novo." *Thomas v. Kaven*, 765 F.3d 1183, 1190 (10th Cir. 2014); *see Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). We ask whether the factual allegations in the complaint, if accepted as true, allege a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-57 (2007).

A. ***Dismissal of the First Amended Complaint***

1. **No Failure to Address Individual Claims Against Mr. Bruner**

Mr. Williams contends we should remand because the district court left unresolved the individual capacity claims against Mr. Bruner. This argument fails because Mr. Williams did not challenge substitution. Once the United States was substituted as the sole defendant, Mr. Bruner was no longer a party defendant under the FTCA.

a. **Legal background**

The FTCA waives sovereign immunity for certain tort claims against the government. 28 U.S.C. § 1346(b). Under 28 U.S.C. § 2679, however, "federal employees [have] absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). This statute authorizes the Attorney General to certify that a federal

"employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose."[3]

When a case is certified, (1) the action, if initiated in state court, "shall be removed" to federal court and "shall be deemed . . . against the United States" under the FTCA; and (2) "the United States shall be substituted as the . . . defendant." 28 U.S.C. § 2679(d)(2). Although certification is "conclusive for purposes of removal," it is not for substitution, which the plaintiff may challenge. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). If a plaintiff successfully contests substitution, the case shall proceed in federal court with the employee as the defendant. *See Osborn*, 549 U.S. at 230; *Gutierrez de Martinez*, 515 U.S. at 435.

Although the statute does not outline a procedure for challenging substitution, the Supreme Court approved a procedure of filing a response and submitting specific evidence opposing the government's substitution motion. *See Osborn*, 549 U.S. at 234, 246 (noting "[a] plaintiff may request judicial review of the Attorney General's scope-of-employment determination, as Osborn did here"). The plaintiff must produce evidence to show the conduct was outside the scope of employment. *See Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995) (noting "certification, although subject to de novo review, is prima facie evidence that an employee's challenged conduct was within the scope of his employment" and "[t]he plaintiff then bears the burden of rebutting the scope-of-employment certification with specific

[3] *See* 28 C.F.R. § 15.4(a)-(b) (delegating certification authority to the United States Attorney for the district where the civil action is brought).

facts"). If there is a factual dispute, a court should hold a hearing to determine the employee's scope of employment. *See Fowler v. United States*, 647 F.3d 1232, 1241 (10th Cir. 2011).

b. **Analysis**

To support his contention that the district court failed to address his individual capacity claim against Mr. Bruner, Mr. Williams argues he challenged substitution and the district court failed to comply with *Fowler*'s mandate that "a court must identify and resolve any disputed issues of fact regarding the employee's scope of employment." *Id.* (internal quotation marks omitted). But here there was no dispute.

In *Fowler*, there plainly was a dispute. The Attorney General declined to seek certification, and the employee petitioned for a ruling on his scope of employment under 28 U.S.C. § 2679(d)(3). *Id.* at 1235-36. There was no factual dispute here because Mr. Williams failed to challenge the certification and substitution. He now insists there was a dispute that required a hearing based on (1) the certification itself, (2) his filing of the First Amended Complaint against the United States and Mr. Bruner after the substitution motion was filed, and (3) the allegations in the original Complaint and the First Amended Complaint that Mr. Bruner was acting outside the scope of his employment. We disagree.

First, certification alone does not create a dispute as to the scope of employment. A district court would otherwise need to conduct a hearing for every case in which there is a certification—a novel notion with no support in 28 U.S.C.

§ 2679. Instead, certification is "prima facie evidence" that the plaintiff must rebut "with specific facts." *Richman*, 48 F.3d at 1145.

Second, Mr. Williams mistakenly contends he filed the First Amended Complaint after the substitution and that it alleged claims against both the United States and Mr. Bruner.[4] The district court's order granting substitution and specifying that the United States was "the *sole defendant* in this case" was entered *after* Mr. Williams filed his First Amended Complaint. Aplt. App. at 38 (emphasis added). He never challenged this order. Indeed, after the substitution order, Mr. Williams referred to the United States as "the Defendant" and did not assert in response to the motion to dismiss that there were pending claims against Mr. Bruner. *Id.* at 47-52.

Third, the allegations in the original Complaint and the First Amended Complaint were conclusory and failed to satisfy Mr. Williams's burden under *Richman* to rebut the government's certification with specific facts.[5]

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[4] Mr. Williams listed only the United States in the caption but listed Mr. Bruner in his official and individual capacity in the body. *See Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996) ("[A] party not properly named in the caption of a complaint may still be properly before the court if the allegations in the body of the complaint make it plain the party is intended as a defendant.").

[5] At the hearing on the motion to dismiss the Second Amended Complaint, Mr. Williams referenced "manuals" that Mr. Bruner allegedly violated, Aplt. App. at 152-53, similar to the documentary evidence submitted in *Osborn*, 549 U.S. at 234. Unlike in *Osborn*, however, Mr. Williams never submitted such evidence.

Fourth, Mr. Williams first asked the district court to address the scope of employment at the hearing on the motion to dismiss the Second Amended Complaint. *See* Aplt. App. at 153-54 ("[I]f this Court was going to dismiss, I think at the very least we should have a hearing whether we would be able to file our defamation claim again in state court and determine whether Mr. Bruner was indeed acting within the scope of his employment. That issue really has not had any judicial determination."). His counsel conceded "the issue really was not raised at the last hearing" or "in the last briefing," and, as the court noted, nothing "prevent[ed] the plaintiff from raising that." *Id.* at 155, 160.

The district court did not address an individual capacity claim against Mr. Bruner in the First Amended Complaint because Mr. Williams did not create a disputed issue of fact as to substitution. After the uncontested substitution, the United States was "the sole defendant," *id.* at 38, and Mr. Bruner was no longer a defendant. No claims against Mr. Bruner in his individual capacity remained pending.

2. **No Conversion of Motion to Dismiss to a Motion for Summary Judgment**

Mr. Williams next contends the district court's order dismissing his First Amended Complaint must be vacated and remanded because the court converted the government's motion to dismiss into a motion for summary judgment without providing the parties adequate notice. We disagree.

a. **Legal background**

If a court considers "matters outside the pleadings," then it "must treat the motion [to dismiss] as one for summary judgment and proceed under Rule 56." *Franklin v. Okla. City Abstract & Title Co.*, 584 F.2d 964, 967 (10th Cir. 1978). Before converting a motion to dismiss into one for summary judgment, the court must provide the parties notice and "the opportunity to present to the court all [relevant] material." *Nichols v. United States*, 796 F.2d 361, 364 (10th Cir. 1986) (internal quotation marks omitted). Absent a waiver, failure to provide notice constitutes reversible error. *See Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1496 (10th Cir. 1993).

b. **Analysis**

In its order dismissing the First Amended Complaint for lack of jurisdiction, the district court invoked Rules 12(b)(1) and (6). Even if Mr. Williams is correct that the district court should have relied on Rule 12(b)(6) only, his challenge on appeal turns on whether the court improperly converted the motion into one for summary judgment. It did not.

The record confirms that neither the parties nor the district court included or referenced extraneous materials in briefing or deciding the motion to dismiss. Mr. Williams contends the government's certification constitutes extraneous material. But he concedes "[t]he U.S. Attorney submitted its Certification not in support of any of its motions to dismiss but rather as a statutory prerequisite to its notice of removal and motion to substitute." Aplt. Opening Br. at 26 n.4. Moreover,

the court did not "rely on the extraneous Certification," *id.* at 24-25, or consider anything outside the First Amended Complaint. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103-04 (10th Cir. 2017) (noting the motion was properly adjudicated under Rule 12(b)(6) where the court considered only the complaint and materials attached to or referenced in the complaint); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1129 & n.9 (10th Cir. 1999) (noting the district court, in considering the motion under Rule 12(b)(6) and not Rule 56, "did not consider two affidavits which the government filed," but did consider materials that the "plaintiffs appended to and incorporated by reference in their complaint").

Because the district court did not convert the motion to dismiss into one for summary judgment, Mr. Williams's argument that it did so without providing him advance notice fails.

B. ***Dismissal of the Second Amended Complaint's* Bivens *Claim***

Mr. Williams argues the district court erred in dismissing his *Bivens* claim, which alleged deprivation of a liberty interest under the Fifth Amendment's Due Process Clause.[6] We disagree.

[6] Mr. Williams expressly abandons his *Bivens* claim against Mr. Bruner in his official capacity, and rightly so, as "[t]here is no such animal as a *Bivens* suit against a public official . . . in his or her official capacity," *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005) (internal quotation marks omitted).

1. **Legal background**

"The liberty interest that due process protects includes the individual's freedom to earn a living," *Setliff v. Mem'l Hosp. of Sheridan Cty.*, 850 F.2d 1384, 1396 (10th Cir. 1988) (internal quotation marks omitted), as well as "a person's . . . reputation," *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004) (internal quotation marks omitted). To state a due process liberty claim based on defamation, a plaintiff must show "defamation *plus* something more." *Al-Turki v. Tomsic*, 926 F.3d 610, 617 (10th Cir. 2019) (emphasis added). This so-called "stigma-plus" claim requires a plaintiff to show "(1) governmental defamation and (2) an alteration in legal status." *Martin Marietta Materials, Inc. v. Kan. Dep't of Transp.*, 810 F.3d 1161, 1184 (10th Cir. 2016) (internal quotation marks omitted). Courts have recognized status alterations for the denial of the right to purchase liquor, a prohibition from public employment, the denial of the right to attend school, parole revocation, termination of the right to drive, and a requirement to register as a sex offender. *See Al-Turki*, 926 F.3d at 617; *Brown v. Montoya*, 662 F.3d 1152, 1167 (10th Cir. 2011).

2. **Analysis**

The district court dismissed Mr. Williams's *Bivens* claim because he failed to show the alleged defamation occurred during the "course of termination" from his employment. We affirm on the alternative ground that Mr. Williams failed to allege a cognizable injury under *Bivens* sufficient to constitute an alteration in legal status.

First, to the extent Mr. Williams asserted "lost standing," "damage to his good name and reputation," and lost "employment from several potential employers," Aplt. App. at 96, neither reputational harm nor resulting "impairment of . . . future employment opportunities" are actionable under *Bivens*. *Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991); *see also Setliff*, 850 F.2d at 1396 (holding "circumstances which make an employee somewhat less attractive to employers"—as distinct from "legal barrier[s]"—"hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty" (internal quotation marks and citation omitted)).

Mr. Williams also has asserted an alteration in his legal status based on reputational damage causing him to lose his sponsor for a security clearance and to be unable to procure a new sponsor. But we have held a civilian does not have a constitutionally protected liberty interest in a security clearance. *See Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) ("Whatever expectation an individual might have in a clearance is unilateral at best, and thus cannot be the basis for a constitutional right."). Moreover, Mr. Williams has not alleged his inability to procure a sponsor was "governmentally imposed," *Al-Turki*, 926 F.3d at 618 (internal quotation marks omitted), or the result of a "legal barrier." *Setliff*, 850 F.2d at 1396. Rather, as with employment opportunities, his loss of sponsorship "flows from" the reputational damage and is not recoverable under *Bivens*. *Siegert*, 500 U.S. at 234.[7]

[7] We need not address the government's qualified immunity argument because of how we dispose of the *Bivens* claim. *See Hill*, 884 F.2d at 1320 (10th Cir. 1989).

Mr. Williams failed to allege a sufficient "plus" for his stigma-plus claim. The district court properly dismissed the *Bivens* claim.

III. CONCLUSION

We affirm the district court's judgment. Although not addressed by the parties, we note that "[j]urisdictional dismissals ordinarily should be entered *without* prejudice." *Barnes v. United States*, 776 F.3d 1134, 1151 (10th Cir. 2015) (emphasis in original). The district court's dismissal of the First Amended Complaint for lack of jurisdiction should have been "without prejudice," not "with prejudice" as the order specifies. We remand to the district court to modify the order.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge