FILED
United States Court of Appeals
Tenth Circuit

October 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SCOTT A. WILLIAMS,

Plaintiff - Appellant,

v.

CHALON KELLER; HEIDI GIBSON; NED KING; RANDY TITUS; DAVID BOLTON; UNITED STATES OF AMERICA; JOHN and JANE DOES I-XX,

Defendants - Appellees.

No. 21-4022
(D.C. No. 1:19-CV-00079-TS)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY** and **HOLMES**, Circuit Judges.

Plaintiff Scott A. Williams appeals the district court's Fed. R. Civ. P. 12(b)(6) dismissal of his malicious prosecution claims against the above-named federal

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

The following factual summary is derived from the complaint. Mr. Williams was employed by STS Systems Integration (SSI), a defense contractor doing work for the Air Force at Hill Air Force Base (HAFB) related to the acquisition of F-16 aircraft by the Indonesia Air Force (IDAF). In March 2013, he and several Air Force civilian employees, including defendants Heidi Gibson and Randy Titus, met with representatives of the IDAF to discuss its need for F-16 components and parts. During the conference, an IDAF officer asked Mr. Williams to show him a technical order with drawings of the cockpit in the F-16 aircraft the IDAF was going to acquire. Believing he was authorized to do so, Mr. Williams gave the IDAF officer the drawings. When Mr. Williams realized the data transfer may have been premature, he informed Mr. Titus. They then retrieved the drawings from the IDAF.

Several weeks later, Ms. Gibson told defendant Ned King, the section chief over the F-16 Indonesia program, she thought Mr. Williams's disclosure of the drawings was inappropriate. Mr. King reported this to defendant Chalon Keller, the deputy director of the F-16 International Branch at HAFB. Together, they reported the alleged security violation to security manager Donalene Knowley.

[1] The district court dismissed the United States as a defendant after Mr. Williams conceded it was not a proper defendant in a *Bivens* action. *See Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001). He does not appeal that ruling.

In April 2013, at the request of IDAF officials, Mr. Williams arranged for spare brake assemblies to be shipped to Indonesia for installation on one of the IDAF's F-16s. He alleged that he believed the shipment was consistent with Air Force policy, but the defendants claimed it violated Air Force regulations and that he had made the shipment to advance his own interests to the detriment of the Air Force.

SSI terminated Mr. Williams in May 2013. He alleged his termination was the result of Mr. Keller's and Mr. King's insistence that SSI remove him from the F-16 foreign military sales program because of the data transfer and parts shipment.

The Office of Special Investigations at HAFB began an investigation of Mr. Williams's sharing of the F-16 drawings with the IDAF officer and his shipment of the brake assemblies to the IDAF. Mr. Keller, Ms. Gibson, Mr. King, and Mr. Titus provided statements to defendant David Bolton, the lead investigator.

In February 2016, a grand jury returned an indictment against Mr. Williams on two counts of unlawful exportation of goods from the United States, false statement in a document, and conversion of property of the United States. The indictment was based in part on information developed by Mr. Bolton's investigation, including the statements provided by the other defendants. Mr. Williams was detained in county jail for four days.

In July 2017, the district court dismissed the indictment on a motion by the United States. Mr. Williams then brought this action alleging he was subjected to a malicious prosecution in violation of the Fourth Amendment based on the defendants' allegedly false statements about him during the investigation. He sought

damages under the authority of *Bivens*. The district court dismissed the complaint under Rule 12(b)(6), concluding Mr. Williams failed to state a plausible claim under *Bivens* because (1) his claims arose in a context different from Supreme Court precedents, and (2) there were significant reasons for declining to create a new *Bivens* cause of action. This appeal followed.

DISCUSSION

Mr. Williams contends the district court erred by dismissing his complaint. But he largely ignores the basis for the court's decision—that his claims are not cognizable under *Bivens*—and focuses instead on fact-based arguments about the merits of his claims. We conclude the district court properly dismissed the claims as legally insufficient to state a plausible *Bivens* claim, and we therefore do not address Mr. Williams's merits arguments.

A. Standard of Review

As an initial matter, we note that although Mr. Williams was represented by counsel in district court, he is proceeding pro se on appeal. We thus read his filings liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

We review the district court's Rule 12(b)(6) dismissal de novo. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). "To survive a motion to dismiss, 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) (internal quotation marks omitted). In conducting our review, we accept all well-pleaded factual allegations as true, view them in the light most favorable to the plaintiff, and draw all reasonable inferences in his favor. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021), *petition for cert. filed* (U.S. June 25, 2021) (No. 20-1822). Our duty "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Smith*, 561 F.3d at 1098 (internal quotation marks omitted).

B. *Bivens* Standards

In *Bivens*, the Supreme Court recognized an implied cause of action for damages against federal officers alleged to have violated a citizen's Fourth Amendment rights. *See* 403 U.S. at 396-97. But the Court has recognized that "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). Accordingly, the Court has warned that when tasked with determining "who should decide" if a damages remedy is available, "[t]he correct answer most often will be Congress." *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (internal quotation marks omitted). Since *Bivens* was decided, the Court has proceeded cautiously and, with only two exceptions, has

refused to extend *Bivens* to new contexts and new categories of defendants. *Abbasi*, 137 S. Ct. at 1857-59 (internal quotation marks omitted).[2]

Consistent with the Court's view that further expansion of the *Bivens* remedy is "disfavored," *Iqbal*, 556 U.S. at 675, the two-part test established in *Abbasi* places significant obstacles in the path to recognition of an implied cause of action where there is no statute authorizing a claim for money damages. First, courts must determine whether a claim "presents a new *Bivens* context." *Abbasi*, 137 S. Ct. at 1859. The context is new if the case differs "in a meaningful way" from the Court's previous *Bivens* cases. *Id.* "A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernandez*, 140 S. Ct. at 743.

Second, if the plaintiff's claim presents a new *Bivens* context, courts must consider whether "there are special factors counselling hesitation in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857 (internal quotation marks omitted). The focus of the special-factors inquiry is "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858. "[T]o be a special factor counselling hesitation, a factor must cause a court to hesitate before

[2] The two exceptions are *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (permitting an employee of a member of Congress to bring a *Bivens* action alleging gender discrimination under the Due Process Clause of the Fifth Amendment), and *Carlson v. Green*, 446 U.S. 14, 18-20 (1980) (allowing a federal prisoner to pursue an Eighth Amendment claim under *Bivens* for deliberate indifference to serious medical needs by prison officials).

answering that question in the affirmative." *Id.* (internal quotation marks omitted). The "special factors" at issue here are (1) whether a *Bivens* action "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch," *id.* at 1861; (2) whether Congress has taken other action in the area without authorizing a damages remedy, *see id.* at 1862; and (3) whether a "remedial structure" is already in place to address constitutional violations, even if it does not go as far as a *Bivens* remedy might, *id.* at 1858, 1862-63. When factors like these are present, it is "less probable that Congress would want the Judiciary to entertain a damages suit," *id.* at 1858, so we must "reject the request" to expand *Bivens*, *Hernandez*, 140 S. Ct. at 743.

C. Application

Applying that analytical framework here, we have no trouble concluding that Mr. Williams's claims do not fall within the narrow spectrum of claims for which the Supreme Court has approved a *Bivens* remedy. He conceded in district court that his claims "establish a new *Bivens* context" because they are meaningfully different from the Fourth Amendment claim at issue in *Bivens*. R. at 143. Thus, the only question we must answer is whether this is one of the unusual situations in which we are "well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858. We conclude it is not, because we agree with the district court that the intrusion into executive-branch functions and presence of alternative remedial processes counsel against extending *Bivens* here.

First, expanding *Bivens* here would interfere with executive branch functions in several important ways. To prove his claims, Mr. Williams would have to establish that the defendants provided false information knowingly or with reckless disregard for the truth, and that probable cause would not have existed without that information. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (to prevail on Fourth Amendment claim alleging misrepresentations in warrant affidavit, defendant had to show false statements were necessary to probable cause finding); *see also Hartman v. Moore*, 547 U.S. 250, 252, 265-66 (2006) (to prove First Amendment retaliatory prosecution claim, plaintiff must show lack of probable cause). The jury considering Mr. Williams's claims would have to examine the evidence available to investigators, prosecutors, and the grand jury, then decide whether the grand jury would have voted to indict him without the allegedly false information the defendants provided. The fact that litigating his claims would require delving into executive charging decisions and compromising the secrecy of grand jury proceedings counsels against extending *Bivens*.[3] *Cf. Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (recognizing in selective prosecution case "that the decision to prosecute is particularly ill-suited to judicial review" and identifying "substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute"); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983) ("[T]he proper

[3] We recognize that some suits under 42 U.S.C. § 1983 pose similar risks. But we presume Congress has done the cost benefit analysis and decided the potential encroachment is worth it, and recognizing a new *Bivens* claim in this context would require us to make that balancing determination without congressional guidance.

functioning of our grand jury system depends upon the secrecy of grand jury proceedings." (internal quotation marks omitted)). The fact that fear of potential financial liability may chill federal employees' willingness to participate in internal investigations also counsels against extending *Bivens* here. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (recognizing that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

Second, Congress has provided a statutory damages remedy for some victims of wrongful prosecution and tortious conduct by federal employees but not for others, which reflects a deliberate policy decision that we should not disrupt. The Hyde Amendment permits defendants in criminal cases to recover attorney's fees when the government's position was vexatious, frivolous, or in bad faith. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997). And under the unjust conviction and imprisonment statutes, a person who can show his conviction was reversed or set aside because he was not guilty of the offense is entitled to recover damages based on the length of his unjust incarceration. *See* 28 U.S.C. §§ 1495, 2513(a). Congress has also established a statutory framework for remedying torts committed by federal officers—the Federal Tort Claims Act (FTCA). *See Hernandez*, 140 S. Ct. at 748 (considering scope of FTCA remedies in determining whether to create a new *Bivens* remedy). It waives the federal government's sovereign immunity for many tort claims but expressly exempts from that waiver most claims arising from malicious

prosecution. 28 U.S.C. § 2680(h).[4] Congress's decision not to expose most federal employees to liability for malicious prosecutions under the FTCA does not necessarily mean it would do the same if it were to enact legislation covering constitutional claims against federal employees,[5] but the limited scope of the FTCA's waiver of immunity weighs against our expansion of the *Bivens* remedy to cover Mr. Williams's malicious prosecution claims. *See Hernandez*, 140 S. Ct. at 748.

The fact that statutory remedies may be unavailable to Mr. Williams does not affect our special-factors analysis.[6] *See United States v. Stanley*, 483 U.S. 669, 683 (1987) (explaining that "it is irrelevant to a special factors analysis whether the laws currently on the books afford [the plaintiff] . . . an adequate federal remedy for his injuries" (internal quotation marks omitted)); *see also Schweiker v. Chilicky*, 487 U.S. 412, 414, 425 (1988) (declining to imply a *Bivens* remedy for due process claims stemming from the denial of Social Security benefits despite unavailability of compensatory damages under alternate remedial scheme). The special factor that counsels hesitation is not whether Congress has established a remedy for the plaintiff, but whether it has established a remedial structure and whether judicially created

[4] The exception does not apply to investigative or law enforcement officers. 28 U.S.C. § 2680(h).

[5] The FTCA does not apply to a civil action brought against a federal employee for a constitutional violation. *See* 28 U.S.C. § 2679(b)(2).

[6] We recently dismissed Mr. Williams's appeal of the district court's entry of summary judgment for the United States on his FTCA claims and the dismissal of the action without prejudice for lack of subject matter jurisdiction. *Williams v. United States*, 852 F. App'x 378, 379 (10th Cir. 2021).

remedies would upset the balance Congress struck. *See Abbasi*, 137 S. Ct. at 1857-58 (explaining that "[w]hen an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them," and that when "Congress has designed its regulatory authority in a guarded way, . . . it [is] less likely that Congress would want the Judiciary to interfere" (internal quotation marks omitted)).

We conclude that these concerns provide "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" here. *Id.* at 1858; *see Annappareddy v. Pascale*, 996 F.3d 120, 137-38 (4th Cir. 2021) (declining to extend *Bivens* remedy to Fourth Amendment malicious prosecution claim, citing existence of alternative remedial structure for persons wrongly charged or convicted and judicial interference in executive branch investigations and prosecutorial functions); *Cantú v. Moody*, 933 F.3d 414, 423-24 (5th Cir. 2019) (same, citing, among other factors, the FTCA and "the length of time Congress has gone without statutorily creating a *Bivens*-type remedy for this context"); *Farah v. Weyker*, 926 F.3d 492, 500-02 (8th Cir. 2019) (same, citing intrusion into executive functions and existence of alternative remedial schemes). Accordingly, the district court properly dismissed Mr. Williams's claims as legally insufficient. And because his claims are not cognizable under *Bivens*, we do not address his merits-based arguments.

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Jerome A. Holmes
Circuit Judge