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FILED

UNITED STATES COURT OF APPEALS

AUG 27 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EDWIN F. PARSON,

Plaintiff-Appellant,

v.

UNITED STATES AIR FORCE; et al.,

Defendants-Appellees.

No. 18-35995

D.C. No. 4:18-cv-00002-TMB

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska

Timothy M. Burgess, District Judge, Presiding

Submitted August 19, 2019**
D PHOENIX D CH D PHOENIX
CARTER CH CARTER OBAMA
SENIOR ?

Before: SCHROEDER, PAEZ, and HURWITZ, Circuit Judges.

Edwin F. Parson appeals pro se from the district court's judgment dismissing his action alleging federal claims. We have jurisdiction under 28 U.S.C. § 1291.

We review de novo a dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii). *Watison v.*

Carter, 668 F.3d 1108, 1112 (9th Cir. 2012). We may affirm on any ground

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

supported by the record. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).

We affirm.

The district court properly dismissed Parson's claims alleging violation of the Posse Comitatus Act because Parson failed to establish that the United States

had waived sovereign immunity for such claims. See *Reed v. U.S. Dep't of the Interior*, 231 F.3d 501, 504 (9th Cir. 2000) ("The United States can be sued only to

the extent that it has waived sovereign immunity."); *Holloman v. Watt*, 708 F.2d

1399, 1401 (9th Cir. 1983) ("The party who sues the United States bears the

burden of pointing to . . . an unequivocal waiver of immunity.").

Dismissal of Parson's claim under *Bivens v. Six Unknown Named Agents of*

Federal Bureau of Narcotics, 403 U.S. 388 (1971) against defendants United

States Air Force, Eielson AFB Security Forces, and Dobbins was proper because

Parson failed to allege facts sufficient to state a plausible claim. See *Ashcroft v.*

Iqbal, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to

Bivens . . . a plaintiff must plead that each Government-official defendant, through

the official's own individual actions, has violated the Constitution."); *FDIC v.*

Meyer, 510 U.S. 471 (1994) (the United States has not waived its sovereign

immunity for constitutional torts; declining to extend *Bivens* liability to agencies of

the federal government); *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010)

(although pro se pleadings are construed liberally, plaintiff must present factual

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allegations sufficient to state a plausible claim for relief).

AFFIRMED.

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No. 18-35995

D.C. No. 4:18-cv-00002-TMB
District of Alaska,
Fairbanks

ORDER

Before: ~~ORSTER~~ ~~CAWTON~~ ~~OGAMA~~
SCHROEDER, PAEZ, and HURWITZ, Circuit Judges.

Parson's petition for rehearing en banc (Docket Entry No. 11) is denied.

No further filings will be entertained in this closed case.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

EDWIN F. PARSON,
Plaintiff,

vs.

UNITED STATES AIR FORCE,
EIELSON AFB SECURITY FORCES,
and SSGT MATTHEW DOBBINS,
Defendants.

Case No. 4:18-cv-00002-TMB

SECOND SCREENING ORDER

Edwin F. Parson, a self-represented Plaintiff, filed a Complaint claiming that his civil rights were violated during an incident at the security gate to Eielson Air Force Base, which was followed by him losing his job;¹ and an Application Waive the Filing Fee, which the Court granted.² Under federal law,³ the Court screened the Complaint and provided Mr. Parsons an opportunity to amend to establish that this Court has subject-matter jurisdiction.⁴ The Court will not repeat the screening requirement and standard of review here.

¹ Docket 1.

² Dockets 3, 7.

³ 28 U.S.C. § 1915(e)(2).

⁴ Docket 7.

Diversity Jurisdiction

In his initial Complaint, Mr. Parson alleged that Defendant SSgt Dobbins was a resident of Alaska.⁵ The Court described diversity jurisdiction in its Screening Order, explaining that because Mr. Parson and SSgt. Dobbins are both residents of Alaska, diversity jurisdiction has not been established.⁶ In his First Amended Complaint, Mr. Parson now claims that SSgt Dobbins is a resident of Oklahoma.⁷

Although the Court liberally permits a plaintiff to file an amended complaint unless amendment would be futile,⁸ this is not so that a “plaintiff [may] amend the complaint to state a viable claim ‘[by] contradicting ... the allegations of his original complaint.’”⁹ Because Mr. Parson attempted to establish diversity jurisdiction by asserting contradictory facts, the Court finds no diversity jurisdiction here. And even if the Court were to accept these new facts, Mr. Parson has also named

⁵ Docket 1 at 2.

⁶ Docket 7 at 4 (Under 28 U.S.C. § 1332, a “federal court may hear claims if there is diversity jurisdiction between the parties and more than \$75,000 is at issue. Diversity jurisdiction requires that the plaintiff is a citizen of a different state from each defendant.” (citations and internal quotation marks omitted).

⁷ Docket 8 at 2. Mr. Parson seeks damages in the amount of \$250,000, punitive damages in the amount of \$250,000, and an order requiring Defendants to “restore security clearance, void tickets and bar letter, and inform any others of information ...” *Id.* at 6

⁸ *Garmon v. County of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016).

⁹ *Id.* at 846 (citation omitted).

Eielson AFB Security Forces, and the United States Air Force in Alaska as defendants, thus defeating diversity jurisdiction.¹⁰

Federal Question Jurisdiction

Mr. Parson brings this action under “28 U.S.C. § 1367 original jurisdiction, [for] alleged violation[s] of 18 U.S.C. § 1385 and 10 U.S.C. § 275, and the Defendant is United States.”¹¹ 28 U.S.C. § 1367 provides the district courts with “supplemental jurisdiction over ... claims that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” Before supplemental jurisdiction applies, Mr. Parson must show that the court has original jurisdiction in the first place. Thus, the statute is inapplicable.

18 U.S.C. § 1385 provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

And 10 U.S.C. § 275 provides:

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any

¹⁰ See *Cook v. AVI Casino Enterprises*, 548 F.3d 718, 722 (9th Cir. 2008) (quoting *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (diversity jurisdiction requires “complete diversity of citizenship”)).

¹¹ Docket 8 at 1.

personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

The statutes do not state that the Court has jurisdiction to provide a remedy for an individual who claims that his rights under the statutes were violated by the United States or any other defendant. Thus, Mr. Parson has not cited to this Court's jurisdiction over his case.

Re-Litigating Pending Traffic Case

In Claim 1, Mr. Parson complains about a traffic violation in *USA v. Parson*, 4:18-po-00001-SAO, and violations of "the Posse Comitatus Act of 1878."¹² In *USA v. Parson*, trial was held on June 6, 2018, in which Defendant SSgt Dobbins testified.¹³ In that trial, Mr. Parson stated: "[W]hen I arrived at that gate, they violated my civil rights by taking my property, my vehicle, and my means of employment by acting in violation of the Posse Comitatus Act as a peace officer."¹⁴ Mr. Parson questioned witnesses about his civil rights and the Posse Comitatus Act.¹⁵ When he testified, he stated:

¹² Docket 8 at 3.

¹³ 4:18-po-00001-SAO, Dockets 16, 17.

¹⁴ *Id.*, Docket 16 at 23-24.

¹⁵ *Id.*, Docket 16 at 62 (Questions by Mr. Parson of witness: "So you're there at that duty shack. Are you taking into consideration any of the civil rights?

A. 100 percent. It's a part of our job, which is why you weren't extracted from your vehicle.

4:18-cv-00002-TMB, *Parson v. United States Air Force, et al.*

Second Screening Order

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... They can keep my ID card. But I felt at that time that I was wronged by them keeping that card, my property, so that alone was a Fourth Amendment right.

And I guess because I knew ... right away that I had been wronged, because a similar incident had taken place on Fort Wainwright, to the point where I was taken from my vehicle, interrogated and jailed at their installation...

...

... I know that [they] violat[ed] the Posse Comitatus Act...

So I'm not sure -- well, I was never meant to have a soldier be cognizant of someone's civil rights. So there's a disconnect and that's why that act is still in existence from ... 1789? It's an old act.

Nonetheless, all this took place because of AST's -- well, really not their fault. There's a root cause and it has to do with a 26-year divorce after that. It's because of those contacts with the state district court that these keep getting repeated fraudulently.¹⁶

Mr. Parson complains that a violation of the PCA occurred "when security forces (SF) ... participated ... without authority in arrest of me and seizure of me

Q. Because of civil rights and because --

A. Because legal proceeded to let us know that it was within your right to maintain your freedom inside of your vehicle at that time.

Q. But in my sense I was not free. I was held there.

A. You were still on a military installation, yes, sir."); *id.* at 79 (Questions by Mr. Parsons of witness about "5525.5, DoD instruction ... a section in there called Enclosure 4 that ... talks about an acronym PCA. Are you familiar with that?

A. Can you tell me what it means?

Q. Yes. It's Posse Comitatus Act. Have you heard that before?

A. I have heard of that, but I'm not 100 percent read up on it. I don't know it 100 percent.

Q. Are you familiar with any or part of a report that's given quarterly to show your assistance or direct or non-direct assistance with local authorities? ... Are you in a report to -- showing that you assisted local authorities?

A. I believe so, yes.

Q. But you're not sure?

A. No, I'm not."); *id.* at 81 (Questions by Mr. Parson: "Are you more in the mode of defeat the enemy or the protection of individuals' civil rights?

A. Protection.").

¹⁶ *Id.*, Docket 16 at 85-86.

and my vehicle at Eielson AFB gate.”¹⁷ Throughout Claim 1, Mr. Parson argues his position in his traffic violation case.

In Claim 2, Mr. Parson continues his arguments from his traffic violation case, asserting that his civil rights were violated when a video of the incident was taped over afterwards. He “would like to have subpoenaed any who had and/or the communications themselves to the effect of acting without AST present for arrest and seizure.”¹⁸

In Claim 3, Mr. Parson continues to assert that “the chain of events by Eielson AFB SF led to civil rights violations... [The Defendants have] oppressed the governed’s right to life, liberty and the pursuit of happiness.”¹⁹

A decision is pending in *USA v. Parson*, 4:18-po-00001-SAO, and the Court will not interfere with or re-litigate that case here. If Mr. Parson is found guilty, he may appeal the decision of the Magistrate Judge. So, even if Mr. Parson had asserted jurisdiction based on the violation of his civil rights,²⁰ an action asserting the claims is premature.

¹⁷ Docket 8 at 3.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 5.

²⁰ In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court “recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). “Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991). But “the Supreme Court has held that 4:18-cv-00002-TMB, *Parson v. United States Air Force, et al.*

Second Screening Order

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IT IS THEREFORE ORDERED:

1. Mr. Parson's complaint is DISMISSED for failure to state a claim.
2. Any outstanding motions are DENIED as moot.
3. The Clerk of Court is directed to enter a judgment accordingly.

DATED at Anchorage, Alaska, this 15th day of November, 2018.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

no *Bivens* remedy is available against a federal agency[.]” *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1119 (9th Cir. 2009) (citing *FDIC v. Meyer*, 510 U.S. 471 484 (1994)) (emphasis added). If Mr. Parson is found guilty, *Heck v. Humphrey*, 412 U.S. 477 (1994), will preclude a *Bivens* action unless and until the sentence or conviction is invalidated. *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996).

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Second Screening Order
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