NOT RECOMMENDED FOR PUBLICATION

No. 22-1915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 14, 2023
DEBORAH S. HUNT, Clerk

CAROL ANN MCBRATNIE, Plaintiff-Appellant, v. CHARLES PAUL RETTIG, IRS Commissioner, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: BOGGS, BATCHELDER, and GIBBONS, Circuit Judges.

Carol Ann McBratnie, a pro se Michigan resident, appeals the district court's judgment dismissing her complaint. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because the district court correctly dismissed the case, we affirm.

I. Facts & Procedural History

McBratnie filed this action against the Internal Revenue Service ("IRS"), former IRS Commissioner Charles Rettig, various IRS officials and attorneys, and United States Tax Judge Maurice B. Foley, asserting due process violations and claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq.; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.; and 26 U.S.C. § 7433, which addresses unauthorized collection actions. She sued the individual defendants in their personal and official capacities and sought damages, a declaratory judgment, and injunctive relief. McBratnie later moved for leave to amend her complaint to include a claim under *Bivens v. Six Unknown Named Agents of Federal*

Bureau of Narcotics, 403 U.S. 388 (1971). McBratnie's complaint focused on disputes between her and the IRS regarding her classification as an employee or independent contractor for income tax purposes. She alleged that these disputes and the IRS's mistreatment of her during administrative proceedings and tax-court litigation destroyed her career as a nurse practitioner.

The defendants moved to dismiss McBratnie's complaint for lack of subject-matter jurisdiction, insufficient process, insufficient service of process, and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (4)-(6). To that end, the defendants argued that (1) both the IRS and the individual defendants are immune from suit for money damages; (2) McBratnie's claims for money damages under the FTCA, RICO, § 7433, and *Bivens* all fail as a matter of law; (3) federal law bars McBratnie's claims for equitable relief; and (4) McBratnie failed to properly serve any of the individual defendants. The district court granted the defendants' Rule 12(b) motion, denied McBratnie's motion for leave to amend as futile, and dismissed her complaint. The court also denied McBratnie's subsequent motion to alter or amend the judgment. *See* Fed. R. Civ. P. 59(e).

McBratnie now appeals, challenging the district court's dismissal of her complaint.

II. Law & Analysis

a. Standard of Review

We review de novo a district court's decision to dismiss a complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) or for failure to state a claim under Rule 12(b)(6). *See Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014); *In re Carter*, 553 F.3d 979, 984 (6th Cir. 2009). Under Rule 12(b)(1), a challenge to the sufficiency of the pleadings is a "facial attack" on the existence of subject-matter jurisdiction, and the plaintiff bears the burden of establishing that subject-matter jurisdiction exists. *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). The plaintiff's allegations are taken as true. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). To avoid dismissal for failure to state a claim under Rule 12(b)(6), "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

b. Sovereign Immunity

The district court first concluded that sovereign immunity barred McBratnie's claims for money damages against the IRS and the individual defendants in their official capacities. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Sovereign immunity "extends to agencies of the United States," *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993), and to federal officers acting in their official capacities, *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 671 (6th Cir. 2013). A waiver of sovereign immunity may not be implied and exists only when Congress has expressly waived immunity by statute. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992).

The United States has not expressly waived its sovereign immunity for constitutional tort claims for money damages. *See United States v. Testan*, 424 U.S. 392, 400-02 (1976). Nor has it done so with respect to RICO claims. *Partain v. Isgur*, 390 F. App'x 326, 329 (5th Cir. 2010) (per curiam); *see Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) ("[T]here can be no RICO claim against the federal government."). Although the FTCA includes a limited waiver of sovereign immunity for torts committed by federal employees acting within the scope of their employment, 28 U.S.C. § 1346(b)(1), the FTCA exempts from this waiver "[a]ny claim arising in respect of the assessment or collection of any tax." 28 U.S.C. § 2680(c). Here, McBratnie's FTCA claim is based on an allegation that the IRS negligently failed to process her SS-8 forms[1] for certain tax years. Accordingly, the district court properly dismissed McBratnie's due process, RICO, and FTCA claims against the IRS and the individual defendants in their official capacities for lack of jurisdiction under Rule 12(b)(1).

c. Judicial & Quasi-judicial Immunity

Next, McBratnie challenges the district court's dismissal of her claims for monetary damages against Judge Foley and the IRS attorneys in their individual capacities. But "[i]t is a

[1] Workers file Form SS-8 with the IRS to request a determination of whether they are an employee or an independent contractor for purposes of federal employment taxes and income tax withholding. *See* https://www.irs.gov/forms-pubs/about-form-ss-8.

well-entrenched principle in our system of jurisprudence that judges are generally absolutely immune from civil suits for money damages." *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997). And this doctrine of "absolute judicial immunity has been extended to non-judicial officers who perform 'quasi-judicial' duties." *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (quoting *Joseph v. Patterson*, 795 F.2d 549, 560 (6th Cir. 1986)). "Quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Id.* IRS attorneys representing the federal government in administrative and judicial proceedings fit that bill. *Fry v. Melaragno*, 939 F.2d 832, 836-38 (9th Cir. 1991); *see Butz v. Economou*, 438 U.S. 478, 512-13 (1978) ("We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages.").

The Supreme Court has held that judicial immunity is overcome in only two circumstances: (1) "nonjudicial actions, i.e., actions not taken in the judge's judicial capacity" and (2) "actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam). McBratnie's complaint did not allege that Judge Foley or the IRS attorneys acted in a non-judicial capacity or in the complete absence of all jurisdiction. Accordingly, Judge Foley and the IRS attorneys are immune from civil suit for money damages, and the district court properly dismissed McBratnie's claims against those defendants pursuant to Rule 12(b)(6).

d. Qualified Immunity

The district court next determined that the doctrine of qualified immunity shielded the non-attorney IRS officials named in McBratnie's complaint from suit for money damages in their individual capacities. Qualified immunity shields government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether a government official is entitled to qualified immunity, we employ a two-step analysis, "which we may conduct in either order." *Sumpter v. Wayne County*, 868 F.3d

473, 480 (6th Cir. 2017). "We ask whether the facts alleged or shown 'make out a violation of a constitutional right' and 'whether the right at issue was "clearly established"' at the time of the incident." *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). The plaintiff bears the burden of "satisfy[ing] both inquiries in order to defeat the assertion of qualified immunity." *Id.* When reviewing qualified immunity at the pleading stage, "the inquiry should be limited to the 'clearly established' prong of the analysis if feasible." *Clark v. Stone*, 998 F.3d 287, 298 (6th Cir. 2021).

In order to conclude that the right that the official allegedly violated is clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Whether the official had such notice is "judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). "Critically, we do not define clearly established law at a 'high . . . level of generality.'" *Trozzi v. Lake County*, 29 F.4th 745, 761 (6th Cir. 2022) (alteration in original) (quoting *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021)). Instead, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quoting *Anderson*, 483 U.S. at 640).

McBratnie's complaint alleged that the non-attorney IRS officials named in her complaint violated her federal rights by failing to process her SS-8 forms. But McBratnie has failed to identify a case where an IRS official acting under similar circumstances as the officials in this case was held to have violated federal law. Indeed, we have found no case supporting the proposition that an IRS official has a legal duty to process an SS-8 form, and the relevant authority suggests otherwise. *See* 26 U.S.C. § 7436 ("the Tax Court *may* determine" whether an employment tax amount is correct) (emphasis added); *see also B G Painting, Inc. v. Commissioner*, 111 T.C.M. (CCH) 1282, 2016 WL 1375160, at*10 (T.C. 2016) (noting that "[t]he Form SS-8 process is an entirely voluntary compliance initiative" and is not part of the IRS's normal audit and examination procedures). Accordingly, "existing precedent" has not "placed the question 'beyond debate'" so that reasonable officials would understand that they were violating the right that McBratnie asserts. *Clark*, 998 F.3d at 298 (quoting *Schulkers v. Kammer*, 955 F.3d 520, 533 (6th Cir. 2020)).

e. Claim Under 26 U.S.C. § 7433

McBratnie's remaining claim for money damages was brought under § 7433.[2] That statute provides a cause of action against the United States "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of [Title 26 of the United States Code], or any regulation promulgated under [Title 26]." 26 U.S.C. § 7433(a). "A successful claim under § 7433 can only occur, therefore, when Title 26, or a regulation promulgated thereunder, is violated." *Sachs v. United States ex rel. IRS*, 59 F. App'x 116, 118 (6th Cir. 2003). Because McBratnie's complaint failed to identify any provision under Title 26 or regulations promulgated thereunder that the IRS allegedly violated, she cannot prevail on her § 7433 claim. ***(See id.).*** The district court properly dismissed this claim under Rule 12(b)(6) for failure to state a claim.

f. Claims for Equitable Relief

McBratnie's claims for equitable relief against the IRS fare no better. The Anti-Injunction Act provides that, except for certain lawsuits authorized elsewhere in the Internal Revenue Code, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). "When the Anti-Injunction Act applies, the district court is deprived of its jurisdiction and the suit must be dismissed." *Shifman v. IRS*, 103 F.3d 130 (6th Cir. 1996) (per curiam) (unpublished table decision). Therefore, to the extent that McBratnie sought a court order directing the IRS "to refund the proceeds improperly collected" against her based on "the difference caused by the unprocessed SS-8" forms or "a preliminary injunction barring further collections actions regarding tax years 2017 . . . and 2019," the Anti-Injunction Act bars the action. *See RYO Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 471

---

[2] McBratnie's complaint makes several references to criminal statutes, such as 18 U.S.C. §§ 241 and 242. To the extent that she sought to sue the defendants under those statutes, her claims were subject to dismissal under Rule 12(b)(6) because those statutes provide no private cause of action. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 190 (1994); *see also Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (holding this court may affirm on any basis that is supported by the record).

(6th Cir. 2012) (noting that the Anti-Injunction Act "has been interpreted broadly to encompass almost all premature interference with the assessment or collection of any federal tax"); *see also Alexander v. Ams. United Inc.*, 416 U.S. 752, 759 (1974) ("[T]he constitutional nature of a taxpayer's claim . . . is of no consequence under the Anti-Injunction Act.").

Similarly, the Declaratory Judgment Act authorizes courts to issue declaratory judgments "except with respect to Federal taxes." 28 U.S.C. § 2201(a). The Declaratory Judgment Act operates "coterminously" with the Anti-Injunction Act, and the analysis under the two statutes is identical. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1435 (D.C. Cir. 1995). Thus, the Declaratory Judgment Act also deprives a federal court of jurisdiction to the extent McBratnie seeks a declaratory judgment regarding her various tax-related claims. *See Ecclesiastical Order of the ISM of AM, Inc. v. IRS*, 725 F.2d 398, 402 (6th Cir. 1984) (treating the Declaratory Judgment Act as jurisdictional). For these reasons, the district court properly dismissed McBratnie's claims for equitable relief under Rule 12(b)(1).

g. Motion to Amend Complaint

Lastly, to the extent that McBratnie argues that the district court erred by denying her leave to amend her complaint to assert a *Bivens* claim, her argument lacks merit. We review de novo a district court's denial of a motion to amend a complaint when the court decides that "amendment would be futile." *Williams v. City of Cleveland*, 771 F.3d 945, 949 (6th Cir. 2014). Leave to amend a pleading should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). But leave need not be given if amendment would be futile. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 640-41 (6th Cir. 2018). An amendment is futile if it could not survive a motion to dismiss. *Williams*, 771 F.3d at 949.

To state a claim under *Bivens*, McBratnie must allege that she was "deprived of rights secured by the Constitution or laws of the United States" and that "the defendants who allegedly deprived [her] of those rights acted under color of *federal* law." *Marie v. Am. Red Cross*, 771 F.3d 344, 364 (6th Cir. 2014). The Supreme Court has explicitly recognized only three contexts in which a private right of action for damages may be properly brought against federal officials for constitutional violations: (1) under the Fourth Amendment for a violation of the prohibition

against unreasonable searches and seizures of a private citizen's residence, *Bivens*, 403 U.S. at 397; (2) under the Fifth Amendment's Due Process Clause for gender discrimination, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979); and (3) under the Eighth Amendment for failing to provide adequate medical treatment to a prisoner, *Carlson v. Green*, 446 U.S. 14, 19 (1980).

The Supreme Court has since counseled that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (quoting *Iqbal*, 556 U.S. at 675). Thus, in determining whether *Bivens* should be expanded in a particular case, a court must first ask "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]"; if so, "then the context is new." *Id.* at 139. If presented with a new context, then a court must determine whether "'special factors counsel[] hesitation' in recognizing the new claim.'" *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020) (alteration in original) (quoting *Abbasi*, 582 U.S. at 139). Such factors include "whether alternative processes exist for protecting the right," "whether existing legislation covers the area," and "separation-of-powers principles"—for instance, whether recognizing a new claim would "interfere[e] with the authority of the other branches and whether the judiciary can competently weigh the costs and benefits at stake." *Id.* (citing *Abbasi*, 582 U.S. at 136-37, 143-44; *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020)).

McBratnie's due process claims arise in a new context because they concern mistreatment that she allegedly endured from Judge Foley and several IRS officials and attorneys during her administrative proceedings and tax-court litigation. Because McBratnie's due-process claims arise in a new context, the next question is whether "'special factors counsel[] hesitation' in recognizing the new claim." *Callahan*, 965 F.3d at 524 (alteration in original) (quoting *Abbasi*, 582 U.S. at 139). They do. Most significantly, and as previously mentioned, § 7433 provides a damages remedy for misconduct committed by IRS employees. *See Fishburn v. Brown*, 125 F.3d 979, 982-83 (6th Cir. 1997) (citing 26 U.S.C. § 7433), *abrogated on other grounds by Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). The *Bivens* remedy therefore does not extend to this case. *See Abbasi*, 582 U.S. at 139. Accordingly, the district court properly denied McBratnie leave to amend her complaint on the ground that her proposed amendment would be futile.

III. Conclusion

In sum, the district court properly dismissed McBratnie's complaint under Rules 12(b)(1) and 12(b)(6), and the district court properly denied McBratnie leave to amend her complaint. Our conclusion on these points obviates the need to address the district court's alternative basis for dismissing McBratnie's complaint under Rules 12(b)(4) and 12(b)(5) for insufficient process and insufficient service of process. For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-1915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAROL ANN MCBRATNIE,

Plaintiff-Appellant,

v.

CHARLES PAUL RETTIG, IRS COMMISSIONER, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: BOGGS, BATCHELDER, and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

*Judge Davis recused herself from participation in this ruling.