APP. A

THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

No. 24-6118

(D.C. No. 5:22-CV-00282-SLP)

Susan M. Smith, Plaintiff-Appellee

v.

Comm'r of SSA, et al, Defendant-Appellant

Case Filed: September 20, 2024

Mandated November 12, 2024

ORDER AND JUDGMENT

Before MATHESON, BACHARACH, and McHUGH, Circuit Judges

Susan M. Smith appeals the district court's June 11, 2024, docket notice striking her motion entitled

APP. A

"Requesting Authorization to File Vexatious And/or

_____*After

examining the briefs and appellate record, this panel determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1 (G). the case is therefore ordered submitted without oral argument. This order and judgment is not binding precent, 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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1. Frivolous Claim." She also filed additional motions on appeal, seeking various forms of relief. We affirm the district's court's docket notice and deny the pending motions.

APP. A

BACKGROUND

The Commissioner denied Ms. Smith's application for disability-insurance benefits (DIB) ---------- a decision that Ms. Smith has continually litigate. First, in April 2019, Ms. Smith sought judicial review of the Commissioner's determination that she was not disabled. The district court affirmed, and Ms. Smith voluntarily dismissed her subsequent appeal to this court. Mem. Op. & Order, Smith v. Comm'r, No. 5:19-cv-00300-SM (W.D. Okla. Dec. 26, 2019) ECF No. 39; Mandate, Smith v. Comm'r No. 20-6008 (10th Cir. 2021) (unpublished) ("Smith I"). In the case underlying this appeal, Ms. Smith filed a complaint that sought monetary damages under 42 U.S.C. 1983 and again challenged the denial of DIB

APP. A

See Smith v. Comm'r No. 22-6115, 2023 WL 2945858. *1 (10th Cir. Apr. 14, 2023) (unpublished) ("Smith II"), *cert. denied sub nom. Smith v. O'Malley,* 144 S. Ct. 820 (2024). The district court dismissed Ms. Smith's complaint sua sponte and with prejudice under Federal Rule of Civil Procedure 12(b)(6). Id. Ms. Smith appealed, and we affirmed. Id. At *3. We held that the district court correctly dismissed the 1983 damages claim because Ms. Smith had not alleged state action and because "the Social Security Act provides the exclusive remedy fit the denial of social security benefits." Id. *2. We further held that the extent Ms. Smith continued to litigate her entitlement to DIB, those claims were prevented by the doctrine of res judicata. Id. After we rejected her appeal, Ms. Smith filed a petition for writ, which

the Supreme Court denied. *Smith v. O'Malley*, 144 S. Ct. 820 (2024). Ms. Smith then continued to submit filings in the district court, including a Motion for Summary Judgment. The district courts denied the Motion for Summary Judgment as "procedurally improper and otherwise wholly unsupported." ROA at 57. The court also explained that Ms. Smith's repeated and "meritless filings have needlessly caused judicial resources to be directed to her closed case and have interfered with [the court's] efficient administration of its case." Id. The court thus admonished Ms. Smith "that any future filings based on arguments that have been rejected by [the district court] or the Tenth Circuit Court of Appeals will be stricken and/or summarily denied "and that "continued or vexatious motion practice or other

filings in this case may result in the imposition of monetary sanctions, filing restrictions, or both." Id. At 58. Months later, Ms. Smith filed her motion "Requesting Authorization to File Vexatious And/Or Frivolous Claim." Id. At 5. The district court struck this motion in a June 11, 2024 docket notice, referencing its prior warning. Ms. Smith appealed from the district court's docket notice. In addition to her opening brief, Ms. Smith filed four motions on appeal, entitled "Motion-Right to Trial by Jury," "Motion to Dismiss," "Motion for Recusal of Judge." And "Opposition to Appellees [sic] Notice of withdrawal of Opening Brief."

II. DISCUSSION

Because Ms. Smith is proceeding pro se, we construe her filings liberally. Ogden v. San Juan County, 32

F. 3d 452, 455 (10th Cir. 1994). Nevertheless, her pro se "status does not excuse" her obligation "to comply with the fundamental requirements of the Federal Rules of Civil Procedures". Id. We first address Ms. Smith's challenge to the June 11, 2024 docket notice. We then resolve the motions pending on appeal. Federal Rules of Civil and Appellate Procedure." Id.

A. June 11, 2024, Docket Notice. Ms. Smith challenges the June 11, 2024 docket notice striking her motion "Requesting Authorization to File Vexatious And/Or Frivolous Claim." ROA at 5. We conclude the district court did not abuse its discretion by striking the motion. "The power of district courts to manage their dockets is deeply ingrained in our jurisprudence" *United States v. Schneider,* 954 F.3d 1219, 1226 (10th Cir. 2010); See

also Link v. Wabash R.R. Co., 370 U.S. 626, 630-3 (1962) (referencing "the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases"). We accordingly review the docket notice striking Ms. Smith's motion for abuse of discretion. *In re Young,* 91 F.3d 1367, 1377 (10th Cir. 1996); *see also Hornsby v. Evans,* 328 *F. App'x* 587, 588 (10th Cir. 2009). (reviewing a district court's order striking a motion for abuse of discretion). "A district court abuses its discretion when its decision is arbitrary, capricious or whimsical or falls outside the bounds of permissible choice in the circumstances." *Dansie v. Union Prac.* R.R. Co., 42 F. 4th 1184, 1198 (10th Cir. 2022)) (quotation marks omitted). Ms. Smith contends the district court erred because her filings

"were submitted in good faith" and were not meant "to harass the defendants in any way." Appellant's Br. At 1. She further contends that the defendant's "are the frivolous and/or vexatious litigants," Id. But the record does not support Ms. Smith's contentions. Rather, the record demonstrates Ms. Smith has extensively litigated the denial of DIB, including through two unsuccessful 1appeals. *See Smith I,* 846 F. App'x at 737-38; Smith II, 2023 WL 2945858 at *1. After her second appeal failed, Ms. Smith continued to submit unmeritorious filings, leading the district court to warn her that "future filings" based on already-rejected arguments would "be stricken and/or summarily denied." ROA. Given the history of this case the district court acted well within it's discretion in striking Ms. Smith's motion. *See*

Hornsby, 328, F. App'x at 589 (holding district court did not abuse its discretion by striking motion because plaintiff had "already received more than [his] fair share of scarce judicial resources" (alteration in original) (quotation marks omitted)); *Kahler v. Wal-Mart Stores, Inc.* No. 24-1023, 2024 WL 2151594, at *2 (10th Cir. May 14, 2024) (unpublished) (same). We thus reject Ms. Smith's challenge to the June 11, 2024 docket notice.

Motions Filed on Appeal.

Motion-Right to Trial by Jury

In her Motion-Right to Trial by Jury, Ms. Smith challenges various rulings made by the district court in the underlying case. We lack appellate jurisdiction to consider these challenges. Federal Rule of Appellate Procedure 3 states that a notice of appeal

must, among other things, "designate the judgment or the appealable order-from which the appeal is taken." Fed. R. P. 3 (c)(1)(B). We literally construe the requirements of Rule 3." *Smith v. Barry,* 502, U.S. 244, 248 (1992). So even if a litigant's filing technically varies the rule if the litigant's action is the functional equivalent of what the rule requires." Id. (quoting *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 317 (1988). But the "principle of liberal construction "does not "excuse noncompliance with the Rule." Id. This is because "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." Id. Thus, "noncompliance" with Rule 3"is fatal to an appeal." Id. In her notice of appeal, Ms. Smith designated order on appeal as "Judge Palk's order on June 11,

2024. [sic] denying her request for authorization to file a vexatious AND or frivolous claim." ROA at 59 She did not designate any other. Even with liberal construction, an intent to appeal from an order other than the June 1, 2024, docket notice cannot be inferred. *See Sines v. Wilner*, 609 F. 3d 1070, 1074-75 (10th Cir. 2010). (holding Rule 3 (c) was not satisfied when the notice of appeal designated is confined to arguments challenging the June 11, 2024 docket notice. We thus do not consider the arguments raised in Ms. Smith's Motion-Right to Trial

Motion to Dismiss

Ms. Smith filed a Motion to Dismiss, citing Tenth Circuit Rule 27.5(A)(9), which authorizes the clerk of the court to act for the court on a motion "by appellant to dismiss an appeal." We deny this motion

APP. A

It is unclear whether Ms. Smuth actually seeks to dismiss her appeal. Under Federal Rule of Appellate Procedure 27, "[a] motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. App. P. 27(a)(2)(A). Ms. Smith's Motion to Dismiss does not satisfy this requirement because it is unclear what relief she seeks. Although Ms. Smith begins her motion by stating she wants "a dismissal," she later states that this court has jurisdiction and that she is "demanding" to exercise her Seventh Amendment Right Constitutional Right for a Trial by Jury to decide if the defendants [are] Although unclear, the Motion-Right to Trial by Jury appears to raise some arguments relevant to June 11, 2024,

docket notice. But we already rejected those arguments, so we do not address them again here *See supra.* Section II.A. Liable or not." Mot. To Dismiss at 1-2. Ms. Smith also quotes Federal Rule Appellate Procedure 42, which discusses voluntarily dismissals, and states that the "parties did not meet the requirements according to Rule 42(b) for this dismissal in this case." Id. At 1. Although it is unclear whether "this case" refers to the instant appeal, Ms. Smith's contention that Rule 42(b) has not been satisfied adds further ambiguity. Even with the liberal construction, it is unclear what relief Ms. Smith seeks in her Motion to Dismiss. We thus deny the motion for failure to comply with Rule 27(a)(2)(A).

Next, Ms. Smith asks us to remove District Judge Scott L. Palk from her case. Ms. Smith does not contend she raised the issue before the district court, and based on our review of the record, we conclude this is raised for the first time on appeal. *See 10th Cir. R. 28.1 (A)* ("for each issue raised on appeal, all briefs must cite the precise references in the record where the issue was raises and ruled on."). Because Ms. Smith raises this issue for the first time on appeal, she must satisfy all elements of plain error review. *Richson v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011). But she has not made any attempt to argue for plain the Motion to Dismiss states "Appellant voluntarily dismissed the original case 20-6008. The parties did not meet the requirements according to Rule 42(b) for this

dismissal in this case," Ms. Smith may be referring to her first appeal, which was numbered 20-6008. Error review. This failure means her recusal argument is waived, and we accordingly deny her Motion for Recusal of Judge. *See United States v. Leffler*. 942, F.3d 1192, 1196 (10th Cir. 2019). ("When the appellate fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all- for plain error or otherwise."); *See also ClearOne, Inc. v. Chiang, Nos.* 20-4105 & 20-4108, 2021 WL 2879015, at *5 (10th Cir. July 9, 2021) (unpublished) (declining to reach a recusal claim because the appellant failed to raise the issue before the district's court and failed to argue for plain error review). Ms.

APP. A

Smith's final motion begins by challenging the Commissioner's waiver of the right to file an appellate brief., but it devolves into challenging the district court's order denying her Motion for Summary Judgment. She identifies the relief sought as a jury trial. Ms. Smith does not identify any authority permitting her to challenge the Commissioner's decision not to file an appellate brief. See *Fed. R. App. P. 27(a)(2)(A)* (requiring a motion to state the "legal argument necessary to support" the motion). She cites only Tenth Circuit Rule 27.6 (B), which discusses motions to extend time to file a brief. And as already explained, we do not have Appellate jurisdiction. Although Ms. Smith labeled this filing as an "Opposition," we liberally construe it as a motion because it request relief. Jurisdiction to

consider arguments concerning orders other than the June 11, 2024 docket notice. *See supra.* Section II. B.1. for these reasons, we deny this motion.

WE AFFIRM the district court's June 11. 2024 docket notice and Deny Ms. Smith's motions filed on appeal. We caution Ms. Smith that additional filings in this matter may result in sanctions.

Carolyn B. McHugh
Circuit Judge

APP. B

THE UNITED STATES TENTH CIRCUIT COURT

OF APPEALS

No. 22-6115

(D.C. No. 5:22-CV-00282)

(W.D. Okla)

Susan M. Smith, Plaintiff-Appellant,

v.

Comm'r of SSA, et al, Defendant-Appellees.

Opened July 14, 2022

Closed June 6, 2023

ORDER and JUDGMENT

Before **TYMKOVICH, BALDOCK,** and **PHILLIPS Circuit Judges.**

judicata. The district court adopted that recommendation and dismissed the case after Ms. Smith failed to object. *See* Order, *Smith v. Comm'r*, *No. 5:20-cv-00124 (W.D.* Okla. Sept 1, 2020), ECF No. 20. This court applied the firm waiver rule and dismissed he appeal. *See. Smith v. Comm'r*, 846 F. App'x 737, 739 (2021).

Now, Ms. Smith has brought another round of litigation. This time, while she still complains about the denial of DIB, she also seeks monetary relief under 42 U.S.C. 1983 against the Commissioner, Berger and Valerio. In particular, she alleges that the "Commissioner . . . acted in conceit [sic] with the defendants in a wrongful taking of p[her] entitlement to social security benefits." R. at 4. She also claims that Berger and Valerio delayed and refused to

perform their duty as a gatekeeper for other medical personal capable of treating plaintiff's condition...caus[ing] mental setbacks [], frequent psychologist appointments and dosage increase of medication." R. at 5.

The district court dismissed Ms. Smith complaint under Fed. R. Civ. P. 12(b)(6) sua sponte and with prejudice. In doing so, the court relied on (1) res judicata as a bar to relitigating the disability determination and (2) the lack of state action and the exclusivity of the Social Security Act as foreclosing 1983 relief.

APP. B

DISCUSSION

Under Rule 12(b)(6), a district court may dismiss sua sponte then it is patently obvious that the plaintiff could not prevail on the facts alleged, and allowing [her] an opportunity to amend [the] complaint would be futile." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). (internal quotation marks omitted). Similarly, "[a] dismissal with prejudice is appropriate where a complaint fails to state a claim under 12(b)(6) and granting leave to amend would be futile." *Knight v. Mooring Corp. Fund LLC,* 749 F.3d 180, 1190 (10th cir. 2014).

Our review of Rule 12(b)(6) dismissal is de novo. *Sagome, Inc. v. Cincinnati Ins. Co.,* 56 F. 4th 931, 934 (10th cir. 2023). " To survive, a complaint. Must

allege facts that, if true, state a claim to relief that is plausible on its face." Id. (internal quotation marks omitted). Ms. Smith provides no cogent argument that the district court erred. Although we liberally construe a pro se plaintiff's filings, we "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Conor Maddux & Janer,* 425 F.3d 838, 840 (10th Cir. 2005). ("The doctrine of res judicata, or claim preclusion issued final judgment.") We note that Ms. Smith opportunity to contest the determination that she was not disabled ended in 2020 when she dismissed her appeal to this court. *See* Restatement (second) of judgments 19 cmt.a (1982) (stating that "fairness to the defendant[]

and sound judicial administration [] required that at some point judgment [must] be corrected on appeal or to set it aside and not made the basis for a second action on the same claim"). As for Ms. Smith 1983 claim, the district court correctly ruled that there was no state action. *See McCarty v. Gilchrist,* 545 F.3d 1281, 1285 (10th Cir. 2011). "Section 1983 provides a federal civil remedy for the deprivation of any rights, privileges, or immunities secured by the Commissioner by any district court was also under the color of state law"). The district court was also correct that the Social Security Act provides the

The district court properly declined to construe Ms. Smith's complaint as asserting a Bivens claim against federal officials acting in their individual capacities. *See Egbert v. Boule,* 142 S. Ct. 1793, 1802-03 (2002) (observing that Bivens actions have been recognized in only limited circumstances under the Fourth, Fifth and

APP. B

Exclusive remedy for the denial of social security benefits. *See Mathewa v. Eldridge,* 424 U.S. 319, 327 (1976) (stating that "[t]he only avenue for judicial review [of the Commissioner's final decision] is 42 U.S.C. 405(g)"); *Schweiker v. Chilicky,* 487, U.S. 412, 424 (1988) (declining to imply a cause of action "for remedies in money damaged against [Social Security] officials responsible for [allegedly] unconstitutional conduct that leads to the wrongful denial of benefits"). Thus, the district court did not err in sua sponte dismissing Ms. Smith's complaint with prejudice, because it is patently obvious that she cannot prevail on the facts alleged and allowing her an opportunity to ament would be futile.

APP. B

CONCLUSION. We affirm the district's court's judgment for substantially the same reasons the district court gave in its June 16, 2000, order

Entered for the Court

Bobby R. Baldock

Circuit Judge

Eighth Amendments, and "emphasiz[ing] that recognizing a [new] cause of action under Bivens is a disfavored judicial activity" (internal quotation marks omitted)). Insofar as Ms. Smith stated she was pursuing "two state law claims" against the defendants, R. at 4, the district court accurately noted that she pled no state law claims.

49.

APP. C

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Susan M. Smith

Plaintiff,

v.

Comm'r of SSA, Allam D. Berger and Christina J. Valerio

Defendants.

CIV-22-00282-SLP

Filed April 4, 2022

Closed June 16, 2022

Appeal ed July 14 2022

APP. C

Plaintiff appearing pro se, brings this action alleging two claims for relief. Plaintiff purports to invoke this court's federal question subject matter jurisdiction under 28 U.S.C. 1983 as the basis for her claims, alleging violation of her constitutional rights under the First and Fourteenth Amendments. She further cites 42 U.S.C. 495(g), which authorizes judicial review of the Commissioner of social security's final decision regarding disability, as a basis for her claims. Additionally, Plaintiff purports to bring "two state law claims." Plaintiff names as Defendants: "Comm'r SSA, Allan D. Berger and Christina J. Valerio."

I. Plaintiff's Claims for Relief

Plaintiff claims appear to arise out of her denial of social security benefits. She states that

APP. C

Defendant Commissioner has "acted in conceit with the defendants in a wrongful taking of plaintiff's entitlement to social security benefits." Compl. at 1. Count 1, in its entirety, states; Denial of Social Security Benefits for a menial condition." Id. at 2. Count II of the complaint alleges [d]enial of adequate medical treatments for severe major depression and anxiety," Comp. 2 at 2. Plaintiff sues Defendants Berger and Valerio because they "delayed and refused to perform their duty as a gatekeeper for other medical personnel capable of treating plaintiff's condition, allegedly that is a mental condition that has caused mental setbacks, frequent psychologist appointments and dosage of increased medication." Id.

APP. C

II. Governing Standard

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint set forth a "short and lain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8 "does not require detailed factual allegations...it

As discussed below in addressing Plaintiff's claim under 1983, Plaintiff Complaint is void of any allegations of state action, i.e., wrongful conduct by a state actor. Necessarily therefore, Any due process challenge would be governed, instead, by the Fifth Amendment. *See, e.g. Koessel v. Sublette Cnty. Sheriff's Dep't,* 717 F.3d 736, 748 n, 2 (10th Cir. 2013) (recognizing that Due Process Clause of the Fifth Amendment applies to actions by the federal government while the Due Process Clause of the Fourteenth Amendment applies to actions by state government). "Moreover, because 1983 imposes liability only for actions taken under state law" and a federal actor [is] involved.

APP. C

There [is] no Fifth Amendment claim under 1983." Id. demands more than an unadorned, the-defendant unlawfully harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To survive dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," Id. at 678 (2009) (quoting *Bell Atl, Corp. v .Twombly,* 550 U.S. 544, 570 (2007). "Although dismissals under Rule 12(b)(6) typically follow a motion to dismiss...a court may dismiss sua sponte when it is patently obvious that the plaintiff could not prevail on the facts alleged and allowing [her] the opportunity to amend [her] complaint would be futile." *Hall v. Bellmon,* 935 F.2d 1106, 1109-10

(10th Cir. 1991). Where the court reviews the sufficiency of the allegations of a pro se complaint, the court applies the same legal standards, but liberally construes the complaint's allegations, *see Northington v. Jackson,* 973 n F.2d 1518-21 (10th Cir. 1992). The court does not, however, "take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 840 (10th Cir. 2005). Moreover, "pro se parties [must] follow the rules of procedure that govern other litigants." Id. (internal quotation marks omitted).

APP. C

III. Discussion

Plaintiff has previously filed actions in this judicial district to challenge the Commissioner's final decision that she was not "disabled" under the Social Security Act. See Compl. at 3 (setting forth litigation history). The Commissioner's final decision has been affirmed on judicial review under 42 U.S.C. 405(g). *see. Smkith v. Saul, Case No. CIV-20_124-SM, W.D. Okla.* ***(Smith II)***, Compl. [Doc. No. 1]: see also id. R&R [Doc. No. 19] and Order and Judgment [Doc. Nos. 20-21]; aff'd 846 F. App'x 737, 738 (10th Cir. 2021) (addressing res judicata issue in context of firm-waiver rule and concluding that plaintiff has not shown any error, let alone plain error, in the

magistrate judge's [res judicata] analysis"). To the extent Plaintiff again attempts to challenge the disability determination, the doctrine of res judicata precludes Plaintiff from doing so. *See MACTEC, Inc. v. Gorelick,* 427 F.3d 821, 831 (10th Cir. 2005) (the doctrine of res judicata prevents "a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment").

With respect to any remaining claims for relief under 42 U.S.C. 1983, Plaintiff does not allege any Defendants acted under the color of state law, a jurisdictional requisite for a 1983 claim. *Polk Cnty. V. Dodson,* 454 U.S. 312, 315 (1981; *Dry v. United States,*

57.

APP. C

The court may "take judicial notice of its memorandum of order and judgment from a previous case involving [the plaintiff." *Amphibious Parnters, LLC v. Redman,* 534, F.3d 1357, 1361-62 (10th Cir. 2008).

Subsequent to filing the complaint, Plaintiff filed a motion for Request of Order and Judgment [Doc. No. 11]. In that Motion, Plaintiff "asks the court to reverse, or, in alternative, remand this matter to the commissioner or ALJ of social security, as the case status is still pending." Plaintiff inaccurately sates that the case is still pending. And she further inaccurately states that the Memorandum Opinion and Order "was for the commissioner to remand for further Administration processing." Id. at 1. Instead, the record reflects that on judicial review, the court affirmed the decision of the Commissioner. *See* ***Smith I,*** Memo. Op. and Order [Doc. No. 39]. Regardless, the statements included in Plaintiff's Motion further reflect that she seeks to impermissibly relitigate maters previously decided. 235 F.3d 1249, 1255 (10th Cir. 2000). Further, the Court takes judicial notice of the record in **Smith I** which demonstrates that Christina J. Valerio and

Allan D. Berger are Assistant United States Attorneys who entered appearances and litigated the action on behalf of the Commissioner. Nothing about their conduct in that capacity would give rise to liability under 1983. *See e.g. Savage v. United States,* 450 F.2d 449, 451 (8th Cir. 1971) ("Neither the United States Attorney nor his Assistant, because of their respective federal positions, can be sued under 1983. That section reaches state action only.")

Similarly, the Commissioner is not a state actor subject to 1983 liability. *See, e.g., Salas v. Astrue,* CIV-11-0273 LAM/RHS, 2012 WL 13080163 at *2 (D.N.M. Mar. 13, 2012) (as a federal employee, the Commissioner of Social Security is not a state actor as required to state a claim under 1983); *N"Jai v. Berryhill,* No. 18-1616, 2018 WL 6697677 at 3

APP. C

(W.D. Pa. Dec 20, 2018) (dismissing 1983 claim against the Commissioner of Social Security, who is clearly a federal employee, and therefore, not a state actor). Furthermore, any claim Plaintiff purports to bring against the Commissioner arising from the denial of her request for disability benefits is statutorily barred. *See*, 42 U.S.C. 405(g) ("No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under [28 U.S.C. 1331 or 28 U.S.C. 1346] to recover on any claim arising under this subchapter.") See *also Ross v. Kijakazi, No. CV-*

Plaintiff conclusorily asserts that "[a]ll defendants acted under the color of state law," see Compl.at. 1, but she fails to support this legal conclusion with any factual support.

And Plaintiff alleges in her complaint that she "seeks monetary damages against Special Assistant United

APP. C

States Attorney's for the Office of the General Counsel for the Social Security Administration..." Compl. at 1

ELH-20-1157, 2021 WL 3784888 at *4 (D. Md. Aug. 25, 2021) (Section 405(h) means that the Social Security Act provided an exclusive remedy for claims arising under the Social Security Act and no other action against the United States or its employees may be brought for the same claim").

Moreover, the court declines to construe the Complaint as alleging Bivens claim. Even if the court were to do so, the allegations are insufficient to support such claim. *See e.g. Smith v. United States,* 561 F.3d 1090, 1099 (10th Cir. 2009). (recognizing that a Bivens claim cannot be asserted directly against the United States, federal officials in their

official capacities, or federal agencies"); *See also* *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (declining to imply a Bivens remedy in context of improper denial of disability benefits allegedly resulting from due process violations in administration of continuing disability review program).

Finally, Plaintiff fails to identify the bases for her "state law" claim. And, even liberally construing the Complaint, the Court can identify no such claims.

The Supreme Court continues to narrowly construe the circumstances giving rise to a Bivens cause of Bivens and stating that "our cases have made clear that, in all but the most unusual circumstances,

APP. D

THE UNITED STATES TENTH CIRCUIT

COURT OF APPEALS

No. 24-6118

(D.C. No. 5:22-cv-00282-SLP)

Susan M. Smith

Plaintiff,

v.

Comm'r of SSA, et. al,

Defendants.

Filed September 20, 2024

Mandated November 12, 2024

Denied Rehearing September 30, 2024

APP. D

ORDER AND JUDGMENT

Before MATHESON, BACHARACH, AND McHUGH, Circuit Judges.

Appellant's petition for rehearing is denied for failure to comply with Federal Rule of Appellate Procedure 35. We again, caution Ms. Smith that additional filings in this matter may result in sanctions.

Entered for the Court

CHRISTOPHERE M. WOLPERT, CLERK

Respectfully Submitted,

Susan Smith

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