

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARTHA MURGIA, Personal)	
Representative of the Estate of)	
Arlen Manuel Murgia, and on her)	
own behalf and on behalf of all)	
statutory beneficiaries,)	
)	
Plaintiff,)	
)	
vs.)	
)	
THE UNITED STATES OF AMERICA, and)	
OFFICER REED, OFFICER PARSON, and)	
JOHN DOES AND JANE DOES I-XX, each)	
in their individual capacities,)	
)	No. 2:07-cv-0101-HRH
Defendants.)	
)	

O R D E R

Motion for Summary Judgment

Defendants Robert Parsons and Scott Reed move to dismiss, or in the alternative, for summary judgment.¹ This motion is opposed.² Oral argument was not requested and is not deemed necessary.

Background

Plaintiff Martha Murgia has brought a Bivens action as the personal representative of Arlen Manuel Murgia and on her own behalf

¹Docket No. 82.

²Docket No. 88.

and on the behalf of all other statutory beneficiaries against defendants Scott Reed and Robert Parsons.

The acts complained of took place on the Gila River Indian Reservation. The Gila River Indian Community (GRIC) is a federally-recognized Indian tribe. Arlen Murgia was an enrolled member of the Gila River Indian Community.

On January 10, 2005, Ray Murgia placed two 911 calls requesting that GRIC police officers be sent to his home because his two sons, Arlen and Cecil, had been drinking all day, had stolen his car, and were still drunk. Defendants were dispatched to the Murgia home to respond to a domestic disturbance call.

Reed arrived at the Murgia home first. When Parsons arrived, he saw Reed and Arlen Murgia standing about eight to ten feet apart.³ Parsons testified that Arlen then began walking toward him while yelling at him.⁴ Parsons shot Arlen with pepper balls because he was not responding to Parsons' orders.⁵ Arlen then went back into the house. Sometime thereafter, Arlen came back out of the house. When Arlen came out of the house, Parsons testified that he had a bat,

³Deposition of Robert M. Parsons, Jr. at 25, lns. 5-8, Exhibit 1, Plaintiff's Statement of Facts in Opposition to Defendants Motion to Dismiss, or, in the Alternative, for Summary Judgment and Plaintiff's Disagreement with Defendants Statement of Facts, Docket No. 87.

⁴Id. at 27, lns. 16-18.

⁵Id. at 26, ln. 19 - 27, ln. 14.

which he was swinging at Parsons.⁶ Reed also testified that Arlen had a bat and that he was swinging the bat at Parsons.⁷ Plaintiff and her husband aver that Arlen was unarmed and did not attack either Reed or Parsons with a baseball bat.⁸ Reed ultimately shot and killed Arlen. Reed testified that he did so because Arlen was attempting to kill Parsons.⁹

On January 10, 2005, defendants were employed as police officers by the GRIC.¹⁰ Neither defendant had been commissioned by the Bureau of Indian Affairs (BIA) as a law enforcement officer.¹¹ The GRIC provides its own law enforcement services pursuant to agreements with the federal government.

⁶Id. at 35, ln. 18 - 36, ln. 23.

⁷Deposition of Scott E. Reed at 18, lns. 7-15, Exhibit C, Statement of Facts in Support of Motion to Dismiss or, in the alternative, for Summary Judgment, Docket No. 82.

⁸Affidavits of Martha and Ray Murgia, Sr. at 1, ¶¶ 3-4, Exhibits 2-3, Plaintiff's Statement of Facts in Opposition to Defendants Motion to Dismiss or, in the Alternative, for Summary Judgment and Plaintiff's Disagreement with Defendants Statement of Facts, Docket No. 87.

⁹Reed Deposition at 18, ln. 18 - 19, ln. 1, Exhibit C, Statement of Facts in Support of Motion to Dismiss or, in the alternative, for Summary Judgment, Docket No. 82.

¹⁰See Affidavit of Robert M. Parsons, Jr. at 1, ¶¶ 2-3, Exhibit 1; Affidavit of Scott E. Reed at 1, ¶¶ 2-3, Exhibit 2; Officer Parsons and Reed's Motion to Dismiss, Docket No. 34.

¹¹Parsons Affidavit at 1, ¶ 4, Exhibit 1; Reed Affidavit at 1, ¶ 4, Exhibit 2; Officer Parsons and Reed's Motion to Dismiss, Docket No. 34; Declaration of Warren C. Youngman, Jr. at 3, ¶ 10, Exhibit 6, Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment, Docket No. 35.

In 1998, the BIA, pursuant to the Indian Self-Determination Act and Education Assistance Act (ISDEAA), P. L. 93-638, first entered into a contract with the GRIC for the provision of law enforcement services.¹² The 638 contract specified that the GRIC is to "provide all necessary qualified and licensed personnel, equipment, materials and services to perform all tribal law enforcement and detention services on the Gila River Indian Reservation, including the investigation of applicable Federal violations (major crimes)."¹³ The 638 contract further specified that "[t]he Uniform Police Program provides police protection and enforcement of Federal laws and laws of the Gila River Indian Community."¹⁴ In 2005, the United States and the GRIC entered into a Self-Governance Compact, which replaced the GRIC's existing ISDEAA programs under the contract. The 638 compact provides that "[t]he programs, functions, services, and activities that will be the responsibility of the Community ... shall be identified in the Community's funding agreement."¹⁵ The 638 compact contained no details about the GRIC's law enforcement program. The 2005 Funding Agreement provided that the GRIC would assume responsi-

¹²See Exhibit 2, Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment, Docket No. 35.

¹³Id. at MUR.DOI.0116.

¹⁴Id.

¹⁵Compact of Self-Governance between the Gila River Indian Community and the United States of America, Article III, Section 3, Exhibit 4 at MUR.DOI.0017, Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment, Docket No. 35.

bility for law enforcement services.¹⁶ The 2005 Funding Agreement contained no detail about the GRIC's law enforcement program, other than that it was to have the following four components: 1) uniform police, 2) adult detention, 3) communications, and 4) criminal investigation.¹⁷

The Constitution and Bylaws of the GRIC empower the Community Council, which is the governing body of the GRIC, to provide for the maintenance of law and order and the administration of justice in the Community by establishing a police force. GRIC Code § 2.1109(4) authorizes law enforcement officers to arrest persons if an officer has probable cause to believe domestic violence has been committed.¹⁸ General Order #13 of the GRIC Police Department provides that "[f]irearms may be discharged in the performance of police duty ... [w]hen the officer reasonably believes it is necessary to defend him/herself or another person from what the officer reasonably believes to be the use of, or imminent use of, serious physical force."¹⁹ General Order #13 further provides that "[o]fficers are

¹⁶Annual Funding Agreement for Fiscal Years 2005 between the Gila River Indian Community and the United States of America, Exhibit 5 at MUR.DOI.0004, Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment, Docket No. 35.

¹⁷Id.

¹⁸See Exhibit 6, Officer Parsons and Reeds' Motion to Dismiss, Docket No. 34.

¹⁹Gila River Police Department General Order #13, "Use of Force," at VIII.B.3, page 13.7, Exhibit 8, Defendant United States of America's (continued...)

prohibited from [u]sing a firearm when it creates substantial risk to innocent persons, unless it can be justified under the circumstances."²⁰

In her complaint, plaintiff alleges that defendants violated Arlen's Fourth Amendment rights by using excessive force. Plaintiff asserts that defendants "were acting under color of law and pursuant to their authority as federal employees and federal law enforcement authorities"²¹ and that they "were employed pursuant to a 'Public Law 93-638' agreement whereby their pay was derived from the federal government in consideration of their providing law enforcement services at the GRIC."²²

Defendants contend that this court does not have subject matter jurisdiction over plaintiff's Bivens claim against them. They move to dismiss plaintiff's Bivens claim, or in the alternative, for summary judgment on plaintiff's Bivens claim.

Discussion

The Ninth Circuit has held that, in this case, the jurisdictional issue is intertwined with the merits.²³ Thus, the court "employ[s]

¹⁹(...continued)
Motion to Dismiss and Motion for Summary Judgment, Docket No. 35.

²⁰Id. at VIII.E.4, page 13.8.

²¹Complaint at 3, ¶ 15, Docket No. 1.

²²Id. at 2, ¶ 5.

²³See Memorandum at 4, attached to Mandate, Docket No. 69.

the standard applicable to a motion for summary judgment" in deciding the instant motion. Augustine v. U.S., 704 F.2d 1074, 1077 (9th Cir. 1983). Under that standard, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Id. "Unless that standard is met, the jurisdictional facts must be determined at trial by the trier of fact." Id.

"A 'Bivens action' is a commonly used phrase for describing a judicially created remedy allowing individuals to seek damages for unconstitutional conduct by federal officials." Stanley v. Gonzales, 476 F.3d 653, 657 n.1 (9th Cir. 2007). In order to prevail on a Bivens claim, a plaintiff must prove that 1) a federal actor 2) acting under color of federal law 3) deprived him of a right, privilege or immunity secured by the Constitution. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Defendants argue that plaintiff's Bivens claim fails because they are not federal actors nor were they acting under color of federal law.

It is undisputed that defendants were employed by the GRIC and that they had not been commissioned by the BIA as law enforcement officers.²⁴ But these two facts do not necessarily mean that plaintiff's Bivens claim fails. Plaintiff contends that defendants

²⁴See Youngman Declaration at 3, ¶ 10, Exhibit 6, Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment, Docket No. 35 ("neither Officer Robert Parsons nor Officer Scott Reed had a SLEC card on January 10, 2005").

were federal actors because they can be deemed federal officers for purposes of 18 U.S.C. § 111.

Section 111 provides that "[w]hoever ... forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties" shall be subjected to a fine and/or imprisonment. 18 U.S.C. § 111(a)(1). Section 1114 sets out the punishment for anyone who "kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties[.]" 18 U.S.C. § 1114. Tribal police officers fall within the scope of these statutes pursuant to 25 U.S.C. § 2804(f), which provides, in pertinent part, that "[w]hile acting under authority granted by the Secretary under subsection (a) of this section, a person who is not otherwise a Federal employee shall be considered to be ... an employee of the Department of the Interior only for purposes of ... sections 111 and 1114 of Title 18[.]" In short, a tribal police officer is deemed a federal employee for purposes of section 111, if the tribe has a 638 contract or compact. See U.S. v. Schrader, 10 F.3d 1345, 1350-51 (8th Cir. 1993) ("[T]ribal officers are afforded the same protection under 18 U.S.C. § 111 that Congress has afforded BIA employees. This is so regardless of whether the officer is enforcing a tribal, state,

or federal law, so long as he is engaged in the performance of his official duties"). Because defendants are federal employees for purposes of section 111, plaintiff argues that they are also federal actors for Bivens purposes.

Defendants first argue that plaintiff, by relying on sections 111 and 1114, is attempting to make them federal actors based on the actions of Arlen Murgia rather than their own actions. Defendants contend that what plaintiff is arguing is that if Arlen had lived, he could have been charged under 18 U.S.C. § 111, and since section 111 makes it a crime to assault a federal employee, defendants must be federal actors. However, defendants argue that Bivens requires proof that the defendant acted under color of federal law, not that the actions of the plaintiff implicated federal law.

As plaintiff is quick to point out, it is the testimony of defendants that brings section 111 into play. It is defendants who testify that Arlen was assaulting Parsons. That said, defendants cannot be deemed federal officers for purposes of a Bivens claim solely because they might be deemed federal employees for purposes of 18 U.S.C. § 111. 25 U.S.C. § 2804(f) plainly provides that tribal police officers are not otherwise federal employees and that they are only considered federal employees for purposes of sections 111 and 1114 of Title 18. The fact that a tribal police officer is considered a federal employee for purposes of sections 111 and 1114 does not mean that he is also a federal actor for purposes of a Bivens claim.

Plaintiff has cited to no authority to the contrary. The case cited by plaintiff, Schrader, 10 F.3d 1345, addressed whether a tribal police officer was a federal employee for purposes of section 111, not whether a tribal police officer is a federal actor for purposes of a Bivens action.

But the fact that defendants are not deemed federal actors for purposes of a Bivens claim based on section 111 does not necessarily mean that plaintiff's Bivens claim fails. "[T]he private status of the defendant will not serve to defeat a Bivens claim, provided that the defendant engaged in federal action.'" Boney v. Valline, 597 F. Supp. 2d 1167, 1172 (D. Nev. 2009) (quoting Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1337-38 (9th Cir. 1987)). The court considers four factors to determine if there has been federal action: 1) the source of the private actor's funding, 2) "the impact of governmental regulations on the conduct" of the private actor, 3) "whether the private actor was performing a function that is traditionally the exclusive prerogative of the government[,]" and 4) "whether a symbiotic relationship existed between the private actor and the government." Morse v. N. Coast Opportunities, Inc., 118 F.3d 1338, 1342 (9th Cir. 1997). The court in Boney, 597 F. Supp. 2d at 1171, applied these factors to determine "whether a tribal officer who violates the constitutional rights of a tribal member in the course of enforcing tribal law can be subject to liability under Bivens," the same question that is before this court.

As for the first two factors, funding and regulation, the Boney court recognized that "[u]nder its 638 contract, the Tribe received funding for its law enforcement activities, and the Department of Interior or 'DOI' (through the BIA) required that the Tribe comply with certain recordkeeping and certification requirements." Id. at 1174-75. But, "the Supreme Court and the Ninth Circuit have made clear ... that a combination of these two factors is not sufficient to impute federal government action to the conduct of a private or non-federal actor." Id. at 1175 (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982), and Morse, 118 F.3d 1338).

As for the third factor, the court concluded that the Tribe was not "performing a function that was 'traditionally the exclusive prerogative' of the government." Id. (quoting Rendell-Baker, 457 U.S. at 842). The court reached this conclusion because the defendant "went to the scene to enforce tribal law against a member of the Tribe, which constitutes conduct within the Tribe's inherent sovereignty." Id. at 1176.

As for the fourth factor, "[a] symbiotic relationship occurs when the government has 'so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participation in the challenged activity." Id. at 1173. There are two ways in which a symbiotic relationship may arise. Id. at 1176. One is through "'significant financial integration'" between the two parties and one is "'by virtue of the government's exercise

of plenary control over the private party's actions.'" Id. (quoting Brunette v. Humane Society of Ventura County, 294 F.3d 1205, 1213 (9th Cir. 2002)). The court found that there was no significant financial integration because there was "no evidence that the DOI was profiting from the Tribe's provision of law enforcement on the Reservation." Id. The court also found that the federal government did not exercise plenary control over the Tribe's police force because the Tribe was responsible for the day-to-day operations of the police department, provided the equipment and personnel necessary for all tribal law enforcement services with the exception of major crimes, was responsible for investigating violations of tribal law, had its own uniforms, and was responsible for recruiting and actually employing the tribal police officers. Id. The court concluded that "although the Tribe received considerable funds from the federal government and was required to comply with certain guidelines provided by the federal government in carrying out its responsibilities under the 638 contract, this evidence is insufficient to establish that the federal government and the Tribe had a symbiotic relationship." Id. at 1177.

The court finds Boney persuasive and concludes that there was not federal action here. The same factors that in Boney weighed against finding federal action weigh against finding federal action here. The only difference between Boney and this case is that in Boney, the Tribe's 638 contract expressly excluded tribal police officers from investigating major crimes, which are federal crimes.

Here, the GRIC's 638 contract expressly provided that tribal police officers could investigate major crimes. But this is a distinction without a difference because the GRIC's 638 compact, which was the operative document at the time of Arlen's death, did not contain any such express provision. But even if GRIC tribal police officers could investigate or enforce federal crimes, that is not what they were doing in this instance. They went to the Murgia house in response to a domestic disturbance call. At the time of the shooting, they were tribal police enforcing tribal law on tribal land.

Because there was no federal action, plaintiff's Bivens claim fails.²⁵ Defendants are entitled to summary judgment on plaintiff's Bivens claim against them. Because plaintiff's Bivens claim fails on this ground, the court need not consider defendants' alternative tribal sovereign immunity argument.

Conclusion

Defendants' motion for summary judgment²⁶ is granted. The clerk of court shall enter judgment dismissing plaintiff's complaint against defendants Parsons and Reed with prejudice.

DATED at Anchorage, Alaska, this 27th day of April, 2010.

/s/ H. Russel Holland
United States District Judge

²⁵While it is not entirely clear whether the lack of federal action defeats the first or the second element of a Bivens claim, it is clear that private persons, such as defendants, can only be subject to Bivens liability if the events in question involved federal action.

²⁶Docket No. 82.