No. 18-15968

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MYLES BEAM,
Plaintiff - Appellant,
v.
ALBAN NAHA, et al.,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
D.C. No. 3:17-cv-08078-JWS

APPELLANT'S OPENING BRIEF

David R. Jordan
The Law Offices of David R. Jordan, P.C.
1995 State Road 602
P.O. Box 840
Gallup, NM 87305-0840
(505) 863-2205

Attorney for Appellant Myles Beam

Table of Contents

Table of Authorities iii
Statement of Jurisdiction 5
Statement of the Issue 5
Statement of the Case 5
Statement of Facts 6
Summary of Argument 6
Argument 6
I. The District Court Erred In Concluding That Appellees Were Not Federal Actors. 6
Conclusion 15
Certificate of Service 15
Certificate of Compliance With Rule 32(a) 16
Statement of Oral Argument 17
Statement of Related Cases 18

Table of Authorities

Cases

Big Owl v. United States, 961 F.Supp. 1304, 1307 (D.S.D.1997) 7
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....5
Boney v. Valentine, 597 F.Supp.2d 1167 (D.Nev.2009) 9
Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009) 8
Brunette v. Humane Soc'y of Ventural Cnty., 294 F.3d 1205, 1213 (9th Cirt. 200214
Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961).....14
Morse v. N. Coast Opportunities, 118 F.3d 1338 (9th Cir. 1997).....9
Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 839–41, (1982).....12
Rendell-Baker v. Kohn, 457 U.S. 830 (1982).....10
U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1093 (9th Cir. 2010).....5

Statutes

5 U.S.C. § 4302 13
25 U.S.C. § 13 10
25 U.S.C. § 2511 7
25 U.S.C. § 450 10
25 U.S.C. § 450f.....7
25 U.S.C. § 452 10
25 U.S.C. § 631 10
25 U.S.C. § 2501 6
25 U.S.C. § 1451 11
25 U.S.C. § 450(b)(3).....11
25 U.S.C. § 450a(c).....11
25 U.S.C. § 450k 11
28 U.S.C. § 1295 5

Public Laws

Pub.L. 101-512, Title II, § 314, Nov. 5, 1990, 104 Stat. 1959.....7
Pub.L. No. 103-138, Tit. III § 308, Nov. 11, 1993, 107 Stat. 1416 7

Other Authorities

6 Weekly Comp. of Pres. Doc. 894, 899-900 (1970).....11

Rules

Ninth Circuit Rule 28-2.5.....5

Regulations

24 C.F.R. § 900.45 12
25 C.F.R. § 36.24 12
25 C.F.R. § 38.5 12
25 C.F.R. § 38.9 13
25 C.F.R. § 42.1 .....12, 13
25 C.F.R. § 44.110 12
25 C.F.R. § 274.1 11
25 C.F.R. § 274.2 11
25 C.F.R. § 274.22 11
25 C.F.R. § 274.32(c) 11
25 C.F.R. § 274.38 11
25 C.F.R. § 274.41 11
25 C.F.R. § 38.10 13
25 C.F.R. § 38.9 13
41 C.F.R. § 14H-70.632 11

Statement of Jurisdiction

The District Court had jurisdiction over this matter pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(2). This is an appeal from a final order of the District Court resolving all issues in the case. Judgment was entered by the District Court on April 27, 2018. Docket #25, Excerpts of the Record, p. 3. This appeal was timely filed on May 25, 2018. Docket #26, Excerpts of the Record, p. 1.

Statement of the Issue

Whether the District Court erred in ruling that employees of a Tribally Controlled Grant School were not federal actors for the purpose of *Bivens* liability.

To comply with Ninth Circuit Rule 28-2.5, Appellant states that this issue was raised before the District Court in his response to the motion to dismiss, or, in the alternative, motion for summary judgment. Docket #22. The appeal raises pure issues of law, and the standard of review is *de novo*. *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010).

Statement of the Case

This is an appeal from the final dismissal order entered by the District Court. Appellant filed a case with the District Court asserting that Appellees had violated his rights under the First Amendment to the U.S. Constitution, and that he had a claim under *Bivens*. Appellees filed a motion to dismiss or, in the alternative, a

motion for summary judgment. The dismissal motion was denied, but the summary judgment motion was granted. This appeal timely followed.

Statement of Facts

This appeal raises pure issues of fact, with the only key fact being undisputed in the case. This fact was as follows:

1. Hopi Junior/Senior High School is a Tribally Controlled School receiving grant funds from the federal government pursuant to the 1988 Tribally Controlled Schools Act, 25 U.S.C. §2501. This fact was the subject of a stipulation by the parties, and this stipulation was recognized by the District Court. Excerpts of the Record, p. 14.

Summary of Argument

The District Court erred in concluding that Appellees were not federal actors. A grant school under 25 U.S.C. §2501 is heavily controlled by the United States government, through the Bureau of Indian Education. This creates a strong interdependence between the federal government and the school, and should create a situation where employees of the school are considered federal actors.

Argument

I. The District Court Erred In Concluding That Appellees Were Not Federal Actors.

Appellant did not bringing this claim against the Hopi Tribe or against employees of the Hopi Tribe, therefore Appellee's argument regarding the sovereign

immunity of the Hopi Tribe is irrelevant. The District Court properly dismissed this argument. The sole question for resolution of this appeal should be whether an employee of a school funded under the 1988 Tribally Controlled Schools Act is a "federal actor" such that their violation of Appellant's constitutional rights give rise to a *Bivens* action by the Appellant.

The term "tribally controlled school" is defined by 25 U.S.C. § 2511 as follows:

> The term "tribally controlled school" means a school that—
>
> (A) is operated by an Indian tribe or a tribal organization, enrolling students in kindergarten through grade 12, including a preschool;
>
> (B) is not a local educational agency; and
>
> (C) is not directly administered by the Bureau of Indian Affairs.

Congress has extended the United States' liability under the Federal Tort Claims Act, by way of Public Law 101-512, which "imposes liability upon the United States for the acts of tribal organizations and their employees administering a grant agreement pursuant to the TSCA." *Big Owl v. United States,* 961 F.Supp. 1304, 1307 (D.S.D.1997); *see* Pub.L. 101-512, Title II, § 314, Nov. 5, 1990, 104 Stat. 1959, as amended by Pub.L. No. 103-138, Tit. III § 308, Nov. 11, 1993, 107 Stat. 1416 (codified at 25 U.S.C. § 450f, Historical and Statutory Notes). Specifically, Public Law 101–512 provides:

> With respect to claims resulting from the performance of functions ... under a contract, grant agreement or cooperative agreement authorized by the ... [TSCA] ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior ... while carrying out any such agreement and its employees are deemed part of the Bureau ... while acting in the scope of their employment in carrying out the contract or agreement: Provided, That ... any civil action or proceeding involving such claim brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and afforded the full protection and coverage of the [FTCA].

Id. In short, grant school employees, such as Appellees, are considered employees of the BIA and can be sued under the FTCA subject to the protections and immunities afforded government employees under the Act.

Of course, Appellees are absolutely right in stating that this is a *Bivens* action, not a FTCA claim. Where Appellees err is in claiming that no *Bivens* action may lie against an employee of a grant school. None of their cited cases support this proposition, and, in fact, it is not a correct statement of the law.

The real question in the present case is whether the Appellees were acting under color of federal law when engaging in the conduct in the complaint. Appellees cited *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009) to District Court, which demonstrated this analysis nicely. In *Bressi*, Tribal Police officers, who asserted the same sovereign immunity arguments proffered by Appellees in the present action, were "acting under color of state law". This was because their stop on a public right

of way went far beyond simply identifying if a driver was an Indian or not. *Bressi*, 575 F.3d at 897.

Appellees' also cite *Boney v. Valentine*, 597 F.Supp.2d 1167 (D.Nev.2009), which demonstrates that, contrary to Appellees' argument, a *Bivens* claim may be brought under circumstances such as those in the present action. *Boney* is a federal district court case which actually holds *against* Appellees. Rather than establishing a "blanket rule" that *Bivens* liability cannot extend to a Tribal federal contractor, *Boney* properly views the case as one of whether the Plaintiff can satisfy the test for federal action:

> Defendant was not a federal government employee at the time of the disputed incident. On July 15, 2004, Defendant was employed by the Walker River Paiute Tribe's Police Department. (Valline Aff. ¶¶ 1–2). Nonetheless, even if Defendant was not directly employed by the federal government, Defendant may still qualify as a federal actor for purposes of *Bivens* liability. In the Ninth Circuit, "the private status of the defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action." *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337–38 (9th Cir.1987) (private status is not alone sufficient to counsel hesitation in implying damages remedy when private party defendants jointly participate with government to sufficient extent to be characterized as federal actors). In other words, *Bivens* liability may be applicable to constitutional violations committed by private individuals, but only if they act "under color of federal law," or are "federal actors." *Sarro v. Cornell Corrections, Inc.*, 248 F.Supp.2d 52, 59 (D.R.I.2003).

Boney v. Valline, 597 F. Supp. 2d 1167, 1172 (D. Nev. 2009).

To support its conclusion that Appellees were not federal actors, the District Court cites *Morse v. N. Coast Opportunities*, 118 F.3d 1338 (9th Cir. 1997). This

case does not rebut the analysis advanced by the Appellant. *Morse* relies upon factors recognized in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), factors which all strongly favor Appellant.

Morse was a Head Start case, and the school in that case was heavily regulated by the State. *Morse*, 118 F.3d at 1342. *Morse* involved pre-kindergarten children in a non-Native context. The Ninth Circuit concluded in *Morse* that this type of education was not of the type typically provided by the federal government. K-12 Indian Education, by contrast, has been dominated by the federal presence for more than a century.

This case is unique because it involves the federal responsibility to provide education to Indian secondary students. The District Court states simply that it is "not persuaded" by this argument. However, the District Court ignored the long history of federal dominance in the area of Indian education:

> This case is indistinguishable in all relevant respects from *White Mountain.* Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive. The Federal Government's concern with the education of Indian children can be traced back to the first treaties between the United States and the Navajo Tribe. Since that time, Congress has enacted numerous statutes empowering the BIA to provide for Indian education both on and off the reservation. See, *e.g.*, Snyder Act, 42 Stat. 208 (1921), 25 U.S.C. § 13; Johnson-O'Malley Act, 48 Stat. 596 (1934), 25 U.S.C. § 452 *et seq.*; Navajo-Hopi Rehabilitation Act, 64 Stat. 44 (1950), 25 U.S.C. § 631 *et seq.*; Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975), 25 U.S.C. § 450 *et seq.* (Self-Determination Act). Although the early focus of the federal efforts in this area concentrated on providing federal or state

educational facilities for Indian children, in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation. See 6 Weekly Comp. of Pres. Doc. 894, 899-900 (1970) (Message of President Nixon).

This federal policy has been codified in the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and most notably in the Self-Determination Act. The Self-Determination Act declares that a "major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 88 Stat. 2203, as set forth in 25 U.S.C. § 450a(c). In achieving this goal, Congress expressly recognized that "parental and community control of the educational process is of crucial importance to the Indian people." 88 Stat. 2203, as set forth in 25 U.S.C. § 450(b)(3).

Section 450k empowers the Secretary to promulgate regulations to accomplish the purposes of the Act. 88 Stat. 2212, 25 U.S.C. § 450k. Pursuant to this authority, the Secretary has promulgated detailed and comprehensive regulations respecting "school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations." 25 C.F.R. § 274.1 (1981). Under these regulations, the BIA has wide-ranging authority to monitor and review the subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. See 25 C.F.R. § 274.2 (1981). Specifically, the BIA must conduct preliminary on-site inspections, and prepare cost estimates for the project in cooperation with the tribal organization. 25 C.F.R. § 274.22 (1981). The Board must approve any architectural or engineering agreements executed in connection with the project. 25 C.F.R. § 274.32(c) (1981). In addition, the regulations empower the BIA to require that all subcontracting agreements contain certain terms, ranging from clauses relating to bonding and pay scales, 41 C.F.R. § 14H-70.632 (1981), to preferential treatment for Indian workers. 25 C.F.R. § 274.38 (1981). Finally, to ensure that the Tribe is fulfilling its statutory obligations, the regulations require the tribal organization to maintain records for the Secretary's inspection. 25 C.F.R. § 274.41 (1981).

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 839–41 (1982).

Although *Ramah* focused on the construction of schools, the same argument could be made for the regulation of the operation of schools. The federal government directly controls many aspects of so-called "Tribally Controlled Schools". For example, the U.S. controls the school's financial reports, accounting records, internal controls and budget controls. 25 C.F.R. §§ 44.110 and 24 C.F.R. § 900.45. The U.S. controls leases and property donation procedures. 25 C.F.R. §§ 44.110(a)(2) and (3). The U.S. controls student rights. 25 C.F.R. § 42.1. The federal government sets standards for educators. 25 C.F.R. § 38.5.

This control over grant schools continues and pervades to this day. The District Court and Appellees argue that the "purpose" of the Tribally Controlled Schools Act is to "remove" the federal government, but this argument is belied by the extreme control the federal government maintains over these schools. The BIE continues to dominate every significant aspect of the school.

An example of this dominance is the federal control over the curricula. 25 C.F.R. § 36.24 establishes the federal "secondary instructional program" that Appellees were obligated to follow. This establishes a set of programs ranging from driver's education to sciences to fine arts that Appellees are obligated to provide. This was not set by the school's "governing" board, it was set by federal regulation.

Pertinent to this appeal, the tribal schools must, as a matter of federal regulation, honor the constitutional rights of students 25 C.F.R. § 42.1 (Bureau funded schools must respect the constitutional, statutory, civil and human rights of individual students). That is relevant to the present action because Appellant was non-renewed, in part, due to providing a "free speech" forum to students.

Educational staff at grant schools must have access to the protections of EEO procedures established under federal regulations. 25 C.F.R. § 38.10(e). The BIE establishes federal guidelines for handling staff grievances. 25 C.F.R. § 38.10(f). The BIE establishes by regulation conditions that could result in discharge for cause. 25 C.F.R. § 38.9(a). The performance standards for teachers in BIE-funded schools is set by 5 U.S.C. § 4302, which provides for the establishment of performance appraisal systems for federal employees. 25 C.F.R. § 38.9(b).

The District Court ignores all of this federal control, and simply states that its decision is buttressed by the fact that the school's governing board controls hiring and firing. Excerpts of the Record, p. 14. Even this is demonstrably wrong. Governing board action on discharges can be appealed to the Bureau of Indian Education. 25 C.F.R. § 38.9(e)(3).

Accordingly, the relationship between the federal government and a grant school poses a "symbiotic relationship" unlike any other area of the law. The Tribal grant school operates to fulfill a responsibility that has been the exclusive obligation

of the United States for more than a century. It cannot be compared to private corporations, private jails, Head Start, or any other type of program. The provision of elementary and secondary education to Indian children stands alone as a powerful connection between the undisputed obligation of the U.S. government and the limited delegation of some aspects of that obligation to the grant school.

Appellant contends that the Bureau of Indian Education maintains "plenary control" over a grant school, such that an employee of a grant school is a federal actor. *Cf. Brunette v. Humane Soc'y of Ventural Cnty.*, 294 F.3d 1205, 1213 (9th Cirt. 2002). In a symbiotic relationship the government has "so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961). This Court cannot look at the enormous federal control that continues over grant schools and conclude that it is anything but a "joint participant".

In its last argument, the District Court asserts that extending *Bivens* would limit tribal autonomy. Tribal autonomy is not limited by the *Bivens* argument, it is limited by the carefully constructed federal scheme of control over a tribal grant school. Congress and, by extension, the BIE could, one supposes, have simply given money to the school, and allowed its governing board to take it from there. That is not reality. The reality is that the heavy federal regulation, *which includes*

the right of direct appeal from board action to the BIE, has already limited tribal autonomy. Extending a federal *Bivens* remedy to the federal actors operating within this scheme is a natural part of that comprehensive federal scheme.

The District Court erred and should be reversed.

Conclusion

This Court should reverse the District Court with orders to deny the Appellee's motion for summary judgment.

RESPECTFULLY SUBMITTED this 24th day of October, 2018.

The Law Offices Of David R. Jordan, P.C.

/s/David R. Jordan
David R. Jordan
1995 State Road 602
P.O. Box 840
Gallup, New Mexico 87305-0840
Attorney for Appellant

Certificate of Service

I hereby certify that on October 24, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/David R. Jordan

Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[x] this brief contains 2,791 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

[ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Macintosh 2011 Version 14.3.8 in Times New Roman Size 14, *or*

[ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

/s/David R. Jordan
Attorney for Appellant
Dated: 10/24/18

Statement of Oral Argument

Appellant does request oral argument.

Statement of Related Cases

Pursuant to Circuit Rule 28-2.6, Appellant states that he is not aware of any related cases pending in this Court.

/s/David R. Jordan