IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRENDA G. CHICHARELLO,

Plaintiff,

v. NO. CIV 20-01070 PJK/JHR

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.

Defendants.

FEDERAL DEFENDANTS'[1] MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

The Court should dismiss the Federal Defendants from this action arising out of Plaintiff's removal from an Indian Education Committee by a vote of its members. While Plaintiff purports to bring this action pursuant to 42 U.S.C. § 1983, this statute applies to state officials, not federal employees or agencies. Even if the Court construes Plaintiff's complaint as bringing a claim against the federal employees in their individual capacities pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Complaint does not plausibly allege that any of the Federal Defendants personally participated in any violation of Plaintiff's constitutional rights. At most, Plaintiff alleges that she sent an email to one of the federal employees after her removal to complain about the decision. Finally, to the extent Plaintiff brings a claim against the federal employees in their official capacities, such a claim is against the United States, and Plaintiff cannot

[1] This Motion is on behalf of the following Defendants only: United States Department of the Interior; Deb Haaland in her capacity as Secretary of the Interior (substituted for Sally Jewell pursuant to Fed. R. Civ. P. 25(d)); Darryl LaCounte in his capacity as Director of the Bureau of Indian Affairs (substituted for Bryan Rice pursuant to Fed. R. Civ. P. 25(d)); and Tony Dearman in his capacity as Director of the Bureau of Indian Education (collectively, "Federal Defendants").

show that the United States has waived its sovereign immunity. The Court therefore lacks subject matter jurisdiction.

Federal Defendants notified Plaintiff's counsel, Mr. David R. Jordan, Esq., of this motion on April 26, 2021, but did not receive a response. Accordingly, Federal Defendants will assume that the motion is opposed.

FACTUAL BACKGROUND[2]

1. Plaintiff alleges that she was a member of the Indian Education Committee ("IEC") for Tobe Turpen Elementary School in Gallup, New Mexico, from 2012 to 2017. Doc. 1 at 4.

2. The IEC was established pursuant to 25 C.F.R. § 273.15 to provide oversight for a Johnson-O'Malley subcontract agreement between the Navajo Nation and Gallup McKinley County School District.[3] Doc. 1 at 2-4.

3. At a regular meeting on October 15, 2017, the IEC voted to remove Plaintiff from the IEC. Doc. 1 at 4.

4. Plaintiff contends that her removal violated the IEC's bylaws, which have no removal procedures. Doc. 1 at 5.

5. Plaintiff sought reinstatement on the IEC by complaining of "the wrongful action against [her] by the IEC Officers and Members" to various authorities, including the Navajo Nation

[2] These facts are recited for purposes of this motion to dismiss only. Referencing and characterizing those facts does not waive Federal Defendants' right to contest them later.

[3] The Johnson-O'Malley Act of 1934, 25 U.S.C. § 5341 *et seq*. ("JOM Act"), authorizes contracts for the education of eligible Indian students enrolled in public schools. The regulations implementing the JOM Act were updated in 2020 pursuant to the Johnson-O'Malley Supplemental Indian Education Program Modernization Act of 2018, Pub. L. 115-404 (2018) ("JOM Modernization Act"). *See* 85 Fed. Reg. 10938 (Feb. 25, 2020). The provisions governing Indian Education Committees are now located at 25 C.F.R. §§ 273.115 to 273.118.

Johnson-O'Malley Program, Navajo Nation Department of Diné Education, the Navajo Nation Justice Department, and the Navajo Nation President. Doc. 1 at 5.

6. After failing to obtain relief, Plaintiff contacted Director Tony Dearman and Program Specialist Angela Barnett of the Department of the Interior's Bureau of Indian Education to request their intervention. Doc. 1 at 6, 88-91.

7. Ms. Barnett informed Plaintiff that "[t]he Bureau of Indian Affairs and [t]he Bureau of Indian Education do[] not get involved with the decisions that are made by the IEC," and that her recourse was to go through the IEC's grievance procedures. *Id*. at 89. According to Ms. Barnett, "the final decision stops at the Education Director of the Tribe." *Id*.

8. Plaintiff filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 naming the Department of the Interior and various Department of the Interior officials, whom she alleges were acting "under color of state law." Doc. 1 at 1-2, 9-10.

9. Plaintiff alleges "Fourteenth Amendment violations of Due Process," and contends that the "Bureau of Interior [*sic*] Federal Government Agency failed to provide the Administrative Procedure Act (APA) to remedy" the due process violations arising from her removal from the IEC. Doc. 1 at 4 (emphasis omitted).

10. The sole relief requested by Plaintiff is "[c]ivil damages of One Hundred seventy thousand dollars." Doc. 1 at 7.

STANDARD OF REVIEW

Motions to dismiss for lack of subject matter jurisdiction generally take two forms—"facial attacks on the complaint's allegations" or factual attacks that "go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). If the grounds for dismissal for lack of subject

matter jurisdiction are not set forth on the face of the complaint, the court may not presume the truthfulness of the complaint's factual allegations but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). *Id*. at 1002. Reference to such evidence outside the pleadings does not convert the motion to a Rule 56 motion unless resolution of the jurisdictional question is intertwined with the merits of the case. *Id*.

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate if a plaintiff fails to state a claim upon which the court can grant the requested relief. Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Rule 12(b)(6), a court accepts the factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). A plaintiff must furnish "more than labels and conclusions"—"a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "To survive a motion to dismiss, 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) (internal quotations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

ARGUMENT

I. Section 1983 Does Not Apply to Federal Defendants.

Plaintiff purports to bring this case pursuant to 42 U.S.C. § 1983. *See* Doc. 1 at 1 (caption); *id*. at 2 (jurisdictional statement). It is well established, however, that Section 1983 applies to state—not federal—officials. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (noting that Section 1983 "entitles an injured person to money damages if a *state official* violates his or her constitutional rights" (emphasis added)); *see also Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 869 (10th Cir. 2016) ("Section 1983 is not directed at conduct by federal officials.

Instead, it provides a remedy against state actors who violate a federal right, pursuant to state authority.").[4] Moreover, Section 1983 applies to persons, not agencies. *See Jachetta v. United States*, 653 F.3d 898, 908 (9th Cir. 2011) (holding that Section 1983 does not apply to federal agencies); *D'Addabbo v. Obama*, 530 F. App'x 828, 829 (10th Cir. 2013) (same).

Because Plaintiff cannot bring a Section 1983 case against any of the Federal Defendants, the Court should dismiss Federal Defendants from this action.

II. Even If the Court Construes the Section 1983 Claim as a *Bivens* Claim, Dismissal Is Still Appropriate Because Plaintiff Has Not Alleged Any Personal Participation.

In *Bivens*, the Supreme Court recognized "a private action for damages against federal officers who violate certain constitutional rights." *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (internal quotation marks omitted). *Bivens* is the "federal analog to suits brought against state officials under [Section 1983]." *Iqbal*, 556 U.S. at 675 (internal quotation marks omitted). To the extent the Court construes the Complaint as raising a *Bivens* claim against Federal Defendants,[5] dismissal is still warranted.

"A *Bivens* claim can be brought only against federal officials in their individual capacities" and "cannot be asserted directly against . . . federal officials in their official capacities or federal agencies." *Smith v. United States*, 561 F.3d 1090, 1099 (10th Cir. 2009) (citation omitted). Here,

[4] A limited exception applies when the complaint alleges that "federal and state actors shared an unconstitutional goal" and engaged in a conspiracy or symbiotic venture to violate a person's constitutional rights. *See Big Cats of Serenity Springs*, 843 F.3d at 869-71. Here, Plaintiff has not plausibly alleged that federal officials acted under color of *state* law for this exception to apply.

[5] Although the Court should liberally construe Plaintiff's *pro se* complaint, it "is not obligated to craft legal theories for the plaintiff." *Garcia v. Cole*, 428 F. Supp. 3d 644, 650 (D.N.M. 2019). Hence, the Court need not construe the Complaint as bringing a *Bivens* claim where, as here, the Plaintiff "does not state that she brings a *Bivens* action, assert facts that suggest a *Bivens* action is appropriate, or allege generally that [federal officials] violated her constitutional rights." *Gervais v. Alb. Reg'l FBI*, No. CV 18-0614 JB/JHR, 2018 WL 6047416, at *4 n.2 (D.N.M. Nov. 19, 2018).

Plaintiff does not clearly allege whether she has named the federal officials in their individual or official capacities. Assuming that she asserts a *Bivens* claim against these officials in their individual capacities, she fails to state a claim for relief.

"Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. Hence, "it is incumbent upon a plaintiff to identify *specific* actions taken by *particular* defendants in order to make out a viable § 1983 or *Bivens* claim." *Pahls*, 718 F.3d at 1226 (internal quotation marks omitted; emphasis in original).

Here, Plaintiff has identified no specific actions taken by any Federal Defendant to violate her constitutional rights, nor has she "identif[ied] the specific policies over which particular defendants possessed responsibility and that led to the alleged constitutional violation." *Id*. Rather, the gravamen of her Complaint is that the members of the IEC, who are not alleged to be federal employees, voted to remove her from the school's IEC in violation of the IEC's internal procedures, and thereby violated her right to due process. The sole allegation regarding a Federal Defendant is that Plaintiff "emailed Director, Tony Dearman" *after* her removal to try to "work out a solution." Doc. 1 at 6.

Because the Complaint lacks any plausible allegation that any of the named federal officials was personally involved in the decision to remove Plaintiff, the Court should dismiss any *Bivens* claim against them for failure to state a claim. *See Smith*, 561 F.3d at 1104 (dismissing *Bivens* claims against the Attorney General and Director of the Bureau of Prisons because the complaint did not "make any individual allegations" against them).

III. To the Extent Plaintiff Asserts a Claim against Federal Employees in Their Official Capacities, the United States Has Not Waived Its Sovereign Immunity.

There is a strong argument that Plaintiff intended to sue Federal Defendants in their official capacities. The Complaint specifically notes that the Bureau of Indian Education ("BIE") is the agency that oversees the JOM program, and that the "Bureau of Interior [*sic*] federal government entity" failed to provide her a remedy under the APA. Doc. 1 at 4, 6. To the extent that Plaintiff is asserting a complaint against Federal Defendants in their official capacities, such suit is barred because they are entitled to share in the sovereign immunity of the United States, and there is no applicable waiver of sovereign immunity. As discussed below, the sovereign immunity of the United States is not waived by filing *a Bivens* claim, nor is it waived by 42 U.S.C. § 1983, 28 U.S.C. § 1343(a)(3), the APA, or the Federal Torts Claims Act.

"There is no such animal as a *Bivens* suit against a public official tortfeasor in his or her official capacity." *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001). Rather, such a claim is properly construed as one against the United States. *See Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989) ("When an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States."). Hence, any official-capacity *Bivens* claim should be dismissed. *See Smith*, 561 F.3d at 1099 (holding that "the district court correctly dismissed [the] *Bivens* claims against all defendants except for his claims against the individual federal officials in their individual capacities").

"It is well settled that the United States and its employees, sued in their official capacities, are immune from suit, unless sovereign immunity has been waived." *Id*.; *see also Martinez v. Aulepp*, 658 F. App'x 382, 383 (10th Cir. 2016) ("To the extent that Mr. Martinez attempts to sue defendants in their official capacities, the claim is actually a claim against the United States and is

barred by sovereign immunity."). "Courts lack subject matter jurisdiction over a claim against the United States for which sovereign immunity has not been waived." *Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010). "Consequently, [Plaintiff] may not proceed unless [she] can establish that the United States has waived its sovereign immunity with respect to [her] claim." *Id*.

Plaintiff cannot, however, establish that the United States has waived its sovereign immunity here. Plaintiff asserts jurisdiction pursuant to "28 U.S.C. § 1343(3) [*sic*]" and "420 [*sic*] U.S.C. § 1983." Doc. 1 at 2. Assuming Plaintiff meant 28 U.S.C. § 1343(a)(3), this statute confers original jurisdiction to the district courts over actions to "redress the deprivation, under color of any State law . . . of any right, privilege or secured by the Constitution of the United States or by any Act of Congress providing for equal rights." However, this statute does not waive the United States' sovereign immunity. *See Jachetta*, 653 F.3d at 908; *see also Salazar v. Heckler*, 787 F.2d 527, 528 (10th Cir. 1986) (holding that a similar jurisdictional provision, 28 U.S.C. § 1343(a)(4), "does not by itself include any waiver of the sovereign immunity of the United States"). Further assuming that Plaintiff meant 42 U.S.C. § 1983, this statute does not waive the United States' sovereign immunity, either. *See Beals v. U.S. Dep't of Justice*, 460 F. App'x 773, 775 (10th Cir. 2012); *Lankford v. United States Dep't of Justice*, No. 1:17-CV-668 WJ/GBW, 2017 WL 5564568, at *4 (D.N.M. Nov. 17, 2017) ("The United States has not waived [its sovereign immunity], and is therefore immune, from claims for money damages arising from a constitutional tort under § 1983/*Bivens*.").

Although Plaintiff mentions the Administrative Procedure Act ("APA") in passing, *see* Doc. 1 at 4, the APA waives sovereign immunity only with respect to claims that do not seek money damages. *See Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1140 (10th Cir. 1999)

("Congress has limited the relief available under the APA by waiving sovereign immunity only as to suits 'seeking relief other than money damages.'" (quoting 5 U.S.C. § 702)). Here, because Plaintiff seeks only money damages, *see* Doc. 1 at 7 (requesting "[c]ivil damages" of $170,000), the United States has not waived its sovereign immunity under the APA.[6]

Nor may Plaintiff avail herself of the Federal Tort Claims Act ("FTCA"). While the "*raison d'être* of the FTCA . . . is to waive sovereign immunity to suits seeking relief via money damages," *Franklin Sav. Corp.*, 180 F.3d at 1140, Plaintiff has not alleged that she exhausted her administrative remedies by filing an administrative claim with the Department of the Interior, which is a jurisdictional prerequisite to bring a claim under the FTCA, *see McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."). Moreover, Plaintiff has failed to name the United States as a defendant. *See Gaines v. Pearson*, 516 F. App'x 724, 726 (10th Cir. 2013) (affirming dismissal of FTCA claim where the plaintiff failed to name the United States). Finally, the FTCA does not apply to constitutional tort claims such as Plaintiff's due process claim. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 478 (1994) (noting that "the United States simply has not rendered itself liable under [28 U.S.C.] § 1346(b) for constitutional tort claims").

Absent a showing by Plaintiff that the United States has waived its sovereign immunity as to any official-capacity claims, the Court lacks jurisdiction and should dismiss any such claim for lack of subject matter jurisdiction.

[6] Even if Plaintiff were seeking solely injunctive or declaratory relief, there is still no viable APA claim because there is no legal obligation for the agency to act in this case. "[T]he only agency action that can be compelled under the APA is action legally *required*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis in the original). The Department of the Interior has no authority to address Plaintiff's dismissal, and certainly has no legal obligation to do so.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Federal Defendants from the Complaint.

Respectfully submitted,

FRED J. FEDERICI
Acting United States Attorney

/s/ Christine H. Lyman 4/30/21
CHRISTINE H. LYMAN
Assistant United States Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 224-1532; Fax: (505) 346-7205
Christine.Lyman@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I filed the foregoing pleading electronically through the CM/ECF system which caused all parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

/s/ Christine H. Lyman 4/30/21
CHRISTINE H. LYMAN
Assistant United States Attorney