

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ROBERT DAVIS

Plaintiff,

v.

ROBERT EVANGELIST, ET AL

Defendants.

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CIVIL ACTION

NUMBER: 06-3037

SECTION: "F"(5)

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**MEMORANDUM IN SUPPORT OF STEPHEN
NOH AND TRENT MILEY'S MOTION TO DISMISS**

MAY IT PLEASE THE COURT:

Defendants, Stephen Noh and Trent Miley, respectfully submit this memorandum in support of their motion to dismiss. Defendants Miley and Noh, federal officers, are not amenable to suit under 42 U.S.C. § 1983. Moreover, the Federal Tort Claims Act provides the exclusive remedy for persons with claims for damages resulting from the actions of federal employees taken within the scope of their employment. Under the Federal Tort Claims Act, defendants Miley and Noh are improper defendants. Accordingly, Plaintiff's claims against defendants Stephen Noh and Trent Miley should be dismissed at Plaintiff's costs

I. PERTINENT FACTS AND PROCEDURAL BACKGROUND

On June 13, 2006, Plaintiff filed this action for personal injury allegedly resulting from the use of excessive force by several law enforcement officers on October 18, 2005. *See* Rec. Doc. 1. In his original complaint Plaintiff named Robert Evangelist, Lance Schilling, and Stewart Smith, in their individual capacity and as New Orleans Police Officers. *Id.* Plaintiff also named the City of New Orleans alleging vicarious liability for the alleged actions of its police officers. *Id.*

Subsequently, on October 26, 2007, Plaintiff filed his first supplement and amended complaint, wherein Plaintiff added Stephen Noh, Trent Miley and the Federal Bureau of Investigation (“FBI”) as defendants. Rec. Doc. 45. Further, on November 5, 2007, Plaintiff once again amended his complaint wherein Plaintiff substituted the United States of America in place of the FBI. Rec. Doc. 50.

Plaintiff files the instant action pursuant to 42 U.S.C. § 1983, §1343, and Louisiana Civil Code Articles 2315 and 2316. Rec. Docs. 1, 45 at ¶¶ I, XIII. Plaintiff seeks monetary damages in the form of compensatory damages, attorney's fees, and pre-judgment interests. *Id.* at Prayer. However, Plaintiff does not have a cognizable action against Defendants Noh and Miley under 42 U.S.C. § 1983, §1343, and any claims under Louisiana Civil Code Articles 2315 and 2316 would lie against the United States under the Federal Tort Claims Act.

II. STANDARD OF REVIEW

An action must be dismissed if it appears that the Court does not possess subject matter jurisdiction over the plaintiff's claims. Fed.R.Civ.P. Rule12(b)(1), (h)(3). As the party invoking jurisdiction, the plaintiff carries the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Unlike the district court's review of a Rule

12(b)(6) motion to dismiss, the Court may examine evidence outside of the pleadings when deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

It is well established that the district court may base its decision on a Rule 12(b)(1) motion on “(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; and (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.” *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996) quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981)).

III. ANALYSIS

A. 42 U.S.C. § 1983

Plaintiff alleges, *inter alia*, that he was deprived of his Fourth, Fifth and Seventh Amendment rights in violation of 42 U.S.C. § 1983. Rec. Docs. 1, 45 at ¶¶ I, XII. Plaintiff specifically alleges personal injury resulting from the use of excessive force by Defendants Noh and Miley in violation of 42 U.S.C. § 1983. *Id* To state a valid claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Resident Council of Allen Parkway Village v. United States Dept. of Housing and Urban Dev.*, 980 F.2d 1043, 1053 (5th Cir.) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

However, no cause of action under § 1983 is cognizable against federal officers. *See Duncan v. Goedeke and Cleasey*, 837 F.Supp. 846, 849 (S.D. Tex. 1993) (citing *Davis v. United States*, 439 F.2d 1118, 1119 (8th Cir.1971); *Monarch Ins. Co. v. District of Columbia*, 353 F.Supp. 1249, 1252 (D.D.C.1973), *aff'd*, 497 F.2d 684 (D.C.Cir.), *cert. denied*, 419 U.S. 1021(1974)). Section 1983 protects persons who were deprived of rights, privileges, and immunities under color of state or local

law, not federal law. Therefore, a federal officer acting under color of federal law, such as defendants Noh and Miley are not subject to suit under 42 U.S.C. § 1983. *Duncan*, 837 F.Supp. at 849 (citing *Zernial v. United States*, 714 F.2d 431, 435 (5th Cir.1983); *Broadway v. Block*, 694 F.2d 979, 981 (5th Cir.1982)). Accordingly, Plaintiff fails to state a claim for relief under 42 U.S.C. § 1983 and as such, these civil rights claims should be dismissed.¹

Further, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971), the Supreme Court recognized for the first time an implied private action for monetary relief against federal officers alleged to have violated a citizen's constitutional rights. The Supreme Court has noted that the purpose of *Bivens* is to deter individual federal officers from committing constitutional violations, the purpose is not to deter a federal agency or the United States. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Therefore, the Supreme Court has concluded that a plaintiff who alleges a constitutional deprivation may bring a claim for monetary relief under *Bivens* against the offending individual officer in his individual capacity, subject to the defense of qualified immunity. *Id.* at 72; *see also Gibson v. Fed. Bureau of Prisons*, 121 F. App'x 549, 551 (5th Cir.2004). The plaintiff, however, may not bring a claim for monetary relief under *Bivens* against the officer in his official capacity, the officer's employer or the United States under the doctrine of sovereign immunity. *Corr. Servs. Corp.*, 534 U.S. at 72. However, Plaintiff's Complaint specifically alleges Defendants Noh and Miley's use of excessive force while acting under their authority as federal agents employed by the FBI. Rec. Doc. 45 at ¶ XII.

¹Plaintiff also invokes the jurisdiction of the Court pursuant to 42 U.S.C. § 1343. 42 U.S.C. § 1343 isn't reflective of any actual statute; therefore, any claims asserted therewith should be dismissed.

B. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

In the alternative, if Plaintiff were to amend his Complaint to state a viable constitutional deprivation claim, Plaintiff's civil rights claims should still nonetheless be dismissed because defendants Noh and Miley are entitled to the defense of qualified immunity.

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Plaintiff's Complaint specifically alleges Defendants Noh and Miley's use of excessive force while acting under their authority as federal agents employed by the FBI. Rec. Doc. 45 at ¶ XII. In fact, nothing in Plaintiff's Complaint alleges any actions by Defendants Noh and Miley outside of the official capacity. *See generally* Rec. Docs. 1, 45.

“The doctrine of qualified immunity serves to shield a government official from civil liability for damages based upon the performance of discretionary functions.” *Thompson v. Upshur County, TX*, 245 F.3d 447, 456 (5th Cir.2001). The first step in evaluating a defense of qualified immunity is to determine whether the plaintiff has alleged the violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). “The second step is to ‘decide whether the defendant's conduct was objectively reasonable’ in light of the legal rules clearly established at the time of the incident.” *Jones v. City of Jackson*, 203 F.3d 875, 879 (5th Cir.2000)(quoting *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir.1993)). “The qualified immunity defense ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’” *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir.1995)(quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)).

The Fifth Circuit has held that when a defendant raises the defense of qualified immunity, a district court may order the plaintiff to file a Rule 7(a) “*Schultea* reply” tailored to the defense of qualified immunity. *Schultea v. Wood*, 47 F.3d 1427, 1433-34. In the reply, the plaintiff must articulate the specific conduct and action giving rise to a constitutional violation. *Id.* Furthermore, the reply must support the plaintiff's claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the defendants' conduct at the time of the alleged acts. *Schultea*, 47 F.3d at 1434. The *Schultea* reply is evaluated under a heightened pleading standard. *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir.1996).

Plaintiff's allegations fail to plead the requisite particularity for his claims and cannot overcome Defendant's qualified immunity defense. Therefore, Plaintiff should be made to file a reply which contains his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of Defendants, conduct at the time of the alleged act.

C. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF UNDER LOUISIANA TORT LAW AGAINST DEFENDANTS NOH AND MILEY.

Plaintiff's Complaint also alleges negligence, pursuant to the Louisiana Civil Code Articles 2315 and 2316. Rec. Doc. 45, Petition, at ¶ XII. The Federal Tort Claims Act provides that a suit against the United States shall be the exclusive remedy for persons with tort claims for damages resulting from the actions of federal employees taken within the scope of their office or employment. 28 U.S.C. § 2679(b)(1). As previously noted, Plaintiff's Complaint specifically alleges Defendants Noh and Miley's use of excessive force while acting under their authority as federal agents employed by the FBI. Rec. Doc. 45 at ¶ XII. Furthermore, the United States is currently an active Defendant in this litigation. Accordingly, defendants Noh and Miley are improper party defendants with respect to Plaintiff's tort claims.

IV. CONCLUSION

Defendants pray that the instant motion be granted and that Plaintiff's claims against defendants Stephen Noh and Trent Miley be dismissed at Plaintiff's costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically and/or by first-class mail, postage prepaid, on this **17th** day of **February**, 2009, on counsel for all parties.

Brock D. Dupre
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