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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Mark D. Davenport,
Plaintiff,
v.
United States Department of Homeland
Security,
Defendant.

No. CV18-00625-PHX-DGC

ORDER

Pro se plaintiff Mark D. Davenport sued the United States, alleging various tort, constitutional, and statutory claims. Doc. 16. Defendant moves to dismiss Plaintiff’s first amended complaint pursuant to Rule 12(b)(1) and (6). Doc. 18. The motion is fully briefed, and no party requests oral argument. Docs. 26, 29. For the following reasons, the Court will dismiss Plaintiff’s first amended complaint without prejudice.¹

I. Background.

Plaintiff alleges that he began participating in an Equal Employment Opportunity Commission (“EEOC”) case in April 2015 as a non-attorney representative for his fiancé, a former employee of the Transportation and Security Administration (“TSA”). Doc. 16

¹ Plaintiff filed a Second Amended Complaint on June 25, 2018. Doc. 17. That pleading is not properly before the Court. A plaintiff may amend his pleading only once without leave of Court; later pleadings may be filed only with the opposing party’s written consent or leave of Court. Fed. R. Civ. P. 15(a).

1 at 2. Debra Wheeler was also involved in the EEOC case, as a TSA human resources
2 specialist. *Id.* Plaintiff alleges that Wheeler retaliated against him and interfered with the
3 EEOC case by falsely alleging that he stalked and harassed her and shot at her window
4 with a gun (*id.* at 3-5), releasing his private and personally identifiable information to
5 third parties (*id.* at 3), sending federal agents to his home to interrogate him about the
6 false allegations (*id.*), and negligently and intentionally defaming and slandering him (*id.*
7 at 5-6). Plaintiff’s first amended complaint refers to the Federal Tort Claims Act
8 (“FTCA”), the First and Fourth Amendments, 5 U.S.C. § 552, 18 U.S.C. § 1001(a), 42
9 U.S.C. § 1983, and sections of the TSA employee code of conduct. *Id.* at 7-8. Defendant
10 argues that the Court lacks subject matter jurisdiction over Plaintiff’s claims and that
11 Plaintiff fails to state a claim for relief. Doc. 18.

12 **II. Legal Standard.**

13 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
14 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, the
15 challenger disputes the truth of the allegations that, by themselves, would otherwise
16 invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039. “In a facial attack,
17 the challenger asserts that the allegations contained in the complaint are insufficient on
18 their face to invoke federal jurisdiction.” *Id.* “The district court resolves a facial attack
19 as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations
20 as true and drawing all reasonable inferences in the plaintiff’s favor, the court determines
21 whether the allegations are sufficient as a legal matter to invoke the court’s
22 jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

23 **III. Analysis.**

24 Defendant’s motion makes a facial attack on Plaintiff’s complaint. The motion
25 does not substantially challenge the truth of the facts alleged. *See* Doc. 18. Thus, under
26 12(b)(1), the Court will accept the alleged facts as true.

1 **A. Federal Tort Claims Act.**

2 The FTCA provides a limited waiver of the government’s sovereign immunity for
3 certain tort claims. 28 U.S.C. § 1346(b); *United States v. S.A. Empresa de Viacao Aerea*
4 *Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807-08 (1984). But the government
5 remains immune from suits for “[a]ny claim arising out of . . . malicious prosecution,
6 abuse of process, libel, slander, misrepresentation, deceit, or interference with contract
7 rights.” 28 U.S.C. § 2680(h).

8 In *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990), the Ninth Circuit
9 explained that “§ 2680(h) bars suit for claims based on conduct which constitutes one of
10 the excepted torts, and bars suit for no other claims.” *Id.* at 1171. The government’s
11 alleged conduct, then, is the touchstone for determining whether § 2680(h) bars
12 Plaintiff’s claims. If Defendant’s alleged conduct constitutes one of the torts listed in
13 § 2680(h), dismissal is required.

14 Defendant argues that Plaintiff’s allegations about Wheeler are based on libel,
15 slander, and misrepresentation, and are thus barred under § 2680(h). Doc. 18 at 5-6.
16 Plaintiff reiterates the factual bases for his claims and cites various federal and state
17 statutes and cases, but he does not meaningfully respond. *See* Doc. 26. Among his
18 allegations, Plaintiff states that Wheeler:

19 intentionally, negligently and in bad faith, attempted[ed] to “frame-up”
20 Plaintiff; [made] malicious, intentional, false and negligent publications,
21 which did defame and slander Plaintiff, causing him extreme anxiety,
22 humiliation, worry fear and emotional duress; [and] falsely alleg[ed]
23 Plaintiff was seen performing sex act . . . [and that Plaintiff] caused
24 damage to a window of [Wheeler’s] home.

25 Doc. 16 at 3-4. Plaintiff also alleges that “Wheeler’s contrived and negligent allegations,
26 . . . [caused Plaintiff to] suffer extreme embarrassment, anxiety, humiliation, worry, fear
27 and emotional duress” (*id.* at 3), and that Wheeler’s actions “were negligent and done
28 intentionally with malice to cause harm, humiliate, defame, slander, harass, annoy and
alarm [Plaintiff]” (*id.* at 4).

1 These allegations amount to slander, libel, misrepresentation, and deceit, all of
2 which are torts barred by § 2680(h). Doc. 16. And the same alleged conduct gives rise to
3 Plaintiff's express claims for defamation, negligence, harassment, and intentional and
4 negligent infliction of emotional distress. Plaintiff's claims are barred by § 2680(h). *See*
5 *United States v. Neustadt*, 366 U.S. 696, 706-07 (1961) (negligence claim barred as
6 actually stating negligent misrepresentation claim); *Thomas-Lazear*, 851 F.2d at 1207
7 (negligent infliction of emotional distress claim restated a slander claim); *Leaf v. United*
8 *States*, 661 F.2d 740, 742 (9th Cir. 1981) (negligence claims restated misrepresentation
9 claim); *Bowles*, 2011 WL 6182330, at *3 (Plaintiff's defamation-related claims restated
10 libel- and slander-type actions); *Rodriquez v. United States*, No. CV 04-2312-PHX-
11 RGS, 2007 WL 2022010, at *5 (D. Ariz. July 10, 2007) ("Section 2680(h) precludes
12 claims against the United States based on defamation through its exceptions of claims
13 'arising out of' libel and slander.").

14 The Court will dismiss Plaintiff's claims for slander, libel, misrepresentation, and
15 deceit, and all claims arising from the same conduct, for lack of subject matter
16 jurisdiction under Rule 12(b)(1).

17 **B. Plaintiff's Other Bases for Jurisdiction.**

18 Plaintiff's complaint cites numerous other statutes. Doc. 16. Defendant argues
19 that even if § 2680(h) does not bar Plaintiff's claims, none of his cited statutes provides a
20 basis for jurisdiction. Doc. 18 at 6. The Court agrees.

21 Plaintiff cites 18 U.S.C. § 1001. Doc. 16 at 7. But § 1001 is a criminal statute and
22 provides no private right of action. *Valencia v. Reyna*, No. CV 07-1294-PHX-DGC
23 (MEA), 2007 WL 2320077, at *3 (D. Ariz. Aug. 10, 2007) (citing *Williams v.*
24 *McCausland*, 791 F. Supp. 992, 1001 (S.D.N.Y. 1992)).

25 Plaintiff also cites the Privacy Act, 5 U.S.C. § 552a. Doc. 16 at 7. The Supreme
26 Court has held, however, that the Privacy Act does not authorize a cause of action for
27 recovery of nonpecuniary mental or emotional harm. *FAA v. Cooper*, 566 U.S. 284, 299
28 (2012). Plaintiff alleges only emotional and mental harm, not pecuniary or economic

1 harm. See Doc. 16 at 3-5. Plaintiff responds that he suffered monetary damages in
2 retaining counsel because he believed he would face criminal charges, and that he sought
3 emergency medical treatment for the anxiety he suffered. Doc. 26 at 13. But neither
4 Plaintiff's original complaint nor his first amended complaint pled monetary damages
5 from retaining counsel or seeking medical treatment. "Plaintiff cannot amend his . . .
6 complaint merely by discussing unpled claims in a response to a motion to dismiss."
7 *Piper v. Gooding & Co. Inc.*, No. CV-18-00244-PHX-DLR, 2018 WL 924947 (D. Ariz.
8 Feb. 15, 2018).

9 Plaintiff cites § 1983 and the First and Fourth Amendments, and seeks punitive
10 damages. Doc. 16 at 7-10. But the United States is immune from constitutional torts and
11 punitive damages claims. 28 U.S.C. § 2674 (the United States "shall not be liable . . . for
12 punitive damages"); *F.D.I.C. v. Meyer*, 510 U.S. 471, 478 (1994) ("the United States
13 simply has not rendered itself liable under § 1346(b) for constitutional tort claims");
14 *United States v. Testan*, 424 U.S. 392, 400-02 (1976) (the United States has not waived
15 its sovereign immunity in actions seeking damages for constitutional violations). And
16 § 1983 "does not provide a cause of action against federal officials acting under color of
17 federal law." *Slaughter v. Dep't of Homeland Sec.*, No. CV-09-433-PHX-SRB, 2010 WL
18 11519167, at *2 (D. Ariz. March 20, 2010) (citing *Billings v. United States*, 57 F.3d 797,
19 801 (9th Cir. 1995)). Even if Plaintiff had properly pled a *Bivens* claim, no such exists
20 where the underlying tortious conduct is barred by § 2680(h). *Thomas-Lazear*, 851 F.2d
21 at 1206-07.

22 Plaintiff argues that the Court has supplemental jurisdiction pursuant to 18 U.S.C.
23 § 1367. Doc. 26 at 3. But § 1367 allows the Court to exercise subject matter jurisdiction
24 only over claims "that are so related to claims in the action within [the Court's] original
25 jurisdiction that they form part of the same case or controversy under Article III of the
26 United States Constitution." 28 U.S.C. § 1367. Plaintiff has identified no claims within
27 the Court's original jurisdiction.

28 The Court will dismiss Plaintiff's first amended complaint under Rule 12(b)(1).

1 **IV. Leave to Amend.**

2 The Court “should freely give leave [to amend] when justice so requires.” Fed. R.
3 Civ. P. 15(a)(2). The policy in favor of leave to amend is not only to be heeded, *see*
4 *Foman v. Davis*, 371 U.S. 178, 182 (1962), it must be applied with extreme liberality, *see*
5 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 880 (9th Cir. 2001).
6 Nevertheless, a motion for leave to amend may be denied “if permitting an amendment
7 would prejudice the opposing party, produce an undue delay in the litigation, or result in
8 futility for lack of merit.” *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990).
9 The party seeking amendment bears the burden of showing that the amendment would
10 not result in prejudice, delay or be futile. *Id.*

11 Following Defendant’s motion to dismiss (Doc. 18), Plaintiff filed a motion for
12 leave to amend his first amended complaint, which did not comply with local rules (*see*
13 Doc. 20).² Plaintiff also previously attempted to file a second amended complaint.
14 Doc. 17. Based on that filing, and the anticipation that a properly filed second amended
15 complaint would be futile, Defendant argues the Court should deny leave to amend
16 because (1) Plaintiff will likely attempt to improperly reinsert Wheeler as a Defendant
17 and the United States is the only proper defendant for actions under the FTCA; and (2)
18 Plaintiff’s claims against Wheeler would be barred by the statute of limitations for tort
19 actions under Arizona law. Doc. 18 at 4-5 n.4.

20 The Court cannot conclude that amendment would be futile. Plaintiff has only
21 amended his original complaint once as a matter of course. Doc. 16. And in light of the
22 Court’s order, Plaintiff may be able to amend his complaint to assert a proper basis for
23 the Court’s subject matter jurisdiction. The Court will dismiss Plaintiff’s complaint
24 without prejudice and grant him leave to amend his complaint.

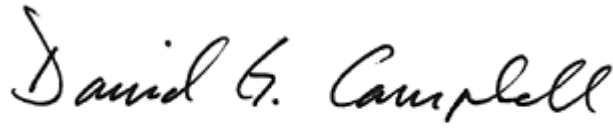
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² At a scheduling conference with the parties on September 6, 2018, the Court
advised Plaintiff to consult the Federal and Local Rules of Civil Procedure.

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IT IS ORDERED that Defendant's motion to dismiss (Doc. 18) is **granted**. Plaintiff's complaint is dismissed without prejudice, and Plaintiff is granted leave to amend. Plaintiff shall file an amended complaint by **December 14, 2018**.

Dated this 26th day of November, 2018.



David G. Campbell
Senior United States District Judge