

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

TIMOTHY C. PLATT,)
vs. Plaintiff,) No. 1:09-cv-347-SEB-DML
UNITED STATES POSTAL SERVICE)
and CHARLES SMITH,)
Defendants.)

**Entry Granting Motion to Dismiss
and Directing Further Proceedings**

I.

The defendants' motion to dismiss¹ (dkt 17) is **granted**. This conclusion is based on the following facts and circumstances:

1. Insofar as defendant Charles Smith is sued in his official capacity, the claim against him is against the entity by which he is employed. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)(explaining that an official capacity suit is "in all respects other than name, to be treated as a suit against the entity . . . for the real party in interest is the entity"). That means, in this case, that any claim against defendant Smith in his official capacity is treated as a claim against his employer, the United States Postal Service ("USPS").

2. The plaintiff's claim brought pursuant to 42 U.S.C. § 1981 against the USPS is barred by the United States' sovereign immunity. *Harrison v. Potter*, 323 F.Supp.2d 593, 604 (S.D.N.Y. 2004).

¹In ruling on the defendants' motion to dismiss, the court has not considered any evidentiary material outside the pleadings. Thus, the motion will not be converted to a motion for summary judgment.

3. Additionally, no viable claim is asserted pursuant to § 1981 because the alleged misconduct on which the plaintiff's claim is based occurred solely under color of federal law, whereas § 1981 provides for liability for actions that took place under color of state law. *Davis v. United States Dep't of Justice*, 204 F.3d 723, 725 (7th Cir. 2000); *Lee v. Hughes*, 245 F.3d 1272, 1277 (11th Cir. 1998). Additionally, the claim under § 1981 is insufficient because the discrimination alleged by the plaintiff is not based on his race, but is based only on the alleged fact that he, as an employee of a postal service contractor, was treated differently than were employees of the USPS. An allegation of discrimination on this basis is outside the scope of the rights secured by § 1981.

II.

A.

No partial final judgment shall issue at this time as to the claims resolved in Part I of this Entry.

B.

The plaintiff shall **report as to the following** no later than **December 17, 2009**:

1. Whether he asserts any claim pursuant to the theory recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
2. The defendant(s) against whom a *Bivens* claim is asserted.
3. The nature of the *Bivens* claim (meaning the legal theory) and the relief sought.
4. The factual basis of each *Bivens* claim – meaning "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

IT IS SO ORDERED.

Date: 12/01/2009



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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