LYTTLE v. The UNITED STATES OF AMERICA et al Doc. 79

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Case No. 4:10-CV-142-D

MARK DANIEL LYTTLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**PLAINTIFF'S OBJECTION TO MEMORANDUM AND RECOMMENDATION OF MAGISTRATE JUDGE**
	)	
THE UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and Local Civil Rule 72.4(b), E.D.N.C., plaintiff Mark Daniel Lyttle ("Plaintiff") respectfully submits this Objection to the Memorandum and Recommendation of Magistrate Judge William A. Webb, served November 14, 2011 (the "Recommendation," Document 75), granting in part and denying in part the motion to dismiss filed by Defendants Dashanta Faucette, Dean Caputo, and Robert Kendall of U.S. Immigration and Customs Enforcement (the "ICE Defendants").

Plaintiff objects to the portion of the Recommendation recommending that this Court dismiss Plaintiff's claims pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging violations of due process and equal protection as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution (the "Bivens due process claims" or the "Bivens claims").

Plaintiff respectfully requests that this Court reject the Magistrate's recommendation that special factors counsel against allowing Plaintiff's Bivens due process claims to proceed, modify

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the Recommendation accordingly, and issue an order denying the ICE Defendants' Motion to Dismiss in its entirety.

STATEMENT OF THE CASE

Plaintiff Mark Daniel Lyttle is a United States citizen who suffers from mental disabilities and who was wrongfully detained and deported from the United States. Plaintiff filed a Complaint on October 13, 2010, and filed an Amended Complaint on May 25, 2011 (the "Amended Complaint," Document 44) against the ICE Defendants and the United States. In his Amended Complaint, Plaintiff brought the following claims against the ICE Defendants: (1) a Bivens claim alleging that the ICE Defendants deprived Plaintiff of his constitutional right to liberty without due process of law as protected by the Fifth Amendment, (2) a Bivens claim alleging that the ICE Defendants violated his Fifth Amendment right to equal protection of the law by deliberately discriminating against him on the basis of race and ethnicity, and (3) a Bivens claim that the ICE Defendants intentionally and unlawfully detained him, violating his right under the Fourth Amendment to be free of unreasonable seizures. Plaintiff also brought the following claims against the United States: (1) a claim pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, alleging that the United States, through its agents, falsely imprisoned him by detaining and deporting him, (2) an FTCA claim alleging that the United States, through its agents, breached its duty of reasonable care by negligently acting or failing to act in such a way that resulted in his wrongful detention and deportation, and (3) an FTCA claim of intentional infliction of emotional distress.

On June 24, 2011, the ICE Defendants filed a motion to dismiss all three of Plaintiff's claims against them pursuant to Fed. R. Civ. P. 12(b)(6). On the same date, the Defendant United States filed a motion to dismiss all of the claims against it.

On November 14, 2011, the Magistrate Judge issued a Memorandum and Recommendation recommending that this Court deny in part and grant in part the ICE Defendants' and United States' Motions to Dismiss. The Magistrate Judge recommended that this Court deny the United States' motion to dismiss Plaintiff's FTCA claims, except that this Court should dismiss the FTCA claims to the extent they seek damages for injuries that occurred outside the United States. The Magistrate Judge recommended that the ICE Defendants' motion to dismiss Plaintiff's Bivens due process claims be granted and that the ICE Defendants' motion to dismiss Plaintiff's Fourth Amendment claim be denied.

Plaintiff now files his objection to that part of the Recommendation that calls for Plaintiff's Bivens due process claims to be dismissed.

STANDARD OF REVIEW

When a party files objections to a Magistrate Judge's recommendation, Rule 72 calls on the Court to make a de novo determination of the parts of the recommendation to which the party objects. See Fed. R. Civ. P. 72(b); accord 28 U.S.C. § 636(b)(1). This de novo review entails "fresh consideration to those issues to which specific objections have been made." 12 Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 3070.2 (3d ed. 2004) (emphasis added) (quoting H.R. Rep. No. 94-1609, at 3 (1976), as reprinted in 1976 U.S.C.C.A.N. 6162, 6163). This is because the District Judge, rather than the Magistrate Judge, "'exercise[s] the ultimate authority to issue an appropriate order.'" Thomas v. Arn, 474 U.S. 140, 153 (1985) (quoting United States v. Raddatz, 447 U.S. 667, 682 (1980)).

In conducting its de novo review, the Court must accept all factual allegations of the claim as true and construe them in the light most favorable to the nonmoving party. Coleman v. Maryland Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010); Nemet Chevrolet, Ltd. v.

Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009). In order to survive the motion to dismiss, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

OBJECTION

Plaintiff submits that the Recommendation erred by concluding that Plaintiff's Bivens due process claims are not cognizable specifically because "special factors counsel against extending Bivens liability to include these claims." (Recommendation at 22.)

The Recommendation properly noted that "Plaintiff alleges claims to which Bivens has already been deemed generally applicable." (Recommendation at 20.) The Recommendation also correctly found that the Immigration and Nationality Act ("INA") does not preclude recovery for Plaintiff's Bivens claims because Congress' plenary power over the admission of aliens does not prevent a U.S. citizen from alleging that federal officials acted to deliberately deprive him of his constitutional rights while purportedly executing their duties under the INA. (See Recommendation at 22.) Yet despite rejecting the ICE Defendants' argument that Plaintiff's Bivens claims are barred by exclusive statutory remedy and finding that the claims are otherwise cognizable, the Recommendation erroneously concluded that allowing Plaintiff's Bivens claims would be an expansion of Bivens liability, and that such an expansion, along with other special factors, should counsel against allowing the Bivens due process claims. (See Recommendation at 26.)

The Recommendation identified the following special factors purportedly counseling against the application of Bivens liability to the facts of the instant case: (1) that Plaintiff's due process claims would be an expansion of the application of Bivens in a manner disfavored by the

Supreme Court, (Recommendation at 23), (2) that because an immigration judge issued the order to remove Plaintiff, Plaintiff's Bivens claims will not deter federal officers such as the ICE Defendants from committing constitutional violations, (Recommendation at 25), (3) that Plaintiff's due process claim of unlawful deportation is a duplicate of his claim that his detention violated his Fourth Amendment right to be free from unreasonable seizures, (Recommendation at 25), and (4) that allowing Plaintiff's claim of discrimination in violation of the equal protection component of the Due Process clause would encroach on Congress' plenary power to regulate immigration and naturalization, (Recommendation at 25-26). None of these factors should counsel against the application of Bivens liability in this case.

1) The Recommendation determined that Plaintiff's due process claims would be an expansion of the application of Bivens in a manner inconsistent with the Supreme Court's Bivens jurisprudence. In so doing, the Recommendation incorrectly characterized Plaintiff's claims as requiring an extension of Bivens liability to a new context and did not adequately weigh the lack of any alternative remedy for Plaintiff as a justification for Bivens liability.

Plaintiff's Bivens claims do not seek to extend liability to a "new context or new category of defendants," which is how the Supreme Court has characterized the circumstances in those cases where it declined to allow a Bivens action. Correctional Services Corp. v. Malesko, 534 U.S. 61, 68 (2001). As the Recommendation recognized in finding Plaintiff's Fourth Amendment Bivens claim cognizable, the ICE Defendants are permissible defendants in a suit for money damages. (Recommendation at 22.) The Recommendation concluded that allowing a claim against those same defendants for violations of the Fifth Amendment, as opposed to violations of the Fourth Amendment, would expand Bivens liability into a new "context." (Recommendation at 20, 24.) The cases in which the Supreme Court has declined to extend

Bivens liability, however, demonstrate that this Court should not consider Plaintiff's Bivens due process claims as arising in a new context at all. In Malesko, the Supreme Court noted that the First Amendment claim in Bush v. Lucas, 462 U.S. 367 (1983), was not cognizable because it arose "in the context of federal employment," and the claim would have involved "a new species of litigation between federal employees," 534 U.S. at 68 (internal quotation marks omitted). Schweiker v. Chilicky, 487 U.S. 412, 425 (1988), concerned the "social welfare context" because the claim would have rendered actions by Social Security administration officials in disbursing disability benefits subject to Bivens liability for the first time. F.D.I.C. v. Meyer, 510 U.S. 471, 485-86 (1994), declined to allow a Bivens claim against a federal agency, a new category of defendant. But simply allowing an additional constitutional claim—a due process claim that is itself generally cognizable under Bivens—against federal immigration officials who are already amenable to suit under Bivens is not a new "context" as reflected in the Supreme Court's Bivens jurisprudence.

Even if the Recommendation were correct in finding that Plaintiff's Bivens claims would be an expansion of liability into a new context, Plaintiff's lack of an alternative remedy is nevertheless a justification for allowing Bivens liability in this case. In Malesko, the majority noted that Bivens liability, while limited by the Supreme Court, has been extended in two circumstances—"to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." 534 U.S. at 70 (emphases in original). The INA provides no remedy for individuals found to have been unlawfully deported. Nor is the availability of a potential remedy under the Federal Tort Claims Act an adequate alternative, because the Supreme Court has found that "the threat of

suit against the United States [is] insufficient to deter the unconstitutional acts of individuals," and it is "'crystal clear' that Congress intended the FTCA and Bivens to serve as 'parallel' and 'complementary' sources of liability." Malesko, 534 U.S. at 68. Furthermore, as set forth below, the availability of a Fourth Amendment Bivens claim against the ICE Defendants is not an adequate remedy for the Fifth Amendment violations alleged in Plaintiff's Bivens due process claims. If Plaintiff's Bivens due process claims are not cognizable, then federal immigration enforcement officers will have de facto absolute immunity to violate the Fifth Amendment rights of U.S. citizens when acting under the color of their official authority. This Court should find that Plaintiff's lack of an alternative remedy for due process violations requires the application of Bivens liability.

2) Plaintiff urges that this Court reconsider the conclusion in the Recommendation that the ICE Defendants should be shielded from Bivens liability because the order of removal was ultimately issued by an immigration judge in Georgia. The Recommendation states that "the ICE Defendants did not make the determination [of removal] that Plaintiff now asserts was not guarded by Due Process" and that a Bivens claim would therefore have no deterrent effect in preventing unlawful deportations. (Recommendation at 25.) Yet Plaintiff's Bivens claim that federal immigration officials deprived him of his liberty without due process of law does not turn on the fact that an immigration judge was involved in the process of removal. Plaintiff's deportation was a result of a series of actions by federal immigration officials that culminated in the immigration's judge's order in a summary deportation hearing conducted by remote video-link, and cannot be termed the product of a single determination by the immigration judge. The crux of Plaintiff's claim is that, by deliberately ignoring the overwhelming evidence of his U.S. citizenship and nonetheless commencing and prosecuting removal proceedings against him, the

ICE Defendants "deported or caused Mr. Lyttle to be deported without reasonable basis or lawful authority." (Amended Complaint ¶ 129 (emphasis added).) The order of removal was the "direct and proximate result of the unlawful actions of [the ICE] Defendants." (Id. at ¶ 133.) But for the ICE Defendants acting "illegally, arbitrarily, and capriciously" (Id. at ¶ 127) by, among other things, coercing Plaintiff into signing false statements, and then initiating removal proceedings against him, he would never have been deported. As such, allowing Plaintiff's Bivens claim would have precisely the deterrent effect that justifies a Bivens remedy, because it would deter ICE officials from acting unconstitutionally when exercising their immigration functions and from thereby causing U.S. citizens to be unlawfully deported. See Malesko, 534 U.S. at 70 ("The purpose of Bivens is to deter individual federal officers from committing constitutional violations."). The Recommendation thus erred in finding that Plaintiff's Bivens claims would have no deterrent effect and that such lack of a deterrent effect is a special factor counseling against the application of Bivens liability.

3) The Recommendation also erred in accepting the ICE Defendants' contention that Plaintiff's due process claim of unlawful deportation duplicates his claim that his detention violated his Fourth Amendment right to be free from unreasonable seizures. (Recommendation at 25.) Plaintiff's claim under the Due Process clause is not that "his detention was continued well beyond the scheduled release date" as claimed by the ICE Defendants and accepted by the Recommendation, (Recommendation at 25), but rather that the ICE Defendants unconstitutionally "deported or caused [him] to be deported," (Amended Complaint ¶ 133). Deportation is clearly a loss of liberty that is distinct from the deprivation of liberty entailed by detention. See Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of

the right to stay and live and work in this land of freedom."). Plaintiff's claim of unreasonable seizure under the Fourth Amendment is based on his unlawful detention and is therefore not a duplicate of his claim that the separate act of deportation violated his constitutional right to liberty without due process. This Court should find that there is no duplication of Plaintiff's claims and that such claimed duplication is not a special factor mitigating against Bivens liability.

4) Finally, Plaintiff submits that the Recommendation erred in finding that Plaintiff's Bivens claim of discrimination in violation of the equal protection component of the Due Process clause would encroach on Congress' plenary power to regulate immigration and naturalization. The Recommendation stated that permitting a Bivens claim against immigration officials for their erroneous classification of Plaintiff as an alien would be a "cure…worse than the disease" and quoted from Appiah v. U.S. I.N.S., 202 F.3d 704, 710 (4th Cir. 2000), for the proposition that "constraints…of nondiscrimination exacted by the equal protection component of the due process clause do not limit the federal government's power to regulate either immigration or naturalization"). (Recommendation at 25.) Plaintiff's Bivens claim, however, does not challenge Congress' plenary power to regulate immigration and naturalization—a fact which the Recommendation acknowledged elsewhere in its Bivens analysis when concluding that the INA does not preclude Plaintiff's Bivens claims because "[u]ltimately, [Plaintiff's] Bivens claims have little to do with Congress' legislative power over the admission of aliens…because [Plaintiff] is not an alien—he is an American-born U.S. citizen who asserts Bivens claims against federal agents who [deliberately] violated his constitutional rights." (Recommendation at 22 (quotation marks omitted; alterations in original).) Plaintiff alleges that the ICE Defendants deliberately and unconstitutionally discriminated against him on the basis of his race and

ethnicity and that their means of doing so was to act under the guise of their immigration enforcement authority and classify Plaintiff as an alien despite overwhelming evidence to the contrary. Such a claim in no way implicates Congress' plenary power to make laws regulating immigration. If it did, federal immigration officials could discriminate, with impunity, on the basis of race or ethnicity while purporting to act under their authority to enforce immigration laws. Where a U.S. citizen with mental disabilities is discriminated against on the basis of his race and ethnicity, interrogated and coerced into signing documents that waive fundamental rights, and then unlawfully detained and deported from the country because of said discrimination, the fact that such unconstitutional actions were committed under the guise of immigration enforcement authority should not preclude a Bivens remedy. This Court should therefore find that Congress' plenary power over immigration is not a special factor counseling against allowing a Bivens claim.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully objects to the portion of the Memorandum and Recommendation of the United States Magistrate Judge recommending the dismissal of his Bivens due process claims. Plaintiff requests that this Court reject the recommendation to grant the ICE Defendants' motion to dismiss Plaintiff's Bivens due process claims, modify the Recommendation accordingly, and issue an order denying the ICE Defendants' Motion to Dismiss in its entirety.

This 8th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2011, I electronically filed the preceding **Plaintiff's Objection to Memorandum and Recommendation of Magistrate Judge** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following: Alexandria J. Reyes alex.reyes@troutmansanders.com, Ann Marie Brown Dooley annmarie@mckinneyandjustice.com, Brian P. Watt brian.watt@troutmansanders.com; David G. Cutler david.g.cutler@usdoj.gov, James R. Whitman james.whitman@usdoj.gov, Jeremy L McKinney jeremy@mckinneyandjustice.com, chris@mckinneyandjustice.com, julie@mckinneyandjustice.com Joseph Finarelli jfinarelli@ncdoj.gov, Judy Rabinovitz jrabinovitz@aclu.org, mlauterback@aclu.org, smehta@aclu.org, Katherine Lewis Parker acluncklp@nc.rr.com, acluparalegal@nc.rr.com, Michael E. Johnson michael.johnson@troutmansanders.com, W. Ellis Boyle ellis.boyle@usdoj.gov, usance.ecfcivil2@usdoj.gov.

This 8th day of December, 2011.

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