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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
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8 CYRUS Y. KIM,
9 Plaintiff,

10 v.

11 KAYLA C. STAHPMAN,
12 THOMAS S. ZILLY,
13 Defendants.

NO. CV-10-0213-RHW

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

14 Before the Court is the Defendants' motion to dismiss for lack of subject
15 matter jurisdiction. (Ct. Rec. 9). Plaintiff, appearing *pro se*, challenges several
16 actions performed by defendants in their official capacities as an assistant United
17 States Attorney and district court judge, respectively. For the reasons explained
18 below, the Court grants Defendants' motion.¹

19 **FACTUAL AND PROCEDURAL HISTORY**

20 This case results from the Defendants' involvement in previous litigation
21 arising from a conflict regarding the delivery of Plaintiff's mail. Plaintiff contends
22 that an adequately addressed parcel was arbitrarily returned to him. Plaintiff
23 traveled to the post office and spoke with a clerk there to determine why his
24 envelope was not delivered. Believing he was the victim of bureaucratic
25 runaround, Plaintiff demanded the employee's name so he could report an "official
26 false comment." An argument developed and, at some point, the clerk shut the
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28 ¹The undersigned is sitting by designation because Judge Zilly of the
Western District of Washington is a named defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS * 1

1 service window near Plaintiff's face. Police eventually removed Plaintiff from the
2 premises.

3 Two lawsuits resulted from this incident. Although the case directly
4 relevant here was commenced in 2009, it is helpful to understand the full context
5 of Plaintiff's claims. For that reason, the Court discusses both.

6 **A. Plaintiff's First Action (2007)**

7 Plaintiff first filed a suit in 2007 (not directly at issue here) against the
8 Postmaster alleging that postal employees violated his Ninth and Fourteenth
9 Amendment rights. The complaint also included some kind of tort claim, though
10 the precise nature of which was disputed. Judge Coughenour dismissed Plaintiff's
11 constitutional claims, concluding that vicarious liability was not cognizable in a
12 *Bivens* action. With the federal element stripped away, the court declined to
13 exercise supplemental jurisdiction over the remaining state tort claim. Ord. on
14 Mtn. to Dismiss, No. 2:07-CV-01917 (W.D. Wash. Mar. 20, 2008). That order
15 was affirmed by the Ninth Circuit. *Kim v. Federal Way Post Office Postmaster*,
16 No. 08-35380 (9th Cir. Jun. 16, 2009).

17 **B. Plaintiff's Second Action (2009)**

18 Plaintiff then filed the lawsuit that underlies this matter in which he
19 renewed his state law tort claims. However, rather than suing the postal clerks
20 individually, he again named the Postmaster as the sole defendant. Upon review
21 of the complaint, the United States Attorney General's office determined the
22 Postmaster was acting within the course and scope of his employment for the
23 purposes of the Federal Tort Claims Act (FTCA). Pursuant to it, Defendant
24 Stahman, an assistant United States Attorney, substituted the United States as the
25 sole defendant and removed the case to federal court. 28 U.S.C. § 2679(d)(2).

26 Stahman then moved to dismiss the complaint. Defendant Zilly, the United
27 States District Court judge assigned to the case, granted the motion. Judge Zilly
28 concluded, as a threshold matter, that Plaintiff had not pursued the required

1 administrative recourse before filing his action. (Ct. Rec. 1-2, at 77). Judge Zilly
2 added that sovereign immunity was not waived for claims “arising out of the loss,
3 miscarriage, or negligent transmission of letters or postal matter,” nor for the
4 intentionally tortious conduct of government employees. (*Id.*, citing 28 U.S.C. §§
5 2680(b) & (h)).

6 Plaintiff filed the instant matter, also in state court, against both Stahman
7 and Judge Zilly for their roles in adjudicating his 2009 lawsuit. The complaint
8 alleges Stahman exceeded her authority “by falsifying and distorting [the] Federal
9 Tort Claims Act” in order to remove Plaintiff’s case from state court.² (Ct. Rec.
10 1-2, at 2). For his part, Judge Zilly allegedly deprived Plaintiff of “the
11 fundamental right of petition” by ordering the substitution of the United States and
12 dismissing the action. (*Id.* at 3). Defendants removed the case to this Court and
13 now move for dismissal arguing that absolute immunity precludes jurisdiction.

14 STANDARD OF REVIEW

15 Dismissal is appropriate under Rule 12(b)(1) when the Court lacks subject
16 matter jurisdiction over the claim. FED. R. CIV. P. 12(b)(1). This a threshold issue
17 which goes to the power of the Court to even hear the case. Because this
18 foundation is at stake, the Court is not limited to the allegations in the complaint
19 but may also consider extrinsic evidence and, if facts are in dispute, may weigh the
20 evidence in order to satisfy itself that jurisdiction exists. *Roberts v. Corrothers*,
21 812 F.2d 1173, 1177 (9th Cir. 1987). Although lack of subject matter jurisdiction
22 is an affirmative defense, the burden of proof in a 12(b)(1) motion is on the
23 Plaintiff. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.
24 1989). Therefore, the court will presume a lack of jurisdiction until it is otherwise
25 proven. *Id.*

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27 ²Plaintiff has since filed an Amended Complaint, dated Feb. 25, 2010. (Ct.
28 Rec. 8). However, that document alters only his damages calculation and thus is
not relevant for determining the merits of Defendants’ motion.

ANALYSIS

A. **Claims Against Individual Defendants**

Because Plaintiff is challenging acts performed by the Defendants in their official capacities, the Court must determine whether Defendants are entitled to absolute immunity. If immunity attaches, then dismissal is proper unless either defendant was acting outside the normal functions of their office. *Imbler v. Pachtman*, 424 U.S. 409, 419, n. 13 (1975) (“[A]bsolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.”).

1. Absolute Immunity

Judges and advocates are shielded from personal liability for their official acts so that they may “perform their respective functions without harassment or intimidation.” *Butz v. Economou*, 438 U.S. 478, 512 (1978). This principle is grounded by the fact that “[t]he loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus.” *Id.* Thus, the Supreme Court has concluded that absolute, rather than qualified, immunity is proper in these instances. *Id.* Although the immunity doctrine found its origin in protecting judges, it has since been extended to include the conduct of, among other actors, government lawyers. *See Harlow v. Fitzgerald*, 457 U.S. 800, 828 (1982) (United States Attorneys are accorded absolute immunity); *Fry v. Melaragno*, 939 F.2d 832, 836 (9th Cir. 1991) (IRS attorneys absolutely immune from liability for official acts).

2. Actions Within the Scope of Office

The question now becomes whether the actions at issue were done within the scope of defendants’ respective offices. Officials deserve immunity based on their conduct, not on the title of the office they hold. *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005). Attorneys and judges act in their official capacities if the particular task is “intimately associated” with the judicial process. *See Burns v.*

1 *Reed*, 500 U.S. 478, 486 (1991). That determination is necessarily a factual one.

2 *I) Attorney Stahman*

3 Absolute immunity is conferred on United States Attorneys when the
4 alleged impropriety is “based solely upon the attorneys’ official conduct
5 representing the government.” *Fry*, 939 F.2d at 836. In other words, tactical
6 decisions and procedural motions, so long as they are taken in good faith, cannot
7 form the basis for a claim that an attorney exceeded the authority of her office. *Id.*
8 Here, Plaintiff is challenging Stahman's removal of and subsequent effort to
9 dismiss his case. These actions fall squarely within those typically performed by
10 government attorneys while defending their client. She is thus entitled to
11 immunity for the acts Plaintiff challenges.

12 *II) Judge Zilly*

13 Plaintiff also argues that Judge Zilly's dismissal of his case was an abuse of
14 authority. A judge will be denied immunity only where “he acts in the clear
15 absence of all jurisdiction or where he performs an act that is not judicial in
16 nature.” *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). The “clear
17 absence” standard is a stringent one. It is not enough that the judge's conduct
18 “was in error, was done maliciously, or was in excess of his authority.” *Stump v.*
19 *Sparkman*, 435 U.S. 349, 356-57 (1978). As the *Sparkman* Court explained:

20 [I]f a probate judge, with jurisdiction over only wills and estates, should
21 try a criminal case, he would be acting in the clear absence of
22 jurisdiction and would not be immune from liability for his action; on
23 the other hand, if a judge of a criminal court should convict a defendant
24 of a nonexistent crime, he would merely be acting in excess of his
25 jurisdiction and would be immune.

26 *Id.* at 357, n.7.

27 The source of Plaintiff's confusion appears to be his construing the FTCA as
28 a separate cause of action rather than a limited waiver of sovereign immunity. He
believes that his failure to plead an initial “FTCA claim,” and his reliance only on
Washington tort law, removed any federal questions from his case. Accordingly,

1 Plaintiff contends that the district court, and by extension Judge Zilly, lacked
2 jurisdiction to dismiss his claim. (Ct. Rec. 10, at 14). However, Plaintiff filed suit
3 against the Postmaster for the City of Federal Way, a federal employee. The
4 FTCA vests exclusive jurisdiction in the district courts for “civil actions on claims
5 against the United States, for money damages ... for injury or loss of property ...
6 caused by the negligent or wrongful act or omission of any employee of the
7 Government[.]” 28 U.S.C. § 1346(b). Therefore it cannot be said that Judge
8 Zilly’s dismissal of Plaintiff’s complaint was an action in “clear absence of all
9 jurisdiction.” To the contrary, jurisdiction was proper and immunity attaches.

10 **B. Claims Against the United States**

11 Finally, Defendants’ attorney, acting now on behalf of the United States,
12 moves to dismiss the remainder of Plaintiff’s complaint arguing that he failed to
13 exhaust administrative remedies as to claims against the United States. (Ct. Rec. 9,
14 at 5-6). The FTCA provides that an “action shall not be instituted upon a claim
15 against the United States for money damages” unless the claimant has first
16 exhausted available administrative processes. 28 U.S.C. § 2675(a). Plaintiff does
17 not address this issue in his response, but the Government provides a sworn
18 declaration from a Department of Justice official who finds no record of Plaintiff
19 having filed an administrative claim. (Ct. Rec. 9-2, at 2-3).

20 Because exhaustion of a FTCA claim invokes a question of jurisdiction,
21 *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000), the Court is free to hear
22 extrinsic evidence on the matter and “to rule on that issue prior to trial, resolving
23 factual disputes where necessary.” *Augustine v. United States*, 704 F.2d 1074,
24 1077 (9th Cir.1983). Plaintiff has provided no evidence regarding the
25 administrative exhaustion of his claim against the United States. Even construing
26 the procedural rules liberally as is appropriate for a *pro se* litigant, the Court finds
27 the Government’s evidence persuasive, especially considering the burden to prove
28 valid jurisdiction is Plaintiff’s to bear. *Stock West*, 873 F.2d at 1225.

