UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTIAN MUMME,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	Docket no. 00-CV-103-B
UNITED STATES OF AMERICA,	)	
U.S. DEPARTMENT OF LABOR, and	)	
SECRETARY OF LABOR	)	
ALEXIS HERMAN,	)	
	)	
Defendants	)	

ORDER DISMISSING PLAINTIFF'S CLAIMS

SINGAL, District Judge

Before the Court is Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Docket #15). Also pending is Plaintiff's Motion to Vacate (Docket #24) an endorsement order whereby this Court granted Defendants a time extension to file a reply brief (Docket #23). Appearing pro se, Plaintiff has brought tort claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671—2680, and a Bivens claim that the Government has violated his Fifth Amendment rights. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).[1] Based on the following reasons, the Court DENIES

[1] In the Complaint, Plaintiff named the Department of Labor and former Secretary of Labor Alexis Herman as defendants. In a motion to amend the Complaint, Plaintiff asked for permission to add the Treasury Department and former Secretary Lawrence Summers (Docket #6). The Court granted permission to amend, but Plaintiff never actually filed an amended complaint. Furthermore, in filings that Plaintiff has made subsequent to his motion to amend, he continues to list Herman and the Labor Department as the only defendants without mentioning Summers or the Treasury Department. Therefore, the Court sees no reason to include Summers or the Department of the Treasury as named defendants. The Government argues that it is improper for Plaintiff to name Herman, Summers or their respective agencies as defendants to claims brought under the Federal Tort Claims Act. Because the United States is the only party that may be sued under the Federal Tort Claims Act, the Court sua sponte adds the United States as a named defendant

Plaintiff's Motion to Vacate and GRANTS Defendants' Motion to Dismiss.

I. SUBJECT MATTER JURISDICTION

A. Standard of Review

When deciding whether to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), courts "may consider whatever evidence has been submitted, such as the depositions and exhibits submitted…." Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996). The court then construes the complaint and any additional evidence "liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." Id. at 1209-1210.

This liberal standard is especially applicable in cases featuring a pro se plaintiff. See Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997) ("We are required to construe liberally a pro se complaint"). "A plaintiff, however, may not rest merely on unsupported conclusions or interpretations of law.… Subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts will not defeat a motion to dismiss." Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995) (internal quotations omitted). Furthermore, a plaintiff bears the burden of establishing subject matter jurisdiction. See Aversa, 99 F.3d at 1209; Murphy, 45 F.3d at 522. Pursuant to this standard, the Court lays out the relevant facts of the case below.

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regarding Plaintiff's tort claims. See 28 U.S.C. § 2679; United States v. Smith, 499 U.S. 160 (1991). Regarding Plaintiff's tort claims, the United States is the only appropriate defendant. The Government argues that the Court should dismiss Plaintiff's other claim, that the Department of Labor and Secretary Herman violated his Fifth Amendment due process rights, because constitutional claims cannot be brought under the FTCA. See FDIC v. Meyer, 510 U.S. 471, 477 (1994). Indeed, Plaintiff cites the FTCA as the legal basis of his causes of action. The Court, however, reads Plaintiff's pro se pleadings liberally. See, e.g., Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). Therefore, the Court construes Plaintiff's constitutional claim as a "Bivens" claim. Thus, the Court approaches this case as: numerous tort claims against the United States, and a Bivens claim against the Department of Labor and Secretary Herman.

B. Background

Plaintiff Christian Mumme was an inspector for the United States Department of Treasury Customs Service. His duties included standing on his feet for long hours, lifting baggage and examining their contents. In 1986, Mumme suffered an employment-related back injury while stepping off of the tailgate of a truck that he was inspecting. Over the next few years his back condition worsened and he ceased working in 1991. Since then, the Government has paid him total disability wage loss compensation and provided medical benefits for his back-related injury pursuant to the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq. In 1993, the Government began paying for the treatment of a work-related emotional disorder that Mumme was suffering. Recently, he has been treated for his emotional condition by Dr. Sally Weiss, at the Government's expense. Presently, Mumme receives approximately $1,000 each week in disability pay under FECA, which is administered by the Department of Labor.

Allegedly tipped off by a disgruntled neighbor of Mumme, a joint team of officials from the Department of Labor Office of Inspector General ("OIG") and the Department of Labor Office Workers' Compensation Program ("OWCP") initiated an investigation of Mumme. In the autumn of 1995, investigators observed his residence and allegedly witnessed him performing a variety of tasks not commensurate with one who has been rendered disabled by a back condition. Specifically, investigators claim that they watched Mumme: hammer nails, dig ditches, put up fence posts, saw wood with a chainsaw and operate a tractor. Moreover, the Government's investigators allegedly watched Mumme carry heavy items, such as several bags of cement and a marine motor.

Also, they allegedly saw Mumme regularly riding a motorcycle. As part of this investigation, the OIG and OWCP investigators conducted video surveillance of persons on Mumme's property during the morning of November 9, 1995.

In March of 1998, the Government required Mumme to undergo a physical examination by Dr. John Bradford, an orthopedic specialist. Prior to Mumme's appointment with the doctor, the OWCP sent Bradford certain materials regarding Mumme's physical condition. Among these materials, the Government transmitted to Bradford the OWCP's report on Mumme, a suggested list of medical findings and a videotape recorded by the Government agents during the morning of November 9, 1995. It is not clear to the Court what this videotape contains, but the Government implies that it shows Mumme performing construction work in his yard. Mumme, however, has submitted affidavits attesting that he was not at home that morning, so the tape can only show other individuals working in Mumme's yard.

Next, the OWCP demanded that Weiss, Mumme's psychiatrist, submit her written evaluations of Mumme to the Government. Mumme instructed Weiss not to submit the medical records pertaining to him to the Government. OWCP responded by temporarily suspending its payment of Weiss' bill and revoking Mumme's travel authorization to see Weiss. Because Mumme refused to permit Weiss from conveying the medical evaluations to OWCP, the OIG attempted to subpoena them. It is not clear on the current record whether the Government was ultimately successful with its request for the documents.

Based on its investigation, the Government allegedly is contemplating prosecuting Mumme for criminal fraud. Because of the Government's actions against him, Mumme

filed a complaint with the Department of Labor Office of the Solicitor. Subsequently, Mumme filed suit with this Court pro se.[2]

C. Discussion

Plaintiff asserts a number of claims sounding in negligence and intentional tort as well as a claim that the Government violated his Fifth Amendment rights. The Court interprets Plaintiff's claims as: invasion of privacy, slander, libel, malicious prosecution, abuse of process, negligently prejudicing Dr. Bradford's medical opinion of Plaintiff, negligently investigating Plaintiff for criminal fraud, negligently pressuring Plaintiff and Dr. Weiss to submit medical evaluations to the Government, and a Bivens claim against the Department of Labor and Secretary Herman for threatening to deprive Plaintiff of his property rights in violation of the Fifth Amendment's Due Process Clause.

The United States argues that all of Plaintiff's tort claims fail for lack of subject matter jurisdiction. The general rule is that the doctrine of sovereign immunity bars tort claims against the United States. The United States, however, has waived sovereign immunity for many tort claims, as specified in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671—2680. The FTCA features several exceptions, whereby the United States reserves its sovereign immunity against tort liability.

The Government argues that all of Plaintiff's claims fall within the exception protecting the Government from liability for discretionary functions. See 28 U.S.C. § 2680(a). The purpose of the discretionary function exception is to permit government

[2] Mumme has filed three suits against the Department of Labor. The Court dismissed Docket no. 00-CV-98-B for lack of subject matter jurisdiction on October 27, 2000. Still pending is Docket no. 00-CV-96-B, by which Mumme claims that the Government has violated the Privacy Act, 5 U.S.C. § 552a. Also,

employees to carry out their jobs without having to constantly second guess themselves in fear of facing lawsuits. See, e.g., United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808-14 (1984). To determine whether a government agent's actions fall within the discretionary function exception, a court must determine (1) whether the conduct itself is discretionary and (2) whether the conduct is justified by legitimate governmental policy. See Shansky v. United States, 164 F.3d 688, 691 (1st Cir. 1999); Irving v. United States, 162 F.3d 154, 163 (1st Cir. 1998).

Regarding the first question, a government agent's job duty is discretionary if it requires her to make independent decisions. See, e.g., Berkovitz v. United States, 486 U.S. 531, 536 (1988). Also, a function is not discretionary if a federal statute, regulation or policy "'specifically prescribes a course of action for an employee to follow.'" Irving, 162 F.3d at 163 (quoting Berkovitz, 486 U.S. at 536). The conduct that serves as the basis for Plaintiff's tort claims is the Department of Labor's alleged investigation of his entitlement to disability compensation and medical benefits. FECA, however, expressly grants the Department of Labor with the authority and the obligation to investigate claims:

> The Secretary of Labor shall determine and make a finding of facts and make an award for or against payment of compensation under this subchapter after—
> …
> (2) completing such investigation as he considers necessary.

5 U.S.C. § 8124(a)(2). The phrase "as he considers necessary" demonstrates that the Secretary of Labor is authorized to rely on her judgment to make decisions regarding how to conduct an investigation. Section 8128 of FECA specifically authorizes the Secretary

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Mumme's wife, Gail Mumme, has filed suit for loss of consortium, Docket no. 00-CV-104-B, based on the same factual circumstances as the instant case.

of Labor to review grants of benefits, and to increase or decrease such benefits. As well, the Secretary of Labor is expected to delegate investigative responsibilities to subordinates within the Department of Labor. Furthermore, the Inspector General Act, 5 U.S.C. App. 3, grants inspectors general broad investigative powers. See 5 U.S.C. App. 3 § 2; see, e.g., Winters Ranch P'ship v. Viadero, 123 F.3d 327, 330 (5th Cir. 1997). It is an immanent right and duty of the Department of Labor and its OIG to investigate those persons receiving disability benefits to ensure that they are not defrauding the public.

Moreover, even indulging all reasonable inferences in Plaintiff's favor, the Government's conduct has not violated any statutes, regulations or policies. Plaintiff does not raise any – and the Court does not perceive any – statute, regulation or policy specifically prohibiting (1) the Government from transmitting information to a doctor for an impending physical exam or (2) videotaping people in their yards. Furthermore, the Department of Labor was authorized by statute to require Plaintiff to undergo a physical examination by Dr. Bradford. See 5 U.S.C. § 8123. FECA authorizes the Department of Labor to issue subpoenas to acquire evidence, such as Plaintiff's medical records. See 5 U.S.C. § 8126. Moreover, these statutes necessarily demand that Government agents use judgment to make decisions. Therefore, the Court finds that these actions were discretionary.

Turning to the second facet of the discretionary function analysis, the Court must determine whether "some plausible policy justification could have undergirded the challenged conduct." Shansky, 164 F.3d at 692. The courts have not specified what constitutes legitimate policy bases for discretionary acts, instead leaving it to a "case-by-case development…." See id. at 693. Although "the law presumes that the exercise of

official discretion implicates policy judgments," the connection between the governmental conduct and the policy justification cannot be grossly attenuated. See id. at 692-93. In the present case, the Government's conduct was firmly rooted in sound public policy. See Shansky, 164 F.3d at 692; Irving, 162 F.3d at 163. The United States' investigation against Plaintiff "served two separate public policies: regulating FECA claims and preventing criminal fraud against the Government." See Ward v. United States, 738 F. Supp. 129, 133 (D. Del. 1990) (holding that it was a discretionary function of the United States Postal Service to investigate plaintiff who was suspected of dishonestly receiving FECA disability benefits for a debilitating back injury). Therefore, the Court finds that the United States' investigation was justified by legitimate public policy.

Indeed, many courts have held that governmental investigations conducted in the furtherance of public policy considerations fall within the discretionary function exception. See, e.g., Sabow v. United States, 93 F.3d 1445, 1454 (9th Cir. 1996) (holding that investigation of the death of a Marine pilot was protected by the discretionary function exception, even though government agents acted with "poor judgment and a general disregard for sound investigative procedure"); Pooler v. United States, 787 F.2d 868, 871 (3rd Cir. 1986) ("Congress did not intend to provide for judicial review of the quality of investigative efforts."); see also K.W. Thompson Tool Co. v. United States, 836 F.2d 721, 728-29 (1st Cir. 1988) (federal agency protected from liability by discretionary function exception for prosecuting defendants who allegedly violated federal law and regulations). Because the United States' actions were discretionary and justified by legitimate policy considerations, the Court finds that all of Plaintiff's tort

claims against the United States fall within the discretionary function exception of the FTCA and are barred by sovereign immunity.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Because the Court lacks subject matter jurisdiction over Plaintiff's tort claims against the United States, the only remaining matter is Plaintiff's allegation that the Department of Labor and former Secretary Herman have deprived him of his Fifth Amendment rights.

A. Standard of Review

Because both parties have submitted materials outside of the pleadings, and because Plaintiff has had an opportunity to respond to Defendants' relevant factual allegations, the Court opts to treat Defendants' Motion under Rule 12(b)(6) as a summary judgment motion. See Fed. R. Civ. P. 12(b); Whiting v. Maiolini, 921 F.2d 5, 6 (1st Cir. 1990) (district courts have discretion to convert 12(b)(6) motions to Rule 56 motions without prior notice to parties if nonmovant has had opportunity to respond to movant's affidavits and factual allegations).

The Court grants a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts "in the light most amicable to the party contesting summary judgment, indulging all reasonable inferences in that party's favor." Pagano v. Frank, 983 F.2d 343, 347 (1st

Cir. 1993). When considering Defendants' arguments that Plaintiff has failed to state a claim upon which relief can be based, the Court views the factual record – outlined above – pursuant to this summary judgment standard.

B. Discussion

Plaintiff argues that by investigating him and communicating with Dr. Bradford, Defendants were "threatening the los[s] of plaintiff's property entitlements, and violating plaintiff's 5th Amendment rights; injuring the plaintiff as a result." (Pl. Compl. ¶ 2 (Docket #1).) The Court assumes that Plaintiff means by this that the Government has threatened to cancel his disability compensation payments and medical benefits, which comprise property to which he is entitled. The Court construes this allegation as a claim for violation of his due process rights against the taking of property, potentially actionable under the Bivens doctrine. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (establishing cause of action enabling plaintiff to seek judicial relief against federal officers who allegedly violated his Fourth Amendment rights).

First, a plaintiff cannot maintain a Bivens action against a federal agency. See, e.g., Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000). Therefore, Plaintiff has no cause of action against the Department of Labor. Second, the Bivens doctrine permits plaintiffs to seek legal redress against federal employees in their individual capacities, but not federal employees acting in their official capacities. See id. "Even then, the plaintiff must state a claim for direct rather than vicarious liability; respondeat superior is not a viable theory of *Bivens* liability." Id. In the present case, Plaintiff has not brought suit against the

specific agents who allegedly violated his rights. Instead, he has filed suit against the former Secretary of Labor. Even reading the record in a light most favorable to Plaintiff, Secretary Herman never took a direct hand in the Government's efforts against Plaintiff. Therefore, Plaintiff has no Bivens claim against Herman. See id. at 28-29.

Moreover, even if Plaintiff had named the specific agents of the OIG and OWCP who allegedly impinged on his due process rights, he would have no cause of action against them. Plaintiff is correct that benefits paid to one pursuant to the FECA can imbue the recipient with property rights. See, e.g., Stuto v. Fleishman, 164 F.3d 820, 825 (2nd Cir. 1999). The factual record before the Court indicates that Plaintiff continues to receive disability compensation and medical coverage, but that Plaintiff is worried that based on its investigation, the Department of Labor may suspend those benefits. Regarding an individual's property interest in her FECA benefits, however, the mere threat that the Department of Labor may withdraw benefits does not amount to a justiciable claim. See id. According to Stuto, because a FECA recipient can appeal a reduction in benefits with the Department of Labor subsequent to any reduction, the recipient has not been deprived of due process, and therefore he has no Bivens claim against any government employees. See id. (citing Hudson v. Palmer, 468 U.S. 517 (1984)); see also, e.g., 5 U.S.C. § 8124(b)(1) (authorizing FECA recipients to file an appeal with the Department of Labor within 30 days of a change in benefits). Because the Government has not altered his FECA benefits, and because Plaintiff would have an administrative route to appeal any such alteration, he has not been deprived of his due process rights. Therefore, the Court finds that Plaintiff cannot state a claim that his Fifth Amendment rights have been violated.

III. PLAINTIFF'S MOTION TO VACATE

As a final note, Plaintiff objects to and moves to vacate the Court's order extending the time limit for Defendants to file a reply brief. First, it was only fair to extend Defendants' time to file a reply brief because the Court previously had extended the deadline for Plaintiff to file a response brief. (See Order Granting Pl. Mot. to Extend Time, Nov. 29, 2000 (Docket #17).) Second, Defendant needed a time extension because Plaintiff filed a thirty-page response brief, even though Local Rule 7(e) establishes a limit of twenty pages without prior leave of Court. Third, because the Court herein has decided the issue of Defendants' Motion to Dismiss, the Motion to Vacate is moot.

IV. CONCLUSION

For the reasons discussed above, the Court hereby GRANTS Defendants' Motion to Dismiss. Pursuant to this ruling, the Court dismisses with prejudice Plaintiff's tort claims and grants summary judgment for Defendant on Plaintiff's civil rights claim. The Court also DENIES Plaintiff's Motion to Vacate the endorsement order extending Defendants' time to file a reply brief.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 29th day of January, 2001.

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