

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

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NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ERVIN AND ASSOCIATES, INC.,)
et al.,)
)
 Plaintiffs,)
)
 v.)
)
 HELEN DUNLAP, et al.,)
)
 Defendants.)

C.A. No. 96-1253 (WBB)

REPLY MEMORANDUM IN SUPPORT OF HELEN DUNLAP'S MOTION TO DISMISS
COUNTS IV AND V OF PLAINTIFFS' SECOND AMENDED COMPLAINT

The opposition brief of Ervin and Associates, Inc. and EAA Capital Company, L.L.C. (collectively, Ervin) exposes the Second Amended Complaint (Complaint) for what it is: spirited but hollow rhetoric, entirely lacking in the specific factual allegations that are necessary for it to survive Ms. Dunlap's motion to dismiss. Viewed from any angle, the Complaint fails to state a claim for which relief may be granted against Ms. Dunlap -- for three independent reasons.^{1/}

^{1/} Curiously, Ervin chastises Ms. Dunlap for failing to address Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996) (en banc). In Crawford-El, while the D.C. Circuit abandoned its requirement that a plaintiff allege "direct" evidence of unconstitutional motive to survive a motion to dismiss where motive is an element of the constitutional tort at issue, it did not abandon or otherwise undermine its earlier holding that

unsupported factual allegations which fail to specify in detail the factual basis necessary to enable [the defendants] to intelligently prepare [their] defense, will not suffice to deprive [the plaintiff] of [its] constitutional rights.

Martin v. Malhoyt, 830 F.2d 237, 258, reh'g denied, 833 F.2d 1049 (D.C. Cir. 1987). In Crawford-El, the D.C. Circuit then

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First, the Complaint fails to allege facts^{2/} that, if true, would allow a reasonable fact-finder to conclude or infer that Ms. Dunlap violated Ervin's constitutional rights either by retaliating against it for its exercise of protected speech or by depriving it of property or liberty without due process. Second, Ms. Dunlap is protected by the doctrine of qualified immunity because Ervin fails to show that any right allegedly violated by Ms. Dunlap was clearly established at the time that she allegedly acted. Finally, Ervin neglects to explain why the current comprehensive statutory scheme inadequately remedies its alleged injuries.^{3/}

^{1/} (...continued)

articulated new standards for resolving the qualified immunity issue at summary judgment and trial.

^{2/} Indeed, Ervin overlooks that a motion to dismiss addresses only the sufficiency of the pleadings, for it resorts to recitation of speculation in the media -- allegations that are not only unproven but also not asserted in the Complaint -- in defending against this motion to dismiss. See, e.g., Plaintiffs' Brief at 3 (Ms. Dunlap "has also informed this Court that the Department of Justice has refused to represent her presumably because, if news reports are accurate -- a criminal investigation is underway. Under these circumstances, Dunlap is not entitled to qualified immunity.") (emphasis added).

^{3/} As a preliminary matter, Ervin erroneously implies throughout his brief that the Court is obliged to assume the truth of all allegations in the Complaint. As a matter of established law, the Court is required to assume the truth of all factual allegations, not the truth of Ervin's conclusory allegations, characterizations and labels. See, e.g., Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[T]he court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations.").

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I. Count IV Fails To State A Claim Against Dunlap For Violation of Ervin's First Amendment Right to Freedom of Speech.

Ervin admits, as it must, that under Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S. Ct. 2342 (1996), a plaintiff alleging retaliation in violation of the First Amendment "must show that the termination of his contract was motivated by his speech on a matter of public concern, an initial showing that requires him to prove more than the mere fact that he criticized [the government officials] before they terminated him." Id. at 2352 (emphasis added). Ervin, however, inappropriately attempts to dilute this causation requirement -- the need to show that the allegedly retaliatory action was motivated by the government contractor's speech -- and to recast it as mandating just a general "correlation" between the government contractor's speech and the alleged retaliatory action.^{4/}

For instance, Ervin urges the Court to reach the "unmistakable" conclusion that Ms. Dunlap retaliated against it from the single fact that Ervin has not won any HUD contracts during the past two years. Plaintiffs' Brief at 5. Ervin ignores the fact that the referenced HUD procurements were competitive and thus, that not all qualified bidders would

^{4/} See also Plaintiffs' Brief at 15 ("These facts correlate directly to an intent to stop Ervin from making any money from HUD, by any means available.") (emphasis added); Plaintiffs' Brief at 11 ("A more direct and immediate correlation between Ervin's speech and Dunlap's hostile and vindictive retaliation is hardly imaginable.") (emphasis added)

necessarily win a contract. The instant case, then, is fundamentally different from Nestor Colon Medina & Sucesores, Inc., 964 F.2d 32, 41 (1st Cir. 1992), in which a qualified applicant was denied a permit despite the fact that permits were routinely granted to other applicants under similar circumstances.

Ervin's dependence on mere "correlation" at best is not surprising given that it is unable to identify any alleged direct evidence of retaliation. Ervin relies exclusively on alleged circumstantial evidence from which, it argues, an inference of retaliation should be drawn. The law, however, permits only reasonable inferences. See, e.g., Gagliardi v. Village of Pawling, 18 F.3d 188, 195 (2nd Cir. 1994) (holding plaintiff must "allege facts from which a retaliatory intent on the part of the defendant[] reasonably may be inferred") (emphasis added). In this case, it is unreasonable to infer from the Complaint's allegations that Ms. Dunlap acted in retaliation for Ervin's alleged criticism of HUD and her.

Ervin identifies only one statement by Ms. Dunlap, her alleged remark that "Ervin makes too much money," see Complaint at ¶ 110, as evidence of her alleged retaliatory motive. Taken at face value, this remark is nothing more than a personal observation about Ervin's income. It does not recommend any action, let alone mention retaliation against Ervin, for any reason. Even if the statement could be read to suggest retaliation against Ervin -- which Ms. Dunlap maintains is an

unreasonable and impermissible stretch -- the alleged suggestion of retaliation, by its own terms, would be motivated by Ervin's income, not by Ervin's alleged criticism of HUD or Ms. Dunlap.

With that single exception, Ervin's Complaint depends entirely on drawing inferences from the casual predictions or expressions of personal opinion by people other than Ms. Dunlap. Ervin claims that Marc Harris, a HUD employee, offered his impression that Ervin "has been blackballed" from winning new contracts at HUD, Complaint at ¶ 112, and that an employee of another HUD contractor predicted that "Ervin was a one-client operation that would be out of business soon." Complaint at ¶ 113. Ervin further alleges that Lar Gnessin informed it of his suspicion that HUD was refusing to renew Ervin's Asset Management Contract because of "all of the issues going on with John [Ervin] and HUD," Complaint at ¶ 149, and that Marc Harris recommended to Ervin that "if you want to stick around HUD, go with the flow and program. If you go off path, the powers that be will kill you. Ervin is right in the sights of the inner sanctum. You can't win." Complaint at ¶ 113.

Even viewed most favorably to Ervin, each of these remarks is nothing more than the expression of the speaker's subjective belief, not a statement of fact. None of these remarks refers to retaliation against Ervin for its alleged criticism of HUD. And none of these remarks refers to Ms. Dunlap. Accordingly, none of these remarks can reasonably

permit any inference that Ms. Dunlap retaliated against Ervin because of its alleged criticism.

Without more, Ervin's Complaint rests on only "chronology" -- on the mere inference that because the HUD decisions and actions at issue were preceded temporally by Ervin's alleged criticism, they were therefore somehow motivated or prompted by that criticism.^{5/} Mere "chronology," however, is insufficient under Umbehr. Stripped of the unreasonable inferences for which Ervin pleads, the factual allegations in Count IV fail to state a claim for First Amendment retaliation. Count IV must be dismissed.^{6/}

II. Ms. Dunlap Is Entitled To Qualified Immunity On Ervin's First Amendment Retaliation Claim.

Ervin disregards the dispositive fact that the Supreme Court did not recognize the constitutional tort of First Amendment retaliation until it issued its decision in Umbehr in June 1996, several weeks after Ervin filed its first complaint against Ms. Dunlap and the other defendants.^{7/} Ervin thereby

^{5/} Ervin admits its' reliance on simple "chronology." See Plaintiffs' Brief at 5 ("[W]hen Ervin's detailed chronology is viewed in its entirety, the nexus between Ervin's speech and Dunlap's retaliation is unmistakable.").

^{6/} See Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988), cert. denied, 488 U.S. 1029 (1989) ("Assuming all factual allegations are true, a court must dismiss a complaint if the plaintiff fails to establish a right to relief based on the facts alleged in the complaint.").

^{7/} Prior to the Court's decision in Umbehr, there was a "conflict between the Courts of Appeals regarding whether and to (continued...)

neglects to show why Ms. Dunlap is not protected by the doctrine of qualified immunity. See Zweibon v. Mitchell, 720 F.2d 162, 168 (D.C. Cir.) ("[O]nce the trial judge determines that the law was not clearly established at the time the contested conduct occurred, the inquiry ceases."), cert. denied, 469 U.S. 880 (1983).^{2/}

Ervin contends that Ms. Dunlap is not entitled to qualified immunity because the Supreme Court, in Butz v. Economou, 438 U.S. 478 (1978), held that "qualified immunity 'exists only to the extent that the official acted reasonably and in good faith.'" Plaintiffs' Brief at 17 (quoting Butz). Ervin -- brazenly -- ignores more recent, and contradictory, Supreme Court precedent on the issue, namely, Harlow v. Fitzgerald, 457 U.S. 800 (1982). As the D.C. Circuit explained in Crawford-El:

In Harlow v. Fitzgerald the Court reformulated its test for officials' qualified immunity in constitutional tort

^{2/}(...continued)

what extent independent contractors are protected by the First Amendment." Umbehr, 116 S. Ct. at 2346.

^{3/} Ervin strains to identify a post-Umbehr incident of First Amendment retaliation:

The refusal to renew Ervin's Asset Management Agreement occurred on September 20, 1996. The refusal to issue a task order for work under Ervin's AFS Contract occurred in August of 1996. Thus, even if the law was not clearly established, these acts of retaliation occurred post-Umbehr.

Plaintiffs' Brief at 19. Ervin does not identify any conduct or statement by Ms. Dunlap after Umbehr was decided. Ervin's First Amendment retaliation claim against Ms. Dunlap cannot survive.

actions. For acts to which qualified immunity may apply, it held that the plaintiff can prevail only by showing not just that there was a violation, but that defendant's acts violated "clearly established statutory or constitutional rights of which a reasonable person would have known." . . . It thus excluded liability where there was a violation (but not of a right so clearly established that a reasonable person would have known of it) even when the official acted "with the malicious intention to cause a deprivation of constitutional rights or other injury." . . . Accordingly the Court held that qualified immunity could be penetrated only on a showing of objective unreasonableness -- the now familiar requirement of "clearly established" rights.

93 F.3d at 816 (quoting Harlow) (some emphasis in original, some emphasis added). As emphasized by Crawford-El, whether the government official acted in good or bad faith is irrelevant. Thus, the only question is whether Ms. Dunlap allegedly violated a clearly established right of which a reasonable person would have known. This question must be answered in the negative.

Ervin never identifies a right so particularized that "in the light of pre-existing law the unlawfulness" of Ms. Dunlap's conduct was "apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added); see also Hunter v. District of Columbia, 943 F.2d 69, 76 (D.C. Cir. 1991) ("When a plaintiff alleges a violation of his constitutional right by a government official whose actions may be qualifiedly immune from liability, the complaint must establish both (1) that the plaintiff was deprived of a constitutional right, and (2) that the right in question was 'clearly established' at the time the

defendant acted.").^{2/} Count IV cannot withstand Ms. Dunlap's qualified immunity.^{10/}

III. Count V Fails To State A Claim Against Dunlap For Violation of Ervin's "Fifth Amendment Right To Due Process."

Ervin alleges that Ms. Dunlap violated its "Fifth Amendment due process rights" and its "Fifth Amendment liberty interest." Plaintiffs' Brief at 22, 26. This false dichotomy aside,^{11/} and assuming it could identify any property or

^{2/} Ervin apparently quarrels with the fact that D.C. Circuit precedent must be applied in this case:

Dunlap's assertion that she was free to retaliate in this Circuit until the Supreme Court settled the question posed in Umbehr is fatuous. Dunlap asserts that the qualified immunity of a federal official, whose acts take effect throughout the country, is determined either by where she is sitting when she performs those acts or by where she is sued. In short, Dunlap indicates that by effective forum-shopping, a constitutional tortfeasor can evade prosecution.

Plaintiffs' Brief at 18 (emphasis in original). It is disingenuous for Ervin to accuse Ms. Dunlap, a defendant, of "forum-shopping." Ervin sued Ms. Dunlap. Ms. Dunlap insists only that the standards set forth in binding circuit precedent be applied to Ervin's Complaint.

^{10/} According to Ervin, "For over 30 years, it has been impermissible, as a general principle, for a federal official to attack or act arbitrarily against a bidder for a government contract in the District of Columbia." Plaintiffs' Brief at 20 (emphasis deleted) (citing Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964)). Assuming this proposition is true, it is nevertheless irrelevant to the issue at hand, i.e., whether a First Amendment retaliation claim was clearly established before Ms. Dunlap allegedly acted. As illustrated supra, it was not.

^{11/} Contrary to Ervin's suggestion, the Due Process Clause of the Fifth Amendment does not establish separate "due process" (continued...)

liberty interest that is protected by the Due Process Clause, Ervin never identifies the process to which it was legally entitled and which the defendants, including Ms. Dunlap, allegedly denied it. At its core, due process requires notice and opportunity for a hearing. See Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Ervin makes no claim that it was denied either.

Rather, Ervin alleges that its "right to fairness and expectation of impartiality in the procurement process" was violated. Plaintiffs' Brief at 23. Not surprisingly, Ervin never locates this amorphous alleged right within the property or liberty interests that are protected by the Due Process Clause, nor does it cite any authority for the existence of the right.^{12/} Fairness in the procurement process is secured by

^{11/} (...continued)
rights" on the one hand and a "liberty interest" on the other. Rather, it prohibits the deprivation, by governmental action, of property or liberty without due process of law. U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

^{12/} It goes without saying that the Due Process Clause is not triggered, as Ervin seems to suggest, merely because the alleged "tampering, improper interference, and inappropriate influence by Dunlap" implicate "the processes by which HUD awarded or
(continued...)

the vast array of statutory and regulatory rules that govern government contracting in general, and the contracting and procurement process at HUD specifically. But Ervin does not assert a violation of any of these rules. Ervin thus fails to identify the violation of any right. Consequently, Count V fails to state a claim for which relief may be granted, and Ms. Dunlap is entitled to qualified immunity.

As with Count IV, Ervin relies on outdated Supreme Court precedent to support its claim that Ms. Dunlap did not act in good faith and therefore is not shielded from liability on Count V by the qualified immunity doctrine. First, Ervin references "Dunlap's rampant and persuasive interference in the numerous contracts and procurements." Plaintiffs' Brief at 29. Then, it asserts that "by any objective measure, a reasonable person in Dunlap's position would never have" so interfered and "if she did, she clearly would have known that she was not acting in good faith." Plaintiffs' Brief at 30. As set forth earlier, Harlow v. Fitzgerald, not Butz v. Economou, articulates the relevant legal standard. Because Ervin has not identified any clearly established right that Ms. Dunlap allegedly violated, he has not met Harlow's standard for overcoming a government official's qualified immunity. And because Count V cannot withstand Dunlap's qualified immunity, it must be dismissed.

¹²/ (...continued)
procured" contracts. See Plaintiffs' Brief at 24 (emphasis deleted).

IV. Special Factors Militate Against Bivens Remedy.

It is not disputed that a Bivens-type remedy is not available where "special factors counsel[] hesitation in the absence of affirmative action by Congress." Bivens v. Six Unknown Agents, 403 U.S. 388, 396 (1971). Ervin maintains that no special factors prevent this Court from imposing liability under Bivens on Dunlap because "[n]o statutory scheme exists under the Tucker Act, the Administrative Procedure Act, or the Contract Disputes Act by which Ervin has a remedy against Dunlap for such actions taken in her individual capacity." Plaintiffs' Brief at 3 (emphasis added). Ervin misses the point.

What is pertinent to the special factors inquiry is whether Congress has created a scheme that affords relief to an injured plaintiff and makes him whole, not whether Congress has created a scheme by which a plaintiff may seek a remedy from a particular government official.^{13/} In other words, the focus is on the plaintiff's alleged injury, not the conduct that allegedly caused the injury. In this case, regardless of whether Ervin has a statutory remedy against Dunlap herself,

^{13/} In fact, Ervin later concedes this very point: "Dunlap's cases merely stand for the general proposition that a plaintiff's Bivens claim may be dismissed where Congress has established a comprehensive statutory or regulatory scheme for the injuries alleged. Ervin does not take issue with this statement." Plaintiffs' Brief at 33 (emphasis added). See also Bush v. Lucas, 462 U.S. 367, 389-90 (1983) (holding existence of "comprehensive procedural and substantive provisions giving meaningful remedies against the United States" to be a "special factor" counselling hesitation against creating a Bivens remedy).

there are several statutes that provide relief for Ervin's alleged injuries if Ervin proves its allegations.

Ervin's contentions that this case is "not about contractual relief" and "is not a claim for simple contract damages," Plaintiffs' Brief at 31, 34, are specious. As noted in Dunlap's main brief, Ervin alleges that the defendants illegally prevented it from winning new contracts, barred it from renewing or extending existing contracts and refused to pay it for contract work it had already performed. See Complaint at ¶¶ 226-230, 243-44. Moreover, Ervin calculates its alleged damages exclusively in terms of the value of contracts which it claims it was improperly denied. See Complaint at ¶¶ 237, 250.^{14/} These very injuries are addressed in detail by the Tucker Act, the Administrative Procedure Act and the Contract Disputes Act. Accordingly, "there [is] neither need nor reason for a Bivens remedy." Janicki Logging Co. v. Mateer, 42 F.3d 561, 565 (9th Cir. 1994); see also Sky Ad, Inc. v. McClure, 951 F.2d 1146, 1148 (9th Cir. 1991) (holding Bivens action was

^{14/} In fact, the Second Amended Complaint states:

As a result of Dunlap's acts, Plaintiff has suffered actual and compensatory money damages equal to at least the value of the option periods remaining on Ervin's Asset Management Contract and AFS Contract; the loss by Ervin of the value of the Financial Advisory Services Contract, Due Diligence Contract, SWAT Contract and the Single Family Asset Management Contract, the illegal withholding of \$2.5 million due and owing to Ervin for work performed and other amounts equal to at least \$20 million."

Complaint at ¶¶ 237, 250.

precluded by Administrative Procedure Act), cert. denied, 506 U.S. 816 (1992); Gleason v. Malcom, 718 F.2d 1044, 1048 (11th Cir. 1983) (holding special factors counsel against a Bivens remedy because plaintiff could seek equitable relief under Administrative Procedure Act).

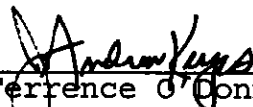
CONCLUSION

Counts IV and V fail on three independent grounds. First, each count fails to state a cognizable constitutional tort. Second, Ms. Dunlap is entitled to qualified immunity on each count. Finally, Ervin may seek only the relief authorized by the Administrative Procedure Act and the Contract Disputes Act. Accordingly, Defendant Helen Dunlap in her individual capacity respectfully requests this Court to dismiss Counts IV and V of Plaintiff's Second Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Helen Dunlap's Motion to Dismiss Counts IV and V of Plaintiff's Second Amended Complaint was caused to be served by first-class mail, postage prepaid, this 5th day of December, on:

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