UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LAURENCE SCHWEITZER, M.D.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 3:99CV02148
	:	
DEPARTMENT OF VETERANS AFFAIRS, MICHAEL SERNIAK, FRED WRIGHT, THOMAS KOSTEN, JEFFRY LUSTMAN, and PAUL McCOOL,	:	
	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

The plaintiff, a former employee of the Department of Veterans Affairs (the "VA"), contends that the defendants ruined his reputation as a psychiatrist by the manner in which they ended his employment at the VA and by their refusal to clear his name since then. He brings this action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)-(c), 2671-2680, and the doctrine of Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The plaintiff contends that the defendants' actions constituted defamation, tortious interference and constitutional violations, and he also attempts to assert pendent state law claims under Connecticut law.

For the reasons set forth below, the defendants' motion to dismiss is being granted as to all claims.

I. Standard

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See also Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Mytych v. May Dept. Store Co., 34 F. Supp. 2d 130, 131 (D. Conn. 1999), quoting Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232).

II. Factual Background

With the foregoing standard in mind, the court accepts as true the plaintiff's factual allegations set forth in the complaint.

The plaintiff, Laurence Schweitzer, M.D., was employed by defendant VA at all relevant times. Defendants Michael Serniak, Fred Wright, Thomas Kosten and Jeffry Lustman were administrators and physicians employed by the VA. Defendant Paul McCool was an administrator employed by the VA. Each of these individuals was at all relevant times acting within the scope of and during the course of his employment.

Prior to April 1997, the plaintiff had been employed by the VA for many years as a psychiatrist and had an exemplary record. In April 1997, the plaintiff was working at a VA facility in Newington, Connecticut. Defendants Lustman and Kosten transferred the plaintiff to a VA facility in Bridgeport, Connecticut. The reason given for the transfer was that the plaintiff's reassignment would lead to an increase in the use of psychiatric services, which would in turn increase revenues for the VA. The plaintiff had misgivings about going forward with this new assignment without a showing that there was a medical need for such increased services. He communicated his misgivings to Lustman and Kosten. The plaintiff told the defendants that their goals were unrealistic and asked Lustman and Kosten to provide him further guidance in writing.

In October 1997, Lustman and Kosten told the plaintiff for the first time that there were irregularities in the manner in which he prescribed medications. In April 1998, unbeknownst to the plaintiff, the defendants reviewed his files and concluded

that he was placing patients in imminent danger because of the manner in which he prescribed certain medications. However, the defendants did not make a formal finding. On June 18, 1998, Wright and Serniak summoned the plaintiff to a meeting and informed him that McCool was rescinding his privilege to prescribe medications and that as a result, he could not return to work. They showed the plaintiff a letter written by McCool. The plaintiff was given a brief period within which to respond to the allegations against him. Before the plaintiff responded to the allegations, the defendants wrote to inform the plaintiff's patients that they were being reassigned to other psychiatrists and that the plaintiff would not be returning to treat them.

The plaintiff retained, at his own expense, medical experts who concluded that there was nothing wrong with the manner in which he had prescribed medications. However, the defendants refused to consider the findings of the plaintiff's experts and refused to permit the plaintiff to resume working. The plaintiff never returned to work after the June 18, 1998 meeting, and his contract with the VA expired on November 18, 1998. The defendants reported to the plaintiff's former colleagues that he had been suspended for suspected professional malpractice. Since November 1998, the defendants have provided negative information concerning the plaintiff to three potential employers. In August 1999, the VA made a formal determination in the plaintiff's case, upholding the original charges against the

plaintiff.

The plaintiff claims that the named defendants rescinded his privilege to prescribe medication and caused him to be unable to return to work in retaliation for his questioning the policy underlying his transfer to the Bridgeport facility. The plaintiff claims further that the named defendants gave negative information about him to potential employers in retaliation for his questioning his reassignment by the VA.

III. Discussion

It is unclear which causes of action are alleged against which defendants. The court assumes, for purposes of its analysis, that each cause of action has been pled against each defendant.

A. FTCA: the Named Defendants

"The FTCA is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private employer for certain torts of 'employees' acting within the scope of their employment." B & A Marine Co. v. Am. Foreign Shipping Co., 23 F.3d 709, 712 (2d Cir. 1994). However, the FTCA does not create personal liability for federal government employees on claims arising from tortious acts committed in the course of their employment.

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or

> resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is *exclusive of any other civil action or proceeding* for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.

28 U.S.C. § 2679(b)(1) (1998)(emphasis added); see also Rivera v. United States, 928 F.2d 592, 608-09 (2d Cir. 1991)(section 2679(b)(1) "provides government employees with immunity against claims of common-law tort"). The plaintiff alleges that the individual named defendants were at all times acting within the scope of their employment. Since the individual named defendants are therefore immune from suit on the plaintiff's tort claims, the plaintiff has failed to state a claim against them.

As to the VA, the exclusive remedy under the FTCA is against the United States of America. Persons may not bring tort claims against a federal agency, such as the VA.

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and *the remedies provided by this title in such cases shall be exclusive.*

28 U.S.C. § 2679(a) (1998)(emphasis added); see also Mignogna v. Sair Aviation, Inc., 937 F.2d 37, 40 (2d Cir. 1991) ("an action [under the FTCA] must be brought against the United States rather than an agency thereof"). Accordingly, the plaintiff has also

failed to state a claim against the VA.

B. FTCA: the United States of America

Although he has yet to do so, the plaintiff indicated in his opposition to the instant motion that he would amend his complaint to assert his FTCA claims against the United States. According, the court will analyze the plaintiff's FTCA claims as though they are asserted against the United States.

1. Defamation and Tortious Interference

The plaintiff's claims for defamation and tortious interference are specifically excluded by the statute. The FTCA provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to ....(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 2680 (1998). Thus, the court does not have jurisdiction over the plaintiff's FTCA claim for defamation. See Gardner v. United States, 446 F.2d 1195, 1197 (2d Cir. 1971); Herbst v. INS, et al., No. 98CIV.5533(LMM), 98CIV.7424(LMM), 1999 WL 1052461, at *4 (S.D.N.Y. Nov. 19, 1999). Likewise, "as ... nearly every court that has addressed th[e] issue has held, actions for tortious interference with business (i.e., prospective) advantage are barred as claims arising out of interference with contract rights." Chen v. United States, 854

F.2d 622, 628 n. 2 (2d Cir. 1988)(citation and quotation marks omitted).[1]

2. Constitutional Violations

A claim under the FTCA must be "actionable under § 1346(b)." FDIC v. Meyer, 510 U.S. 471, 477 (1994). However, a "constitutional tort claim is not 'cognizable' under § 1346(b) because it is not actionable under § 1346(b) –- that is, § 1346(b) does not provide a cause of action for such a claim." Id.

The FTCA waives sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1998). The "law of the place" means the law of the state where the tortious act or omission occurred. Meyer, 510 U.S. at 477. "By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." Id. at 478. Therefore, such a claim cannot be brought under the FTCA.

C. "Bivens" Action

The plaintiff also seeks to bring a claim under the

[1] The court notes that because the plaintiff must bring any tort claims under the FTCA and against the United States, he may not assert pendent state law claims.

doctrine of Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

> In [Bivens], [the Supreme] Court held that the victim of a Fourth Amendment violation by federal officers acting under color of their authority may bring suit for money damages against the officers in federal court. The Court noted that Congress had not specifically provided for such a remedy and that the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. Nevertheless, finding no special factors counseling hesitation in the absence of affirmative action by Congress, and no explicit congressional declaration that money damages may not be awarded, the majority relied on the rule that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Schweiker v. Chilicky, 487 U.S. 412, 421 (1988)(citations and quotation marks omitted). The plaintiff contends that the defendants disclosed his suspension in violation of his constitutional rights.[2] The complaint alleges that the

[2]The court notes that the plaintiff appears to have abandoned any contention that he has a Bivens claim based on conduct of the defendants other than "impugn[ing] the plaintiff's reputation and substantially curtail[ing] his employment options at other medical centers after the plaintiff was no longer a federal employee." Pl.'s Opp'n at 5. He appears to concede that as to any other actions by the defendants, a Bivens claim is barred because of the existence of administrative remedies available through the Veteran's Health Administration and set forth in Title 38 of the United States Code. See id. In any event, any claims based on actions by the defendants other than those addressed here cannot be brought under Bivens because of the existence of the alternative remedy created by Congress, even if

defendants defamed him by "reporting to his former colleagues that he was suspended for acts of suspected professional malpractice" and that "[s]ince November of 1998," the defendants defamed him to three potential employers and thus rendered him unable to obtain employment. Compl. at ¶ 21-22. The plaintiff attempts to characterize his allegations of defamation as a constitutional claim. However, defamation is a tort that is actionable under most state laws, but it is not a constitutional claim. See Siegert v. Gilley, 500 U.S. 226, 233 (1991). There is no constitutional protection for one's reputation. Thus, the plaintiff may not claim a due process violation based on a claim of defamation. "So long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action." Id. at 234. The plaintiff's allegations pertain only to harm that flowed from defamation.[3] Thus, he does not state a claim under Bivens.

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that alternate remedy, i.e. the administrative process, is not a complete remedy. See Schweiker, 487 U.S. at 425-26.

[3] The analysis would be similar if the plaintiff's claim was that tortious interference was a constitutional right. There is no authority for the proposition that tortious interference rises to the level of a constitutional violation.

IV. Conclusion

For the reasons stated above, the Defendants' Motion to Dismiss (doc. #17) is hereby GRANTED, and this case is dismissed.

It is so ordered.

Dated at Hartford, Connecticut this 21st day of February, 2001.

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Alvin W. Thompson
United States District Judge