UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Marilynn Dunn,	:	
Plaintiff,	:	
	:	
v.	:	
	:	**Case No. 3:03cv1928 (JBA)**
United States Federal Bureau	:	
of Prisons, George Camacho,	:	
David Gold, Eric Pipert,	:	
Marvin Bundy, Kuma J. Deboo,	:	
Defendants.	:	

Ruling on Defendants' Motion to Dismiss,
Or In The Alternative, For Summary Judgment [Doc. # 17]

Plaintiff Marilynn Dunn, a former inmate at the Federal Correctional Institution in Danbury, Connecticut ("FCI Danbury"), filed her pro se[1] complaint asserting a claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2670 et seq., for injuries suffered while she was imprisoned and Bivens claims against the individual defendants for deliberate indifference to her medical needs in violation of the Eighth Amendment and for violation of her First Amendment right of access to the courts. See Complaint [Doc. # 2].

Defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6), or summary judgment (see [Doc. # 17]), arguing that plaintiff's FTCA claim is jurisdictionally barred by the Inmate Accident Compensation Act ("IACA"), 18 U.S.C. § 4126,

[1] Dunn has since obtained counsel, who filed her opposition to defendants' Motion.

28 C.F.R. § 301.101 et seq., that even if plaintiff's FTCA claim is not jurisdictionally barred, it must be dismissed for failure to comply with the FTCA because none of the defendants are proper parties and because plaintiff seeks recovery exceeding the damages sought in her administrative tort claim filed with the Federal Bureau of Prisons, and that plaintiff's Bivens claims must be dismissed because plaintiff is suing the individual defendants in their official, rather than individual, capacities. See Def. Mem. [Doc. # 18]; Def. Reply Mem. [Doc. # 26]. For the reasons that follow, defendants' Motion is granted.

I. FACTUAL BACKGROUND

In May 1999, plaintiff was sentenced in the United States District Court for the Southern District of New York to 87 months imprisonment with a five year period of supervised release for armed bank robbery. Plaintiff was thereafter incarcerated at FCI Danbury from June 28, 2000 through March 7, 2003, and again from May 29, 2003 through September 15, 2004, when she was released to home confinement. She was released from home confinement for good behavior on November 10, 2004.

Plaintiff alleges that on March 26, 2002, she was assigned to work on Cable Floor 2 of the United Corrections Federation Industries, Inc. ("UNICOR") factory. She asserts that as she was "exiting her assigned work area to respond to a scheduled medical appointment at the facility clinic, she tripped and fell over a

piece of equipment." Complaint ¶ 1.[2] Plaintiff claims that the equipment "was not and has [sic] not been in immediate use, but was negligently left unattended and obstructing the walkway without any precautionary devices or markings indicating its location, and/or, presence as a potential safety hazard." Id. Plaintiff alleges that after falling, she was escorted in a semi-conscious state in a wheelchair to the facility clinic, and that she suffered "extreme trauma to her head that rendered her semi-conscious; facial swelling and multiple contusions; swelling, contusions, and tendon damage to her right knee; and extreme trauma to her lower back and left shoulder." Id. ¶¶ 2-3. Plaintiff was referred to a specialist, who determined that surgery would be necessary to repair the tendon damage to her right knee. Id. ¶ 4.

Plaintiff claims that she was denied medical treatment inasmuch as defendants "neglected to schedule and perform the surgical procedure for several months after it was first determined that surgery was necessary," id. ¶ 6, and that despite her "continuous complaints and requests in regard to the psychological trauma she suffered and is still experiencing as a result of the incident, to date, no efforts to afford her

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[2] While plaintiff's Complaint states that the date of her injury was March 26, 200**3**, see Complaint ¶ 1, this appears to be a typographical error as plaintiff acknowledges in her Opposition Memorandum that the Government's records show that the injury occurred on March 26, 200**2**. See Pl. Opp. Mem. [Doc. # 23] at 1.

treatment have been made," id. ¶ 5. Plaintiff also claims that defendants have interfered with her access to the courts by, inter alia, coercing her to apply for workers compensation and granting her such compensation even though her injuries were non-work related, transferring her retaliatorily prior to her surgery to an out-of-state facility where working is required, and compelling her to return to work immediately following her surgery, prior to any follow-up examination or physical therapy. Id. ¶ 6. Plaintiff alleges that, in their various official capacities, the individual defendants were obligated to ensure a reasonably safe working environment for inmate employees, including instituting and ensuring enforcement of appropriate safety measures.[3] Id. ¶¶ 7-11.

II. STANDARD

Defendants move to dismiss plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction or for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).[4] In ruling on a motion to dismiss under Rule 12(b)(6), the Court accepts all well-pleaded allegations as true and draws

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[3] Defendant Camacho is UNICOR Foreman, Complaint ¶ 7, defendants Gold and Pipert are UNICOR Factory Manager and Assistant Factory Manager, respectively, id. ¶ 8, defendant Bundy is Safety Manager, id. ¶ 10, and defendant DeBoo is Warden of FCI Danbury, id. ¶ 11.

[4] Defendants move in the alternative for summary judgment. However, because the case can be resolved on a motion to dismiss, the Court treats defendants' motion as one for dismissal.

all reasonable inferences in favor of the pleader. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). 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 [her] claim which would entitle [her] to relief." Conley, 355 U.S. at 45-46 (footnote omitted); Jahgory v. N.Y. State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Additionally, "[a] case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may refer to evidence outside the pleadings. Id. Evidence concerning the court's jurisdiction "may be presented by affidavit or otherwise." Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the

evidence that it exists. Makarova, 201 F.3d at 113.

III. DISCUSSION

A. FTCA Claim

The IACA authorizes the Federal Prison Industries to compensate inmates "for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined." 18 U.S.C. § 4126(c)(4). Under the regulations promulgated pursuant to the IACA, compensation is limited to inmates who suffer "work-related injuries" and takes two forms – compensation for physical impairment or death and compensation for lost-time wages. See 28 C.F.R. § 301.101. A "work-related" injury is defined as "any injury, including occupational disease or illness, proximately caused by the actual performance of the inmate's work assignment." See 28 C.F.R. § 301.102. Pursuant to 28 C.F.R. § 301.202, after receiving notice of a possibly work-related injury, the Institution Safety Committee "make[s] a determination of the injury's work-relatedness based on the available evidence and testimony," and a copy of its decision is provided to the inmate.

In United States v. Demko, 385 U.S. 149 (1966), the Supreme Court held that the IACA compensatory scheme was sufficiently comprehensive so as to be the exclusive remedy for an inmate who

had been awarded compensation pursuant to the IACA.[5] In Demko, an inmate was injured in the performance of an assigned prison task and filed a claim for compensation benefits under the IACA. After winning a compensation award, he brought a FTCA claim in federal court alleging that his injury was due to the Government's negligence and claiming entitlement to additional damages. Demko, 385 U.S. at 150. Relying on the principle that "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group," the Supreme Court held that because the inmate was "protected" by the IACA, and indeed had already received compensation for his injuries pursuant to the Act, recovery under the IACA was his exclusive remedy and his FTCA claim was thus barred. Id. at 152-54.

Plaintiff acknowledges the holding in Demko, but contests its applicability to her case, arguing that her injuries were not work-related because they were sustained as she "was leaving her assigned work area." Complaint ¶ 2. Plaintiff admits by her allegations that she applied for, and received, IACA compensation, but claims that the determination that her injuries

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[5] See also 28 C.F.R. § 301.319 ("Inmates who are subject to the provisions of these Inmate Accident Compensation regulations are barred from recovery under the Federal Tort Claims Act (28 U.S.C. 2671 et seq.). Recovery under the Inmate Accident Compensation procedure was declared by the U.S. Supreme Court to be the exclusive remedy in the case of work-related injury. U.S. v. Demko, 385 U.S. 149 (1966).").

were work-related was "inaccurate, and a collaborated and conspirital [sic] attempt by [defendants] to prevent [plaintiff] from pursuing more availing compensable legal remedies." Id. ¶ 9.[6] A similar issue was considered in Moore v. United States, 85cv1151, 1988 WL 70025 (N.D.N.Y. June 30, 1988), where plaintiff had been injured when he slipped while walking on an icy pathway between his assigned workplace and another prison facility. Plaintiff filed an administrative tort claim and was informed by the Bureau of Prisons that because his injury was work-related, the IACA was his exclusive remedy. Id. at *2-3. Rather than submit an IACA claim for her injuries, plaintiff filed a FTCA suit in federal court for negligence, contending that jurisdiction was proper under the FTCA because his injury was not work-related and claiming that on the day of his injury, he was not on a work assignment but instead was "enroute to the gym for recreational weight lifting." Id. at *3. The Moore court noted that the prison's Safety Committee had determined that plaintiff's injury was work-related and plaintiff had received notice that he had the right to file an IACA claim, and determined that under the IACA regulations, if plaintiff wanted

[6] Plaintiff also argues that she was provided inadequate assistance when she attempted to file an IACA claim for compensation for her injuries prior to her release from prison because she was not provided with a claim form and was not informed of the specific time period in which she needed to file her claim. Pl. Opp. Mem. at 3-5.

to contest the "work-relatedness" of his injury, administrative appeal processes were provided in both the Administrative Remedy Procedure for Inmates and the IACA regulations. Id. at *4. The Moore court thus concluded that because the Safety Committee had determined plaintiff's injury was work-related, and plaintiff had not appealed that determination, his FTCA claims were barred. Id. at *5.

Like the plaintiff in Moore, plaintiff Dunn applied for and received IACA compensation for her lost-time wages and did not administratively appeal the determination that her injuries were work-related.[7] In addition to the decision in Moore which is persuasive reasoning directly on-point, language from both Demko and Granade v. United States, 356 F.2d 837 (2d Cir. 1966), suggests that where a federal prisoner "ha[s] already been protected by 18 U.S.C. § 4126 [(the IACA)]," recovery under the FTCA is not available.[8] See Demko, 385 U.S. at 384; Granade, 356

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[7] The administrative appeal processes include the Administrative Remedy Procedure for Inmates, 28 C.F.R. § 542.10 et seq., and the appeal procedures specific to IACA recovery, at 28 C.F.R. §§ 301.306, 301.308-301.313.

[8] As other courts have held, the Demko holding is one of exclusivity of remedies, not election of remedies. See, e.g., Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973) (citing Demko for the proposition that the Federal Employees' Compensation Act "has . . . been made the exclusive remedy for federal employees within its coverage, and such employees have no election of remedies") (emphasis added); Shepard v. Stidham, 502 F.Supp. 1275, 1281 (D.C. Ala. 1980) ("A determination that the denial of a prisoner's untimely inmate compensation claim removes the bar to suit under the Federal Tort Claims Act would

F.2d at 840-42 (court did not have jurisdiction under the FTCA where inmate was "concededly eligible for benefits under [the IACA]").[9] Thus, plaintiff's appropriate recourse for disputing the work-relatedness of her injury would have been to administratively appeal the determination to award her lost-time wages under the IACA, which she did not do.[10] Likewise, if

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effectively undermine the exclusive remedy holding of Demko, supra. It would render the Demko holding one of election of remedies. . . . Such a holding would allow prisoners to avoid the less desirable remedy of inmate accident compensation in favor of a damage remedy simply by delaying the filing of the compensation claim. This result would violate the clear mandate of Demko and its progeny that the Inmate Compensation Act is the prisoner's exclusive remedy.").

[9] The issue of whether an injury is work-related under the IACA, thus precluding FTCA recovery, can be compared to FTCA cases where compensation has been awarded under the Federal Employees' Compensation Act ("FECA"). In this context, courts have held that where "there is even a substantial question as to whether the plaintiff's injury occurred in the performance of his federal employment [thus qualifying the plaintiff for FECA recovery]," district courts "may not entertain FTCA suits." See, e.g., Gill v. United States, 641 F.2d 195, 197 (5th Cir. 1981). In Gill the court held that, notwithstanding that plaintiff "returned the [FECA] award checks and notified the Government that he was electing to claim his remedy under the FTCA in lieu of his FECA benefits," plaintiff's FTCA claim was barred because "by granting [plaintiff] FECA benefits," it was determined that plaintiff was "within the coverage of FECA." Id.

[10] Plaintiff also contests the work-related determination by claiming that the Injury Report states both that the injury was work-related and non-work-related. See Pl. Opp. Mem. at 2 (citing Injury Report [Doc. # 20, Ex. 1i] at 2). However, plaintiff appears to acknowledge (as is clear from examination of the document) that this was just a technical mistake of failing to circle the "work-related" clause on the form, given that plaintiff also alleges that "the injury was recognized by the Bureau of Prisons, was found to be compensable, and the first stage of compensation actually was paid." Id. at 4.

plaintiff seeks to dispute any denial of her claim for compensation post-release based on inadequate assistance (including failure to provide her with a claim form and inform her of the specific time period in which to file her claim), administrative appeal is the appropriate vehicle for doing so. However, because it was determined that plaintiff was eligible for IACA compensation (and, moreover, plaintiff accepted such compensation), this Court is divested of jurisdiction under the FTCA.[11]

B. Constitutional Claims

Plaintiff also asserts claims for compensatory and punitive damages against the individual defendants under a Bivens theory for deliberate indifference to her medical needs in violation of the Eighth Amendment and for violation of her First Amendment right of access to the courts. See Pl. Opp. Mem. at 5-6 (citing Complaint ¶ 6). Pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 389 (1971), a plaintiff may seek damages against defendants acting in their individual capacities where their conduct is found to violate

[11] Because the Court determines that plaintiff's FTCA claim is barred given her eligibility for compensation under the IACA, it need not reach defendants' arguments for dismissal of all parties on the ground that only the United States is properly named as a defendant in a FTCA suit, and for dismissal of plaintiff's claim for damages in excess of the amount claimed in her administrative complaint.

constitutional rights. See Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981). The only relief available in a Bivens action is an award of damages from the defendants. See Polanco v. United States Drug Enforcement Admin., 158 F.3d 647, 652 (2d Cir. 1998) (noting that a Bivens action is, by definition, a claim for money damages).

A Bivens action will only lie against a federal government official and thus such actions against the United States or a federal agency are "routinely" dismissed. See Mack v. United States, 814 F.2d 120, 122-23 (2d Cir. 1987); see also Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 486 (1994) (actions for damages against federal agencies are not cognizable under Bivens). Because a claim against a federal employee in his or her official capacity is, essentially, a suit against the United States, Bivens does not authorize such claims, and the United States has not waived sovereign immunity for damages claims arising from actions of federal employees in their official capacities. See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (a Bivens claim against federal defendants in their official capacities was barred by sovereign immunity and thus properly dismissed). Defendants argue that "[i]t is clear that the plaintiff is suing all the individually named defendants in their official capacities," see Def. Reply Mem. at 5, and indeed it is. At paragraphs 7, 8, 10 and 11 of

the Complaint, plaintiff identifies each of the individual defendants by name, followed by "in [his/her] official capacity." Thus, because plaintiff asserts claims against the individual defendants in their official capacities, such claims are not cognizable under Bivens and they are therefore dismissed.

IV. CONCLUSION

For the foregoing reasons, defendants' Motion [Doc. # 17] is GRANTED and this case will be closed.

IT IS SO ORDERED.

/s/
Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut this 20th day of March 2006.