

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

BHARANIDHARAN PADMANBHAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	15-10499-WGY
	)	
CENTERS FOR MEDICARE &	)	
MEDICAID SERVICES (BOSTON	)	
REGIONAL OFFICE), RAYMOND	)	
HURD, and WILLIAM KASSLER	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF THE  
FEDERAL DEFENDANTS’ MOTION TO DISMISS

The Defendants, Centers for Medicare & Medicaid Services (Boston Regional Office) (“CMS”), Raymond Hurd (“Hurd”) and William Kassler (“Kassler”) (collectively “Federal Defendants”), have moved this Court to dismiss the action against them, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. This memorandum of law is submitted in support thereof.

STATEMENT OF THE CASE

This 270-paragraph complaint names approximately 70 defendants whom the plaintiff, Bharanidharan Padmanbhan (“Plaintiff”), alleges committed a number of acts against him. These acts all appear to be related to his past employment with the Cambridge Public Health Commission (“CHA”)<sup>1</sup> at Whidden Hospital, in Everett, Massachusetts. In his complaint, Plaintiff states that he is a board-certified neurologist licensed to practice medicine in

---

<sup>1</sup> The Federal Defendants will refer to the Cambridge Public Health Commission as CHA, as that abbreviation is used by Plaintiff throughout his complaint.

Massachusetts. (Docket No. 1-3, ¶1).<sup>2</sup> He claims that in 2007 he was recruited to work for CHA's Whidden Hospital. (Docket No. 1-3, ¶83). He alleges that his colleagues believed his practice to be unprofessional and substandard (Docket No. 1-4, ¶140) and that the Medical Executive Committee suspended his privileges in November 2010. (Docket No. 1-4, ¶ 141). After Plaintiff was terminated on November 11, 2010 (Docket No. 1-4, ¶147), he pursued various administrative appeals including those set forth in a Fair Hearing Plan. (*See, e.g.*, Docket No. 1-4, ¶¶ 83, 144, 147, 151-178). He states that CHA unlawfully terminated his employment, published and uttered falsehoods about him to government agencies, defamed his reputation, destroyed his professional record and forced him to lose his ability to obtain a visa to remain in this country. (Docket No. 1-5, page 55, unnumbered paragraph).

With respect to the Federal Defendants, Plaintiff makes relatively few allegations against them. Indeed, he makes no allegations against Hurd. Against CMS, however, he alleges that he sent a written complaint to the Inspector General for the U.S. Department of Health and Human Services ("IG/HHS") about CHA, but also warned the IG/HHS that CMS was "on the take and engaged in criminal racketeering." (Docket No. 1-5, ¶204). The IG/HHS referred Plaintiff's complaint to CMS, and CMS apparently declined to investigate CHA. (Docket No. 1-5, ¶¶ 204-205). Because of this, Plaintiff alleges that CMS not only actively aided and abetted Medicare fraud but also allowed Defendant Leape ("Leape") to defraud private insurance companies. (Docket No. 1-5, ¶ ¶ 206-207). In addition, he alleges that CMS "actually raided the Treasury" by paying for Leape to speak (presumably at medical meetings). (Docket No. 1-5, ¶210). With respect to Kassler, who is employed by CMS, Plaintiff only claims that Kassler sat on a board of

---

<sup>2</sup> All references are to the docket numbers assigned to Plaintiff's complaint (due to its length, the complaint was docketed on PACER in three separate filings (docket nos. 1-3, 1-4 and 1-5)). The referenced paragraph numbers relate to the specific paragraphs in the complaint.

a group (“Leapfrog Group”) that is allegedly affiliated with Leape, and that he [Kassler] coauthored medical papers with associates of Leape. (Docket No. 1-5, ¶109). Plaintiff apparently is claiming that because Leape is engaged in conscious fraud, so too is CMS based upon Kassler’s close association with Leape. (Docket No. 1-5, ¶ 209).

Despite the scarcity of allegations against the Federal Defendants, Plaintiff nonetheless names them in Count 3 (Violation of the Massachusetts Healthcare Whistleblower Statute) (Docket No. 1-5, ¶ ¶ 237-239); Count 5 (Malicious slander) (Docket No. 1-5, ¶ ¶243-244); Count 8 (Illegal Taking of Property) (Docket No. 1-5, ¶ ¶ 252-256); and, Count 12 (Aiding and Abetting Retaliation against a Public Healthcare Whistleblower) (Docket No. 1-5, ¶ ¶ 268-270).

As set forth below, all counts against the Federal Defendants should be dismissed.

#### ARGUMENT

##### A. The Court Lacks Subject Matter Jurisdiction Over the Federal Defendants<sup>3</sup>

It is well-established that the United States is immune from suit unless it has expressly consented to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Merlonghi v. United States*, 620 F.3d 50, 54 (1st Cir. 2010) (“The United States as a sovereign can be haled into court only if it consents to be sued.”); *Skwira v. United States*, 344 F.3d 64, 72-73 (1st Cir. 2003) (“It is ‘elementary’ that the United States, as sovereign, is immune from suit unless it has consented to be sued.”). “A waiver of sovereign immunity must be unequivocally expressed in statutory text.” *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012); *United States v. Nordic Village, Inc.*, 503

---

<sup>3</sup> Where, as here, an official of the United States is named as a defendant, when the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, the suit is, in effect, a suit against the United States. *Va. Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011); *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In this case any claims against Federal Defendant Kassler or Hurd are to be considered a claim against the United States and the following argument regarding waivers of sovereign immunity applies to them.

U.S. 30, 33 (1992); *United States v. King*, 395 U.S. 1, 4 (1969). Without an express waiver of sovereign immunity, the court lacks subject-matter jurisdiction over the plaintiff's claims. *Mitchell*, 445 U.S. at 538; *Merlonghi*, 620 F.3d at 58 (dismissing for lack of subject matter jurisdiction because FTCA only waives immunity when federal employee acted within the scope of his employment); *Farlino v. United States*, 108 F.3d 1388 (10th Cir. 1997) (unpublished decision) ("It is similarly well established that 'the terms of [the United States]' consent to be sued in any court define that court's jurisdiction to entertain the suit."). As such, there can be no claim against the government for money damages unless there is a statute that expressly grants a damages remedy. See *United States v. Testan*, 424 U.S. 392, 400-01 (1976); *Hanley v. United States*, 1994 WL 723678 at \*2 (1st Cir. Oct. 5, 1994) ("Accordingly, any lawsuit against the United States must be brought in compliance with a specific statute which expressly waives sovereign immunity."); *MacMann v. Titus*, 819 F.2d 8 (1st Cir. 1987) (dismissing plaintiffs' claim for money damages because 5 U.S.C. § 702 only provided court with jurisdiction when plaintiffs sought relief other than money damages). For example, the United States has not waived sovereign immunity with respect to a suit against it directly under the Constitution for money damages. *Tapia-Tapia v. Potter*, 322 F.3d 742, 745-46 (1st Cir. 2003) (finding that sovereign immunity barred plaintiff from seeking money damages based on alleged constitutional violations of Postal Service); *MacMann*, 819 F.2d at 10; *Garcia v. United States* 666 F.2d 960 (5<sup>th</sup> Cir. 1982); *Jaffe v. United States*, 592 F.2d 712, 715-18 (3d Cir. 1979); *Holloman v. Watt*, 708 F.2d 1399, 1401-02 (9<sup>th</sup> Cir. 1983).

The Federal Tort Claims Act ("FTCA") provides a limited waiver of the Government's sovereign immunity, subjecting the United States to suit in tort under certain conditions. 28 U.S.C.A. §§ 1346, 2672-2680. As with all waivers of sovereign immunity, the prerequisites of

the FTCA must be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *Callahan v. United States*, 426 F.3d 444, 450 (1st Cir. 2005); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“[A] waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.”).

Based on the doctrine of sovereign immunity, all counts against the Federal Defendants must be dismissed. Plaintiff does not, and indeed cannot, identify any statute that would waive the Federal Defendants’ sovereign immunity over any of his claims.<sup>4</sup> First, Count 3 (violation of the Massachusetts Healthcare Whistleblower Statute, MGL chapter 149, Section 187) must be dismissed, since the United States has not waived its sovereign immunity to be sued in actions alleging a violation of a state law. Count 5 of the Complaint appears to be a claim sounding in tort, as it alleges the Federal Defendants engaged in malicious slander against the plaintiff. However, § 2680(h) of the FTCA bars all actions sounding in “libel, slander, misrepresentation, deceit, or interference with contract rights.” Because of this, and because Plaintiff has failed to comply with the administrative requirements of an FTCA claim, Count 5 must be dismissed. Finally, Count 8 alleges a constitutional violation – an illegal taking of property. Again, there is no waiver of sovereign immunity by the United States in actions alleging a constitutional violation, so this count, too, must be dismissed.

---

<sup>4</sup> With respect to Count 12 (aiding and abetting retaliation against a public healthcare whistleblower, Plaintiff suggests he has a cause of action against the Federal Defendants (whom he identifies as “Party I”). However, because none of the substantive allegations in Count 12 pertain to the Federal Defendants, he does not. In any event, the Federal Defendants have not waived their sovereign immunity to be sued in such a count.

B. The Complaint Against the Individual Federal Defendants Must Be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted

Although not entirely evident from Plaintiff's complaint, to the extent that he is suing Federal Defendants Kassler and Hurd in their individual capacities, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the action against them still must be dismissed.<sup>5</sup>

A plaintiff bringing a *Bivens* action "must plead that each Government-official defendant, through the official's *own individual* actions, has violated the Constitution." *Id.* at 676 (emphasis added), *accord Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 33 (1st Cir. 2011). Thus, to state a claim against a federal defendant in a *Bivens* action, the complaint must allege specific actions committed by each defendant which violated the plaintiff's constitutional rights. *See DeMayo v. Nugent*, 475 F.Supp. 2d 110, 115 (D. Mass. 2007) (to sustain a *Bivens* claim, plaintiff must allege and prove that a federal agent, acting under color of the law, committed a constitutional violation). A plaintiff cannot rely upon a theory of vicarious liability to maintain a complaint against a federal defendant. *See Ashcroft v. Iqbal*, 556 U.S. at 676.

Plaintiff's action against Kassler and Hurd cannot survive. Indeed, with respect to Hurd, even though he is named in the caption of the Complaint, he is not mentioned at all in the body. Clearly, no action, *Bivens* or otherwise, can continue against him. Nor can it continue against Kassler. As mentioned, Plaintiff's complaint against him is solely that Kassler sat on a board

---

<sup>5</sup> The Federal Defendants note that Plaintiff failed to effectuate proper service of process of his complaint. Rule 4(i)(3) of the Federal Rules of Civil Procedure provides that when an employee is sued in his or her individual capacity, service must be made upon both the individual and the United States (by delivering a copy to the United States Attorney for the district where the action is brought and by sending a copy to the Attorney General of the United States). While the U.S Attorney received a copy of the complaint, Plaintiff has not served the individual defendants, nor has he served the Attorney General.

affiliated with Leape and co-authored articles with associates of Leape. These allegations do not suggest in any manner that Kassler violated Plaintiff's constitutional rights. Because of this, Plaintiff has no cause of action against Kassler, and the complaint therefore must be dismissed.

**CONCLUSION**

Based upon the foregoing, the claims against the Federal Defendants, Centers for Medicare & Medicaid Services (Boston Regional Office), Raymond Hurd and William Kassler, must be dismissed.

CARMEN M. ORTIZ  
United States Attorney

By: /s/ Susan M. Poswistilo  
SUSAN M. POSWISTILO (BBO #565581)  
Assistant U. S. Attorney  
John Joseph Moakley Federal Courthouse  
One Courthouse Way, Ste. 9200  
Boston, MA 02210  
(617) 748-3103  
[susan.poswistilo@usdoj.gov](mailto:susan.poswistilo@usdoj.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants

Date: 03/26/2015

/s/ Susan M. Poswistilo  
Susan M. Poswistilo  
Assistant United States Attorney