United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5183 **September Term, 2019**

FILED ON: JULY 2, 2020

RYAN BUNDY,

APPELLANT

v.

JEFFERSON B. SESSIONS, III, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02520)

Before: TATEL and RAO, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

The Court has considered this appeal on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons set out below, it is

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED**.

Ryan Bundy alleges former Directors of the Federal Bureau of Investigation ("FBI") and Bureau of Land Management ("BLM") conspired with former Attorneys General to unlawfully "raid" his family's ranch and prosecute him because of his outspoken beliefs and religious faith. For almost two decades, the Bundy family and BLM disputed unpaid fees for grazing livestock on federal land. The conflict came to a head in 2014 when BLM officials attempted to collect and remove the trespassing cattle. Members of the Bundy family responded with a multi-day protest at the Bundy ranch in Bunkerville, Nevada, which soon grew to include several hundred individuals. The confrontation developed into an armed standoff between some of the protesters and agents from BLM and FBI. According to Bundy, federal agents ultimately engaged in unprovoked violence by conducting a "raid" against the Bundy ranch that injured members of his family and killed valuable cattle for which the family was never compensated.

In 2016, a federal grand jury indicted Bundy for offenses arising from the protest and armed standoff. The prosecution ended in a mistrial and dismissal with prejudice when the judge identified several instances in which prosecutors failed to disclose material exculpatory information in a timely manner. *See Brady v. Maryland*, 373 U.S. 83 (1963). The United States appealed that decision, and the case is still pending. *See United States v. Bundy*, No. 18-10287 (9th Cir. argued May 29, 2020).

In October 2018, Bundy filed a six-count complaint against former FBI Director James Comey, former BLM Director Neil Kornze ("the Directors"), former Attorneys General Eric Holder and Loretta Lynch, and Attorney General Jefferson Sessions ("Attorneys General") in the U.S. District Court for the District of Columbia. Counts One and Four alleged claims against the Directors under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for unlawful search and seizure and excessive force in violation of the Fourth Amendment. Compl. ¶¶ 64–69, 83–97. Count Two alleged a First Amendment retaliation claim under *Bivens* against all defendants for the raid, arrest, and prosecution. Compl. ¶¶ 70–77. Count Three alleged all defendants violated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, by arresting and prosecuting Bundy on account of his faith and membership in the Church of Jesus Christ of Latter-day Saints. Compl. ¶¶ 78–82. Counts Five and Six alleged First Amendment retaliation and Fourth Amendment malicious prosecution claims under 42 U.S.C. § 1983 against all defendants related to Bundy's arrest and prosecution. Compl. ¶¶ 98–114.

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6). *See Bundy v. Sessions*, 387 F. Supp. 3d 121 (D.D.C. 2019). Bundy timely appealed, and our review is de novo. *Jones v. Kirchner*, 835 F.3d 74, 79 (D.C. Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We agree with the district court that Bundy's complaint failed to state a claim upon which relief can be granted.

First, Bundy failed to allege plausibly that the Directors participated in the unlawful raid, arrest, and prosecution described in the complaint. "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. And Bundy offers no response to the government's argument that "[p]ure vicarious liability … is [also] not sufficient to state a claim under RFRA," Appellees' Br. 16 (quoting *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 55 (D.D.C. 2015)), thus conceding the point, *see Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) ("[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." (citation omitted)). The unlawful search and seizure, excessive force, and retaliation claims related to the raid fail as against the Directors because Bundy offered only conclusory allegations that federal agents acted "upon orders" from Comey and Kornze, who "used [their] agenc[ies]" to violate the law. Compl. ¶¶ 15, 25, 27. On appeal, Bundy argues the national attention generated by the 2014 standoff makes it inconceivable that the Directors did not authorize or plan the operation. *See* Appellant's Br. 8–10. But this is precisely

the type of unsupported allegation the Supreme Court rejected in *Iqbal*, which affirmed the dismissal of allegations that the Attorney General was the "principal architect" of a discriminatory policy the FBI Director was "instrumental" in adopting. 556 U.S. at 680–81; *see also Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 688 (D.C. Cir. 2009) (dismissing conclusory allegations as insufficient under *Iqbal*). The RFRA, malicious prosecution, and retaliation claims related to Bundy's arrest and prosecution likewise fail against the Directors as implausible. Bundy alleges their involvement in the criminal proceedings only through unspecified references to a conspiracy. *See* Compl. ¶¶ 12, 80, 104, 109. Without further factual allegations, it is implausible that federal prosecutors "act[ed] at the direction of and on orders from" the Directors, Compl. ¶¶ 42, 58, 112–13, and the claims therefore fail to meet the requisite pleading standard.

Second, Bundy's RFRA, malicious prosecution, and retaliation claims against the Attorneys General fail based on absolute prosecutorial immunity. Federal prosecutors, including Attorneys General, are entitled to absolute immunity for "initiating a prosecution" and "presenting the [government's] case." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *see also Dellums v. Powell*, 660 F.2d 802, 805–07 (D.C. Cir. 1981). Bundy failed to allege conduct by the Attorneys General that falls outside the scope of immunity as "administrative duties and … investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *see also Atherton*, 567 F.3d at 683–84 (concluding juror officer performed administrative functions outside the scope of absolute immunity). On appeal, Bundy argues the Attorneys General lost this protection by plotting to retaliate against Bundy through unwarranted arrest and prosecution. *See* Appellant's Br. 12–14. But even taking these allegations as true, "instituting a criminal action is precisely the sort of activity that falls within the scope of absolute immunity granted to a prosecuting official such as the Attorney General." *Dellums*, 660 F.2d at 805–06.

Finally, Bundy alleges the raid constitutes retaliation on the part of the Attorneys General. *See* Compl. ¶ 73. Since Bundy alleges Attorney General Holder ordered the raid, this aspect of the claim raises a closer question of prosecutorial immunity under *Buckley*. *See* Compl. ¶ 15. We need not decide the question, however, because this allegation falls short of the *Iqbal* pleading standard. Although Attorney General Holder was in office at the time of the raid, Bundy alleges no facts raising an inference of unlawful activity and, thus, the allegation fails to cross "the line between possibility and plausibility of entitlement to relief." *Atherton*, 567 F.3d at 688 (quoting *Iqbal*, 556 U.S. at 678). Bundy's unsupported references to Attorneys General Sessions and Lynch as having "conspired" with and "ratified" the actions of their predecessor are similarly implausible. *See* Compl. ¶¶ 12, 11.

In sum, all of Bundy's claims against the Directors fail under the *Iqbal* plausibility standard; Bundy's RFRA and malicious prosecution claims against the Attorneys General fail based on prosecutorial immunity; and Bundy's retaliation claims against the Attorneys General fail under prosecutorial immunity as to his arrest and prosecution and under *Iqbal* as to the raid against the Bundy ranch. For the foregoing reasons, the judgment of the district court is affirmed.

Pursuant to D.C. Circuit Rule 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R.

41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk