

23-35

Cohen v. Trump

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the
3 2nd day of January, two thousand twenty-four.
4

5 PRESENT:

6 BARRINGTON D. PARKER
7 MYRNA PÉREZ,
8 SARAH A. L. MERRIAM,
9 *Circuit Judges.*

10 _____
11
12 Michael D. Cohen,

13
14 *Plaintiff-Appellant,*

15
16 v.

No. 23-35

17
18 Donald J. Trump, Former President of the United
19 States, William P. Barr, Former Attorney General of
20 the United States, Michael D. Carvajal, Director of
21 the Bureau of Prisons, Jon Gustin, Administrator of
22 the Residential Reentry Management Branch of the
23 Bureau of Prisons, Patrick McFarland, Residential
24 Reentry Manager of the Federal Bureau of Prisons,
25 James Petrucci, Warden of FCI Otisville, Enid
26 Febus, Supervisory Probation Officer of the United
27 States Probation and Pretrial Services, Adam Pakula,
28 Probation Officer of the United States Probation and
29 Pretrial Services,
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Defendants-Appellees.*

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FOR PLAINTIFF-APPELLANT: JON-MICHAEL DOUGHERTY (Kami E. Quinn, Sarah Sraders, Gilbert LLP, Washington, D.C.; E. Danya Perry, Perry Guha LLP, New York, NY; *on the brief*), Gilbert LLP, Washington, D.C.

FOR DEFENDANT-APPELLEE DONALD J. TRUMP: ALINA HABBA (Michael T. Madaio, *on the brief*), Habba Madaio & Associates LLP, Bedminster, NJ, New York, NY.

FOR DEFENDANTS-APPELLEES: ALYSSA B. O’GALLAGHER (Allison M. Rovner, Benjamin H. Torrance, *on the brief*), Assistant United States Attorneys, Of Counsel, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Lewis J. Liman, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Michael D. Cohen (“Cohen”) appeals portions of the district court’s November 15, 2022 judgment dismissing his claims against Defendants-Appellees. At issue in this appeal is whether Cohen has a claim for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Defendants-Appellees for purported violations of the Fourth and Eighth Amendments of the United States Constitution. We assume the parties’ familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

BACKGROUND

1
2 Cohen worked as an attorney and advisor for former President of the United States
3 Donald J. Trump (“Trump”) both before and during Trump’s term as President.¹ In the fall of
4 2018, Cohen pled guilty to various violations of federal law and was sentenced to thirty-six
5 months’ incarceration. Cohen began serving his sentence on May 6, 2019, at Federal Correctional
6 Institution Otisville (“FCI Otisville”). During his incarceration, Cohen wrote a draft of a book
7 detailing his experiences with Trump, which Cohen publicly stated would portray Trump in a
8 negative and critical light.

9 Cohen was released from FCI Otisville on furlough to home confinement on May 12, 2020,
10 after the Bureau of Prisons (“BOP”) had approved Cohen’s petition for early release in the wake
11 of the COVID-19 pandemic. Cohen made additional public statements about his book while on
12 furlough. In July 2020, Cohen was instructed to visit the United States Probation and Pretrial
13 Services (“PTS”) office. When Cohen and his attorney visited the PTS office, a supervisory
14 probation officer and a probation officer presented them with a Federal Location Monitoring
15 Program Participant Agreement (“FLMPP Agreement”). The FLMPP Agreement prohibited
16 Cohen from engaging with the media and from using any social media platform. Cohen and his
17 attorney asked the probation officers if it was possible to change the FLMPP Agreement to remove
18 or revise this language, and the probation officers responded that they would speak to their
19 supervisors. After Cohen waited approximately ninety minutes for the probation officers’ return,
20 three deputy United States Marshals entered the room and served Cohen with a remand order. The

¹ We take Cohen’s factual allegations from his complaint. See App’x at 11–37. We are “required to accept all ‘well-pleaded factual allegations’ in the complaint as true.” *Lynch v. City of New York*, 952 F.3d 67, 74–75 (2d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

1 probation officers informed Cohen that the situation was out of their hands and the FLMP
2 Agreement had been rescinded. The deputy Marshals took Cohen into custody.

3 Cohen was transported back to FCI Otisville where the warden ordered that Cohen be
4 placed in solitary confinement. Cohen was placed in solitary confinement for sixteen days where
5 he spent roughly twenty-three and a half hours a day alone with poor ventilation and no air
6 conditioning. On July 20, 2020, Cohen filed a petition for a writ of habeas corpus and a motion
7 for an emergency temporary restraining order (“TRO”) in the United States District Court for the
8 Southern District of New York. *See Cohen v. Barr*, No. 1:20-cv-05614-AKH, ECF Nos. 1, 4
9 (S.D.N.Y. July 20, 2020). On July 23, 2020, the district court held a hearing on Cohen’s petition
10 for a writ of habeas corpus and motion for an emergency TRO, and subsequently, it issued an
11 injunction ordering Cohen’s release from custody.² Cohen was released to home confinement on
12 July 24, 2020.

13 In December 2021, Cohen filed this civil action against Defendants-Appellees. Cohen
14 alleges that Defendants-Appellees retaliated against him for his public comments and his
15 anticipated book criticizing Trump. He further alleges that the revocation of his furlough and
16 home confinement, and subsequent remand to BOP custody, violated the Fourth Amendment’s
17 protection against unreasonable seizures, and that his placement in solitary confinement violated
18 the Eighth Amendment’s protection against cruel and unusual punishment. Defendants-Appellees
19 moved to dismiss Cohen’s complaint arguing that, among other things, Cohen did not have a claim
20 under *Bivens*. The district court granted Defendants-Appellees’ motions and dismissed Cohen’s
21 claims. Cohen timely appealed.

² The district court stated: “The Court finds that Respondents’ purpose in transferring Cohen from release on furlough and home confinement back to custody was retaliatory in response to Cohen desiring to exercise his First Amendment rights to publish a book critical of the President and to discuss the book on social media.” App’x at 39.

DISCUSSION

1
2 Congress has never “provide[d] a specific damages remedy for plaintiffs whose
3 constitutional rights were violated by agents of the Federal Government.” *Ziglar v. Abbasi*, 582
4 U.S. 120, 130 (2017). In 1971, however, the Supreme Court in *Bivens* created an implied cause
5 of action such that “damages may be obtained for injuries consequent upon a violation of the
6 Fourth Amendment by federal officials.” 403 U.S. at 395. The Supreme Court has only extended
7 *Bivens* two times. First, in 1979, the Supreme Court recognized a Fifth Amendment claim for
8 damages against a United States Congressman for wrongful termination based on gender
9 discrimination. *See Davis v. Passman*, 442 U.S. 228 (1979). Second, in 1980, the Supreme Court
10 recognized an Eighth Amendment claim for damages against federal prison officials for deliberate
11 indifference to an inmate’s serious medical needs. *See Carlson v. Green*, 446 U.S. 14 (1980).
12 Since *Carlson*, the Supreme Court “ha[s] declined [twelve] times to imply a similar cause of action
13 for other alleged constitutional violations.” *Egbert v. Boule*, 596 U.S. 482, 486 (2022) (collecting
14 cases).³

15 Before a court may extend *Bivens*, it must “engage in a two-step inquiry.” *Hernández v.*
16 *Mesa*, 140 S. Ct. 735, 743 (2020). The first step requires a court to determine “whether the request
17 involves a claim that arises in a ‘new context’ or involves a ‘new category of defendants.’” *Id.*
18 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). We interpret “new context”
19 broadly, and a context is “‘new’ if it is ‘different in a meaningful way from previous *Bivens* cases
20 decided by’” the Supreme Court. *Id.* (quoting *Ziglar*, 582 U.S. at 139). If a claim arises in a new
21 context, the second step requires a court to determine whether “there are ‘special factors’ indicating
22 that the Judiciary is at least arguably less equipped than Congress to ‘weigh the costs and benefits

³ The decision in *Egbert* was the twelfth time.

1 of allowing a damages action to proceed.” *Egbert*, 596 U.S. at 492 (quoting *Ziglar*, 582 U.S. at
2 136). “If there is even a single reason to pause before applying *Bivens* in a new context, a court
3 may not recognize a *Bivens* remedy.” *Id.* (internal quotation marks and citation omitted). And
4 “[i]f there are alternative remedial structures in place, that alone, like any special factor, is reason
5 enough to limit the power of the Judiciary to infer a new *Bivens* cause of action.” *Id.* at 493
6 (internal quotation marks and citation omitted).

7 With those principles in mind, and after conducting a *de novo* review, *see Atterbury v. U.S.*
8 *Marshals Serv.*, 805 F.3d 398, 403 (2d Cir. 2015), we cannot infer a *Bivens* cause of action for
9 Cohen’s claims because there is reason to hesitate before extending *Bivens* to this new context.
10 Cohen sues a former President, a former Attorney General of the United States, FCI Otisville’s
11 warden, and officers and agents of the BOP and the PTS. Cohen’s Fourth Amendment claim
12 involves “new categor[ies] of defendants” that were not contemplated in *Bivens*. *See Egbert*, 596
13 U.S. at 492 (internal quotation marks and citation omitted); *see also Bivens*, 403 U.S. at 389
14 (claims alleged against agents of the now-defunct Federal Bureau of Narcotics). The same holds
15 true for Cohen’s Eighth Amendment claim against the defendants who are not prison officials. *See*
16 *Carlson*, 446 U.S. at 16 (claims alleged against federal prison officials).

17 To the extent that Cohen contends that his Eighth Amendment claim does not arise in a
18 new context because—like in *Carlson*—he also sues prison officials, Cohen’s claim presents only
19 “superficial similarities” to *Carlson*, which is “not enough to support the judicial creation of a
20 cause of action.” *Egbert*, 596 U.S. at 495. Unlike in *Carlson*, which involved allegations of
21 deliberate indifference to serious medical needs, *see* 446 U.S. at 16 n.1, here Cohen alleges
22 unconstitutional conditions of solitary confinement, *see App’x* at 27–28. These differences are

1 We have considered all of Cohen’s remaining arguments and find them to be without merit.

2 Accordingly, we **AFFIRM** the judgment of the district court.

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FOR THE COURT:

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Catherine O’Hagan Wolfe, Clerk of Court

A handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written in a cursive style and is positioned over a circular official seal.

A circular official seal for the United States Second Circuit Court of Appeals. The seal features a red outer ring with the text "UNITED STATES" at the top and "SECOND CIRCUIT COURT OF APPEALS" at the bottom. The center of the seal is white with the words "SECOND CIRCUIT" in black, flanked by two small black stars.