BIVENS FACT SHEET

Disclaimer: While we have attempted to provide information that is current and useful, the law changes frequently. We cannot guarantee that all information is current. If you have access to a prison library, we suggest you confirm that the cases and statutes are still good law.

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I. Introduction

Usually we create legal bulletins and fact sheets in order to provide basic information for *pro se* litigants on how to determine if they have a legal claim and, if so, how to take action in court to assert that claim. We are approaching this fact sheet a bit differently. Here, we provide more background than usual, because we want to convey the unfortunate state of the current law surrounding "Bivens" claims, so that readers understand *how incredibly difficult it is to assert such claims*. At the end of this fact sheet we provide some suggestions for other types of actions you may wish to take instead of filing a *Bivens* lawsuit – both in court and by contacting Congress.

II. What is a "Bivens" claim?

"Bivens" claims are named after the Supreme Court case *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). In *Bivens*, the Supreme Court permitted a constitutional claim for monetary damages to proceed against individual federal agents for their warrantless arrest of and use of excessive force against the plaintiff (Webster Bivens) inside his home, in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. A "Bivens" claim is an "implied" cause of action, as opposed to a claim based on a statute. In an "implied" cause of action, a federal court determines that relief (including monetary damages) is available to remedy the harm suffered by a plaintiff even though Congress has not enacted a law that affirmatively grants such relief. Plaintiffs harmed by unconstitutional acts of ***state*** actors can seek relief (including monetary damages) in federal court through 42 U.S.C. § 1983 (the "Civil Rights Act of 1871"), which was enacted by Congress. By contrast, there is no generally applicable federal statute that can be used to assert claims for monetary damages for unconstitutional conduct by ***federal*** actors. In *Bivens*, instead of applying a statute (because there was none), the Supreme Court used its authority to hear and decide constitutional issues to create a damages remedy in the limited circumstance of a Fourth Amendment violation by a federal actor.

III. In what circumstances can a *Bivens* claim be asserted?

Bivens claims can only be asserted in extremely rare circumstances. Since deciding *Bivens* in 1971, the Supreme Court has implied a *Bivens* remedy in only **two cases** involving circumstances other than a Fourth Amendment violation. First, in *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court recognized a *Bivens* claim for gender discrimination under the Fifth Amendment's Due Process Clause, in a case brought by a former congressional employee after she was fired from her job because of her gender. Next, in *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court applied *Bivens* doctrine to permit an Eighth Amendment claim for denial of medical care to proceed in a case brought by the estate of a federal prisoner who died after BOP medical staff failed to provide treatment for a severe asthma attack. Since *Carlson*, the Supreme Court has not recognized a *Bivens* claim in any other circumstances and has expressly declined to imply a *Bivens* remedy numerous times. *See, e.g., Bush v. Lucas*, 462 U.S. 367 (1983) (no *Bivens* remedy for First Amendment claim based on retaliatory firing of government employee); *FDIC v. Meyer*, 510 U.S. 471 (1994) (no *Bivens* remedy for constitutional claims brought against a federal agency); *Minneci v. Pollard*, 565 U.S. 118 (2012) (no *Bivens* claims against employees of private prison corporations).

After *Carlson,* lower federal courts routinely recognized *Bivens* claims arising from a variety of circumstances. However, this changed rapidly following the Supreme Court's decision in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). *Ziglar*

involved Fourth and Fifth Amendment claims based on conditions of confinement at MDC Brooklyn, including physical abuse and punitive strip searches asserted by non-citizen federal detainees in the aftermath of the September 11, 2001 terrorist attacks on the United States. *Ziglar*, 582 U.S. at 129. The plaintiffs asserted their constitutional claims under the *Bivens* doctrine, seeking monetary relief from individual BOP and Department of Justice employees. *Id.* at 128. In *Ziglar*, the Supreme Court set forth a mandatory test for federal courts to use when deciding whether to imply a damages cause of action under *Bivens* for a constitutional violation. A court must first determine whether the case presents a "new context" for the application of a *Bivens* remedy. *Id.* at 139. The Supreme Court did not define the phrase "new context" but stated that the context is new if the case "is different in a meaningful way from previous *Bivens* cases" decided by the Supreme Court. *See id.* The Supreme Court offered some examples of things that might make a case "meaningfully different" from a prior *Bivens* case, such as: "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 139-140.

If a court determines that a case does not present a "new context" for a *Bivens* remedy, then the *Ziglar* analysis ends and the *Bivens* claim can move forward. If the court finds that a "new context" is present, then it must conduct the second part of the *Ziglar* test, which is determining whether any "special factors counselling hesitation" exist which would lead a court to conclude that in the particular case, Congress is better suited to create a damages remedy than a federal court is. *Ziglar*, 520 U.S. at 136 (internal citations omitted). The Supreme Court did not set forth a precise list of "special factors" but emphasized that this inquiry "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 136. The Court observed that the existence of an "alternative remedial structure" for addressing a plaintiff's claims may be a "special factor" which precludes a *Bivens* remedy. *See id.* at 137. The Court also emphasized that *Bivens* claims may only be asserted against an individual officer for his or her own acts – not the acts of others. *Id.* at 140. Further, a *Bivens* action is "not a proper vehicle for altering an entity's policy." *Id.* at 141 (citation omitted). In other words, *Bivens* claims cannot be used to challenge systemic problems – the focus is on the discrete acts of one or more individual actors that resulted in harm to the plaintiff. Since 2017, federal courts' application of *Ziglar*'s "new context" and "special factors" tests has severely limited the ability of plaintiffs to assert *Bivens* claims.

Then, in 2022, the Supreme Court decided *Egbert v. Boule*, 596 U.S. 482 (2022), which restricted plaintiffs' ability to assert *Bivens* claims even further. In *Egbert*, the Supreme Court declined to imply a *Bivens* remedy for a Fourth Amendment excessive force claim asserted by a United States citizens who alleged he was assaulted by a Customs and Border Patrol agent, despite the similarity of the case's facts with those in *Bivens*. *See Egbert*, 596 U.S. at 495. The Court also concluded that there is no *Bivens* remedy for retaliation under the First Amendment. *Id.* at 498-499. The Court also clarified that it was only *Bivens*, *Davis*, and *Carlson* that can be used in federal courts' "new context" analysis under *Ziglar* – federal courts cannot use Circuit Court precedent to make this determination. *Id.* at 490-492. With regard to the second prong of the *Ziglar* test, the Supreme Court stated that the existence of even one "special factor" is sufficient to preclude a *Bivens* claim. *See id.* at 498. The Court explained that the existence of an "alternative remedial structure" is a "special factor" that is, by itself, sufficient to preclude a *Bivens* remedy - even if the alternative remedy is not as effective as an individual damages remedy. *See id.* at 493, 498. *Egbert* also stressed that recognizing a *Bivens* claim should only be done by a court in the rarest of circumstances and that federal courts must refrain from creating damages remedies, because this power and responsibility belongs to Congress, not the courts. *Id.* at 491-492.

IV. After *Ziglar* and *Egbert* what are my options for bringing *Bivens* claims for damages against individual BOP staff members?

We can't mince words here: there are extremely limited circumstances, getting further limited all the time, in which a *Bivens* claim can be successfully asserted. Since *Ziglar* and *Egbert,* lower federal courts have found that a "new *Bivens* context" existed for nearly every type of claim brought by federal prisoners other than the claim asserted in *Carlson* - an Eighth Amendment denial of medical care claim. *See*, *e.g.*, *Kalu v. Spaulding*, 113 F.4th 311, 325 (3d Cir., 2024) (new context was presented by Eighth Amendment claim stemming from conditions of confinement and sexual assault by staff and special factors existed, making *Bivens* claim unavailable); *Marquez v. C. Rodriguez*, 81 F.4th 1027, 1036 (9th Cir. 2023) (same - pretrial detainee's Fifth Amendment failure to protect claim); *Bulger v. Hurwtiz*, 62 F.4th 127

(4th Cir. 2023) (same – Eighth Amendment failure to protect claim); *Tate v. Harmon*, 54 F.4th 839, 847-48 (4th Cir. 2022) (same – Eighth Amendment conditions of confinement); *Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022) (same - Eighth Amendment excessive force by staff); *Earle v. Shreves*, 990 F.3d 774 (4th Cir. 2021) (same - First Amendment retaliation by prison officials).

If a court concludes that a "new *Bivens* context" is presented by the plaintiff's allegations, it is almost certain that the court will also find that there are "special factors counselling hesitation" which preclude a *Bivens* remedy. In BOP cases, a frequently cited "special factor" is the BOP's administrative remedy program, which has been found to be an "alternative remedial structure" for addressing prisoners' claims, thereby making a *Bivens* remedy unnecessary. *See*, *e.g., Silva*, 45 F.4th at 1141. Courts have held that it does not matter whether the BOP's administrative remedy program provides adequate relief to the particular plaintiff. *See*, *e.g.*, *Tate*, 54 F.4th at 847 (the existence of an alternative remedial scheme prevents us from extending *Bivens*, even when that scheme does "not provide complete relief.") (quoting *Egbert*, 596 U.S. at 493)).

Eighth Amendment denial of medical care claims can still be brought under Bivens.

Because *Carlson v. Green* has not been overruled by the Supreme Court, federal prisoners can still bring denial of medical care claims against BOP employees for damages.[1] However, applying *Ziglar* and *Egbert*, many federal courts have further narrowed the scope of such claims. For example, following *Ziglar*, courts have found that a difference in the specific constitutional amendment involved makes the case a "new *Bivens* context" which weighs heavily against finding that a *Bivens* remedy exists. *See, e.g.*, *Johnson v. Terry*, 112 F.4th 995, 1013 (11th Cir. 2024) (pretrial detainee's medical care claim under the Fifth Amendment's Due Process clause was "meaningfully different" than the Eighth Amendment claim in *Carlson*, thereby presenting a "new *Bivens* context"); *Stanard v. Dy,* 88 F.4th 811, 818 (9th Cir. 2023) (Fifth Amendment claim based on denial of medical care when plaintiff was a pretrial detainee not permitted to proceed, but Eighth Amendment claim, arising after he was a convicted prisoner, was permitted under *Bivens*).

Further narrowing the scope of *Bivens* claims, some courts compare the severity of the medical mistreatment and alleged injuries to the mistreatment and injuries suffered by the prisoner in *Carlson* to determine if they are "meaningfully different" from *Carlson* such that a "new context" for *Bivens* existed. Using the facts of *Carlson* as the litmus test for whether there is a "meaningful difference" between the claims imposes an extremely high bar on plaintiffs, as *Carlson*'s allegations involved severe medical mistreatment resulting in death. *See Green v. Carlson*, 581 F.2d 669, 671 (7th Cir. 1978) (describing allegations). Consequently, such cases will usually result in a finding that a "new *Bivens* context" was presented and that a *Bivens* remedy should not be recognized. *See*, *e.g., Waltermeyer v. Hazlewood*, No. 24-1355, 2025 WL 1303838, at *4 (1st Cir. May 6, 2025) (defendants' alleged deliberate indifference in choosing to treat plaintiff's chronic knee pain non-surgically was meaningfully different from allegations in *Carlson* and therefore presented a "new context" for *Bivens* claims); *Rowland v. Matevousian*, 121 F. 4th 1237, 1243 (10th Cir. 2024) (prison officials' deliberate indifference towards plaintiff's hernia were materially different from the allegations in *Carlson* and therefore case presented a new *Bivens* context); *Vaughn v. Brown*, No. 7:22cv00178, 2025 WL 952392, at *4-5 (W.D. Va. Mar. 28, 2025) (plaintiff's facial and leg abrasions from guard assaults were not life-threatening, as were the injuries in *Carlson*, so no *Bivens* remedy could be implied).

Other courts have rejected this approach, reasoning that "a difference is 'meaningful' when it involves a factual distinction or a new legal issue that might alter the policy balance that initially justified the implied damages remedy in the *Bivens* trilogy." *See Brooks v. Richardson*, 131 F.4th 613, 616 (7th Cir. Mar. 14, 2025) (quoting *Snowden v. Henning*, 72 F.4th 237, 239 (7th Cir. 2023) (permitting *Bivens* claim based on denial of treatment for appendicitis). *See also Stanard*, 88 F.4th at 817 (holding that difference in the severity of deficient medical care is "not a meaningful difference giving rise to a new context" and permitting Eighth Amendment claim based on denial of medical care for Hepatitis C to proceed).

Based on the current state of the case law following *Egbert*, a medical care claim asserted under *Bivens* seems to have a better chance of being permitted to proceed if it focuses on the specific actions of individual defendants (as opposed to systemic issues or problems), the conduct complained about is egregious, and the resulting injury is very serious.

1 As mentioned in Bulletin 8.1 (Medical care), *Bivens* claims **cannot** be brought against Public Health Service (PHS) employees.

V. What alternatives are there to bringing a *Bivens* claim for monetary damages?

Depending on the facts of your case and the specifics of your incarceration (e.g., the state where your prison is located, the characteristics of the defendants and the immunities available for them to assert, whether your prison is privately operated or not, etc.), you may be able to bring one or more of the following types of claims:

1) a tort claim, such as a negligence claim, under the Federal Tort Claims Act (FTCA), based on the law of the state where the incident occurred. Note that there a number of important differences between an FTCA tort action and a *Bivens* action. (For more information on bringing an FTCA lawsuit, see Bulletin 1.5);

2) a direct constitutional claim under 28 U.S.C. § 1331, which provides that federal district courts have jurisdiction "over all civil actions arising under the Constitution, laws, or treaties of the United States" – injunctive or declaratory relief only – no monetary damages;

3) a claim (including claims based on a violation of the Constitution or a federal statute) under the Administrative Procedures Act (APA), including the provisions found in 5 U.S.C. §§ 701-706 – injunctive and declaratory relief only – no monetary damages;

4) a claim based on Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which protects individuals (including prisoners) from disability discrimination by the federal government;

5) a claim based on the Religious Freedom and Restoration Act (RFRA), 42 U.S.C. § 2000bb; or,

6) a claim (including a claim for monetary damages) against a private prison corporation or employee under state law (in state court)[2].

VI. It seems unfair that my constitutional claim for monetary relief cannot be brought simply because I am in federal custody, when I could bring such a claim if I were being held in state (or county) custody. Can anything be done about this?

We agree that this is an unfair situation, since your ability to bring a constitutional claim for monetary damages is being restricted solely based on the fact that you are in federal custody. In *Ziglar v. Abbasi* and the cases following it, the Supreme Court has repeatedly stated that in most cases Congress is "better suited" to "weigh the costs and benefits" of permitting a damages action to proceed against a federal employee. *See Ziglar*, 582 U.S. at 136. With this pronouncement, is clear that the Supreme Court is saying that the branch of government that needs to take action to create a damages remedy for a constitutional violation by a federal employee is the legislative branch – Congress.

Therefore, if you (or your family and friends) want to do something to try to change this situation, we suggest that you write to your Congressional representatives (in the U.S. House of Representatives and the U.S. Senate) to ask them to fix this problem by passing a law which affirmatively permits individuals to assert constitutional claims for monetary damages against individual federal government employees.

VII. Conclusion

We urge you to think carefully before you file a *Bivens* claim. Keep in mind that if you file a *Bivens* case and it is dismissed at an early stage of the proceedings, you will still be responsible for paying the entire filing fee. Moreover, the court could decide that the dismissal constitutes a "strike" under the "three strikes" provision of the Prison Litigation Reform Act (PLRA), which will impact your ability to proceed *in forma pauperis* in any subsequent lawsuit.

2 Unlike employees of a private corporation, federal government employees have absolute immunity from state law tort claims for their negligent or wrongful acts committed in the course of their official duties. *See* 28 U.S.C. § 2679 (b)(1) ("The Westfall Act"). If you attempt to assert a state law tort claim against a federal government employee in state court, under the Westfall Act, that action will usually be removed to federal court and converted to an FTCA action against the United States. *See id.* at § 2679 (d)(1)-(2).