

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-22574-CIV-MARTINEZ/BROWN

AISHA GOODISON,

Plaintiff,

vs.

ROBERT S. MUELLER, FEDERAL BUREAU  
OF INVESTIGATION, DEPARTMENT OF JUSTICE,

Defendants.

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**DEFENDANTS' MOTION TO DISMISS**  
**PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendants, Robert S. Mueller and the Department of Justice ("DOJ"), and its component, Federal Bureau of Investigation ("FBI"), by and through the undersigned Assistant U.S. Attorney, respectfully move to dismiss plaintiff's First Amended Complaint and state:<sup>1</sup>

Plaintiff's First Amended Complaint suffers from the same inadequacies as the original and should be dismissed for the same reasons: failure to comply with FED. R. CIV. P. 8(a), lack of subject-matter jurisdiction, and failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 8(a), 12(b)(6), and 12(b)(1).

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<sup>1</sup> Upon receipt of defendants' motion to dismiss, plaintiff filed an Opposition in response to defendants' motion to dismiss [D.E. 13] as well as a First Amended Complaint [D.E. 14]. Defendants will address herein some of the arguments and assertions raised by plaintiff in her Opposition since defendants anticipate that plaintiff will raise the same or similar arguments and assertions in response to this motion.

**Plaintiff's First Amended Complaint should be dismissed because it fails to comply with FED. R. CIV. P. 8(a).**

Plaintiff's First Amended Complaint fails to comply with FED. R. CIV. P. 8(a)(1) and (a)(2).

FED. R. CIV. P. 8(a)(1) requires a pleading to contain "a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support."

For jurisdictional purposes, plaintiff's First Amended Complaint asserts that plaintiff is bring an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (First Am. Compl. ¶¶ 9-10) and also raising a claim under the "Civil Rights Act of 1964" for denial of "equal access to law enforcement services." See First Am. Compl. ¶¶ 43, 87-88; see also plaintiff's Opposition ¶¶ 26-47 [D.E. 13]. Plaintiff cites to no provision of the Civil Rights Act of 1964 which provides her a right of "equal access to law enforcement services" of a federal agency or entitles her to bring an action under the Civil Rights Act of 1964 against any of the defendants.

Plaintiff also contends, incorrectly, that there is diversity jurisdiction. First Am. Compl. ¶ 88. Suits against the United States, either directly or through its agencies or officials, do not fall into any of the categories of civil actions of which the Court would have jurisdiction based upon diversity of citizenship under 28 U.S.C. § 1332. See 28 U.S.C. § 1332(a).

Plaintiff has not alleged any applicable jurisdictional basis for her claims other than FOIA. To the extent that her First Amended Complaint, like the original complaint, alleges non-FOIA claims and seeks punitive and compensatory damages, there is not jurisdictional basis for such claims and the damages she is seeking are not available under FOIA's jurisdictional provision, 5 U.S.C. § 552(a)(4)(B).

FED. R. CIV. P. 8(a)(2) requires that a pleading contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” See *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009); *Magluta v. Samples*, 256 F.3d 1282, 1284 & n.3 (11<sup>th</sup> Cir. 2001).

Plaintiff’s First Amended Complaint, while shorter than her original complaint, fails to state a claim showing that plaintiff is entitled to relief.

Plaintiff argues in her Opposition to defendant’s motion to dismiss her original complaint [D.E. 14] that the Court must view all of the facts of the Complaint in the light most favorable to the plaintiff. However, as indicated by the Supreme Court in *Iqbal*, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S.Ct. at 1949, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(for purposes of a motion to dismiss the court must take all of the factual allegations in the complaint as true but is “not bound to accept as true a legal conclusion couched as a factual allegation”).

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.’” *Iqbal*, 129 S.Ct. at 1949, citing *Twombly*, 550 U.S. at 570. “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.” *Iqbal*, 129 S.Ct. at 1949, citing *Twombly*, 550 U.S. at 556.

Plaintiff’s First Amended Complaint falls short of the pleading standards set forth in *Iqbal* and *Twombly*. Plaintiff’s conclusory allegations of law are not entitled to be taken as true, and plaintiff has failed to plead facts sufficient for the Court to draw a reasonable inference that plaintiff

is entitled to relief against defendants under any statutory or constitutional provision.

**Plaintiff's First Amended Complaint should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) because it fails to state a claim upon which relief can be granted.**

Plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted under FOIA. The First Amended Complaint, like the original complaint, contains the conclusory assertion that plaintiff exhausted her administrative remedies (First Am. Compl. ¶ 11) but fails to identify any specific FOIA request made by plaintiff for any specific records, or any specific denial of such a request or agency action upon administrative appeal. Instead, plaintiff makes broad assertions, such as the assertion that "[o]ver the past few years" defendants have sent her denial notices (First Am. Compl. ¶ 12).<sup>2</sup> Plaintiff's allegations do not provide sufficient information to identify either the FOIA request or requests which are the subject of this action or the agency decisions which plaintiff is asserting constituted improper withholding of records. As discussed in defendants' motion to dismiss plaintiff's original complaint, exhaustion of administrative remedies is a condition precedent to bringing a FOIA action. *Taylor v. Appleton*, 30 F.3d 1365, 1367-68 (11<sup>th</sup> Cir. 1994). Plaintiff's unspecific allegations are insufficient to establish that she exhausted her administrative remedies as to any records she is seeking. Therefore, plaintiff's First Amended Complaint fails to state a claim under FOIA.

In addition to her FOIA claim, plaintiff claims that defendants violated the Fourth Amendment (First Am. Compl. ¶¶ 29-41 ) and the "Civil Rights Act of 1964" (First Am. Compl. ¶¶ 42-64).

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<sup>2</sup> Similarly, plaintiff asserts in her Opposition that she exhausted her administrative remedies as to a request she made "years ago." See Plaintiff's Opposition, ¶¶ 48, 49, 50 [D.E. 13].

As indicated in defendants' motion to dismiss plaintiff's original complaint, plaintiff cannot bring an action for alleged constitutional violations against an agency of the United States, or an action against an employee in his official capacity which is, in essence, against the United States, because the United States has not waived its sovereign immunity to allow such actions. See Defendants' Motion to Dismiss, pp. 7-9 [D.E. 12].

Moreover, actions for civil damages can be brought against federal employees in their personal capacity only if their conduct violated "clearly established statutory or constitutional rights." See *Iqbal*, 129 S.Ct. at 1946-47, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Plaintiff's First Amended Complaint, like her original complaint, fails to state a claim of violation of "clearly established statutory or constitutional rights" by defendant Mueller.<sup>3</sup>

Plaintiff alleges that defendant Mueller, as Director of the FBI, engaged in "warrantless wiretapping, email scanning and CIPA V usage." First Am. Compl. ¶31. She bases this conclusory assertion upon information she contends is available to her through the media and Inspector General audit reports. First Am. Compl. ¶¶32-36. There are no factual allegations which would explain how this alleged unspecified information pertains to plaintiff's claim or allow the Court to draw a reasonable inference that the defendant Mueller engaged in any conduct with regard to plaintiff that violated "clearly established statutory or constitutional rights."<sup>4</sup> Plaintiff's conclusory allegations

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<sup>3</sup> Unless the alleged conduct is shocking to the conscience courts generally will not create *Bivens* actions against federal agency officials based upon discretionary agency decisions made in the administration of their duties. See *Benzman v. Whitman*, 523 F.3d 119, 126-29 (2<sup>nd</sup> Cir. 2008); *Lomabardi v. Whitman*, 485 F.3d 73, 84-85 (2<sup>nd</sup> Cir. 2007).

<sup>4</sup> Plaintiff does allege that two FBI employees "viciously threatened" her, but neither of these individual is named as a defendant and plaintiff does not allege any conduct by any FBI employee which reasonably constituted a threat to her. See First Am. Compl.¶48. It appears, from plaintiff's Opposition to defendants' motion to dismiss, that the "threat" was a

against Mueller are founded upon unwarranted deductions which are insufficient to support a plausible claim. *See Iqbal*, 129 U.S. at 1949-50; *see also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11<sup>th</sup> Cir. 2009)(“unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of the allegations”and “the facts as pled must state a claim for relief that is plausible on its face”)(citations omitted).

Plaintiff’s First Amended Complaint also fails to state a claim against any of the defendants under the Civil Rights Act of 1964. As indicated above, plaintiff is contending that defendants denied her “equal access to law enforcement services,” but she cites no provision of the Civil Rights Act of 1964 which provides her a right of “equal access to law enforcement services” of a federal agency and no provision which constitutes a waiver of sovereign immunity by the United States for her to bring an action against a federal agency or official for violation of such a right. Thus, she has not stated a claim under the Civil Rights Act of 1964.<sup>5</sup>

**Plaintiff’s First Amended Complaint should be dismissed pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction.**

Even if plaintiff were able to state a claim under FOIA, the only proper defendant in the

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phone call in which an FBI employee allegedly told plaintiff that an FBI agent was “very angry” with her. See Plaintiff’s Opposition, ¶¶ 27, 51 [D.E. 13].

<sup>5</sup> Section 2000a, 42 U.S.C., provides a right to “full and equal enjoyment of goods, services,...of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” See 42 U.S.C. § 2000a(a). However, a federal agency do not fall within the definition of covered establishment or “place of public accommodation” as set forth at 42 U.S.C. § 2000a(b). Thus, this provision is inapplicable to federal defendants. Further, 42 U.S.C. § 2000a-6, which provides jurisdiction to bring a proceeding in a United States district court for violation of rights provided by 42 U.S.C. § 2000a, does not constitute a waiver of sovereign immunity to bring such an action against any of the federal defendants See 42 U.S.C. § 2000a-6.

action would be the Department of Justice. See 5 U.S.C. § 552(a)(4)(B); *Trupei v. Drug Enforcement Agency*, No. 06-1162, 2007 WL 1238867, at \*1 n.1 (D.D.C. Apr. 27, 2007); *Pri-Har v. Dep't of Justice*, No. 04-1448, 2005 WL 3273550, at \*1 n.1 (D.D.C. Sept. 27, 2005); *Brooks v. Bureau of Prisons*, No. 04-0055, 2005 WL 623229, at \*2 (D.D.C. Mar. 17, 2005). There is no subject-matter jurisdiction of any FOIA claim brought against the FBI or Mueller.

Further, absent a waiver of sovereign immunity, there is no subject-matter jurisdiction of any non-FOIA claims plaintiff may be attempting to raise against DOJ, the FBI, or Mueller in his official capacity. See Defendants' Motion to Dismiss, pp. 7-8 [D.E.12]. A waiver of sovereign immunity must be "unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); see also *City of Jacksonville v. Dep't of the Navy*, 348 F.3d 1307, 1314 (11<sup>th</sup> Cir. 2003).

Plaintiff has failed to allege a statutory waiver of sovereign immunity which would allow her to bring any non-FOIA claims, including any claims under the Civil Rights Act of 1964, against defendants DOJ, the FBI, or Mueller in his official capacity. Therefore, any such claims should be dismissed for lack of subject-matter jurisdiction.

#### **Conclusion**

For the foregoing reasons defendants respectfully request that the Court dismiss plaintiff's First Amended Complaint.

Dated: December 7, 2009  
Miami, Florida

Respectfully submitted,

JEFFREY H. SLOMAN  
ACTING UNITED STATES ATTORNEY

By: s/ Carole M. Fernandez  
CAROLE M. FERNANDEZ  
Assistant U.S. Attorney  
Assigned No. A5500016  
E-mail: Carole.Fernandez@usdoj.gov  
99 N.E. 4th Street, Suite 300  
Miami, Florida 33132  
Tel: (305) 961-9333  
Fax: (305) 530-7139  
*Counsel for federal defendants*

**Certificate of Service**

I HEREBY CERTIFY that, on December 7, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and served a true and correct copy of the foregoing document by U.S. mail to:

Aisha Goodison  
P.O. Box 11375  
Miami, Florida 33101  
*Plaintiff, pro se*

s/ Carole M. Fernandez  
CAROLE M. FERNANDEZ  
Assistant U.S. Attorney