

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert Boule v. Erik Egbert

Boule v. Egbert, 980 F.3d 1309 (9th Cir. 2020) · No. 18-35789 · Decided May 20, 2021

SUMMARY

The Ninth Circuit held that a U.S. citizen may bring Bivens claims against a Border Patrol agent for Fourth Amendment excessive force and First Amendment retaliation arising from an incident on the plaintiff's property near the U.S.-Canada border. The court found that although the claims arose in new contexts (border patrol rather than FBI, and First Amendment retaliation), no special factors counseled hesitation because the plaintiff was a citizen on his own property, the excessive force claim was conventional, and the retaliation was unrelated to official duties. The court rejected arguments that alternative remedies under the FTCA, state trespass law, or injunctive relief were adequate to preclude Bivens. Dissenting judges argued the panel improperly extended Bivens against Supreme Court precedent and separation-of-powers principles.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	William A. Fletcher; Susan P. Graber; Nancy D. Freudenthal
JURISDICTION	Federal
DECIDED	May 20, 2021
DOCKET	18-35789
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from grant of summary judgment
STANDARD OF REVIEW	de novo
PRECEDENTIAL VALUE	Published
PARTIES	Robert Boule v. Erik Egbert; Jane Doe Egbert

TOPICS

- civil rights
- fourth amendment
- first amendment
- constitutional law
- remedies
- damages
- summary judgment
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether a Bivens damages remedy is available for a Fourth Amendment excessive force claim against a border patrol agent acting on the plaintiff's property within the United States.
2. Whether a Bivens damages remedy is available for a First Amendment retaliation claim against a border patrol agent for retaliatory conduct unrelated to his official duties.

HOLDINGS

1. The Fourth Amendment excessive force claim is cognizable under Bivens even though it arises in a new context (border patrol agent rather than FBI agent) because it is a modest extension and no special factors counsel hesitation. Boule is a U.S. citizen claiming excessive force on his own property, far from the national security contexts in *Abbasi* and *Hernandez*.
2. The First Amendment retaliation claim is cognizable under Bivens. Although the Supreme Court has never expressly so held, dicta in *Hartman v. Moore* indicates that such a claim may be brought. The court found no special factors because the retaliation was unrelated to official duties and there are no adequate alternative remedies.

KEY QUOTATIONS

“This context is a far cry from the contexts in Abbasi and Hernandez, where the Court found that special factors counseled against a Bivens action.” (at 37)

“When the vengeful officer is federal, he is subject to an action for damages on the authority of Bivens.” (at 42)

“We conclude that Bivens remedies are available in the circumstances of this case, where a United States citizen claims that a border patrol agent violated the Fourth Amendment by using excessive force while carrying out official duties within the United States, and violated the First Amendment by engaging in retaliation entirely unconnected to his official duties.” (at 47)

FACTUAL BACKGROUND

Robert Boule is a U.S. citizen who owns and operates a bed and breakfast inn in Blaine, Washington, on the U.S.-Canada border. He was a paid informant for the Border Patrol. On March 20, 2014, Border Patrol Agent Erik Egbert stopped Boule and asked about guests. Boule told Egbert that a Turkish national was arriving from New York. Later, Egbert followed the car carrying the guest into Boule's driveway. Boule asked Egbert to leave, and when Egbert refused, Boule stepped between Egbert and the car. Egbert shoved Boule against the car and then pushed him to the ground. Boule suffered injuries. After Boule complained to Egbert's superiors, Egbert retaliated by contacting the IRS, Social Security Administration, Washington State Department of Licensing, and Whatcom County Assessor's Office to request investigations of Boule.

PROCEDURAL HISTORY

The district court granted summary judgment to defendants on plaintiff's Fourth and First Amendment Bivens claims, holding that they were impermissible extensions of Bivens. Plaintiff appealed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

for further proceedings consistent with this opinion

CASES CITED

- Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)
- Davis v. Passman, 442 U.S. 228 (1979)
- Carlson v. Green, 446 U.S. 14 (1980)
- Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)
- Hernandez v. Mesa, 140 S. Ct. 735 (2020)
- Hartman v. Moore, 547 U.S. 250 (2006)
- Bush v. Lucas, 462 U.S. 367 (1983)
- Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986)
- Lanuza v. Love, 899 F.3d 1019 (9th Cir. 2018)
- Reichle v. Howards, 566 U.S. 658 (2012)
- Crawford-El v. Britton, 523 U.S. 574 (1998)
- Tolan v. Cotton, 572 U.S. 650 (2014)
- Brunozzi v. Cable Commc'ns, Inc., 851 F.3d 990 (9th Cir. 2017)
- Ganek v. Leibowitz, 874 F.3d 73 (2d Cir. 2017)
- Soto-Torres v. Fraticelli, 654 F.3d 153 (1st Cir. 2011)
- Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997)
- Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015)
- Chavez v. United States, 683 F.3d 1102 (9th Cir. 2012)
- Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006)
- Fazaga v. Federal Bureau of Investigation, 965 F.3d 1015 (9th Cir. 2020)
- Vega v. United States, 881 F.3d 1146 (9th Cir. 2018)
- Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018)
- Hui v. Castaneda, 559 U.S. 799 (2010)