

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12855
Non-Argument Calendar

D.C. Docket No. 1:20-cv-01549-MHC

IRAN DWAYNE KETCHUP,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(May 26, 2021)

Before GRANT, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

In April 2020, Iran Dwayne Ketchup, at the time incarcerated in the United States Penitentiary in Atlanta, filed a six-count complaint in federal district court. That complaint named only the United States as a defendant, and alleged that through its agents the United States both knew that the facility's drinking water contained dangerous levels of arsenic and other substances and allowed Ketchup to drink the water without alerting him. So Ketchup alleged that he was poisoned, that the United States was deliberately indifferent, that the United States committed fraud, and that he had suffered "pain and suffering of body" and "mind." He brought these claims under the Federal Torts Claims Act (FTCA) and as constitutional violations under the Supreme Court's *Bivens* precedent.

The magistrate judge recommended dismissing Ketchup's complaint under 28 U.S.C. § 1915A. That statute provides that the court shall dismiss a complaint if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted." First, the magistrate judge determined that there could be no *Bivens* action here, because such actions can only be filed against individual defendants and Ketchup included only the United States as a defendant. Second, the magistrate judge recommended dismissing the FTCA claim for failure to allege injury. The magistrate report read Ketchup's complaint as saying only that the arsenic "will cause him health problems in the 'past present and future'" and that Ketchup "has been poisoned by Arsenic." The magistrate judge also noted that the FTCA and the Prison Litigation Reform Act require a showing of physical injury in order to bring an action for mental or emotional injury. Ketchup objected to the report and recommendation, but the district court adopted it and found that

Ketchup “failed to allege that he has an existing medical condition or injury as a result of his exposure to any of the chemicals that he alleges are (or were) in the drinking water at the prison.” The district court dismissed Ketchup’s complaint as frivolous, prompting this appeal.

We review a district court’s sua sponte dismissal of a complaint as frivolous for abuse of discretion. *White v. Lemma*, 947 F.3d 1373, 1379 n.8 (11th Cir. 2020). “A claim is frivolous if and only if it lacks an arguable basis either in law or in fact.” *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (internal quotation marks omitted). The district court was right to dismiss Ketchup’s *Bivens* claims; as we have said, those claims cannot be brought against the United States as a defendant. *See United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1339–40 (11th Cir. 2001).

The district court erred, however, when it found that Ketchup did not allege physical injury to support his FTCA claim. “A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss.” *Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016). Here, Ketchup attached his administrative claim to his complaint as an exhibit. And in that exhibit, he stated that he experienced a wide range of physical symptoms: “immunological problems,” “neurological (nervous system) problems,” “diarrhea,” “[dermatitis],” “nausea,” “nosebleed,” “digestive disorders,” “skin inflammation,” “skin irritation,” “reddening of the skin,” “abdominal pain,” and so forth. So when the district court found that Ketchup “failed to allege” injury, that was error. And

because that is the only apparent reason the district court gives for dismissing Ketchup's complaint, that is reversible error.

We make no findings of whether any of Ketchup's allegations in his complaint are true. The only question we have to consider on this appeal is whether Ketchup alleged physical injury. He did, so to the extent the district court's finding of frivolity for his FTCA claim was based on his failure to allege physical injury, it was in error. **REVERSED IN PART AND REMANDED.**