

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

GARY R. WALL :
 :
 v. : Case No.: 3:09cv1066 (DJS)
 :
 THE UNITED STATES DEPARTMENT :
 OF JUSTICE U.S. ATTORNEY'S :
 OFFICE NEW HAVEN, CONNECTICUT; :
 DISTRICT JUDGE JANET C. HALL; :
 UNKNOWN LAW CLERKS; CIRCUIT :
 JUDGE SONIA SOTOMAYOR; and :
 CONGRESSMAN JOHN LARSON :

OBJECTION TO PLAINTIFFS "RED FLAG
F.R.C.P. 65(a)(2) BIVENS INJUNCTION"

I. Preliminary Statement

On July 6, 2009, plaintiff filed a Complaint against the United States Attorney's Office New Haven; the Honorable Janet C. Hall; the Honorable Sonia Sotomayor; unnamed law clerks; and Congressman John Larson, seeking equitable relief, the exact form of which is unclear. On July 28, 2009, the United States moved to intervene on behalf of Judge Hall, Justice Sotomayor, and the unnamed law clerks and moved to dismiss the complaint. The United States also moved to extend the answer deadline until sixty (60) days after a decision on the motion to dismiss was granted. This motion to extend was granted on November 17, 2009.

Instead of waiting for a ruling on the motion to dismiss, the plaintiff has now filed a "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction." While the United States is unsure what a "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction" is, the United States objects to this most recent filing for the reasons stated below.

B. Factual Background

By way of background, this case seems to stem from the decisions rendered in plaintiff's numerous lawsuits and/or appeals in the District Court and the United States Court of Appeals for the Second Circuit.¹ It is unclear from this "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction" what facts from this protracted prior litigation form the basis of this motion, or

¹ Plaintiff's appellate case history includes: *Wall v. Constr. & Gen. Laborer's Union, Local 203*, 224 F.3d 168 (2d Cir. 2000); *Wall v. Roman*, 18 Fed. Appx. 41, 2007 WL 1019499 (2d Cir. 2001); *Wall v. Constr. & Gen. Laborer's Union, Local 230*, 18 Fed. Appx. 44, 2001 WL 1019822 (2d Cir. 2001); *Wall v. Constr. & Gen. Laborer's Union, Local 230*, 80 Fed. Appx. 714 (2d Cir. 2003); *In re Gary Wall*, 93 Fed. Appx. 332 (2d Cir. 2004); *Wall v. Union of NA, Laborers' Int'l.*, 276 Fed. Appx. 68, 2008 WL 1931216 (2d Cir. 2008); *Wall v. Constr. & Gen. Laborer's Union, Local 230*, 2009 WL 230122 (2d Cir. 2009).

Plaintiff's district court case history includes: *Wall v. Laborer's Local 230*, 3:97cv942 (JCH); *Wall v. Cheverie*, 3:97cv2502 (JCH); *Wall v. Executive Office for United States Attorneys, et al*, 3:09cv344 (JCH); *Wall v. Union of NA, et al*, 3:04cv91 (WWE).

even this lawsuit. However, in 2000, the United States Court of Appeals for the Second Circuit outlined the factual history of plaintiff's claims as alleged by plaintiff's then counsel. These facts, as stated by the Second Circuit, are very detailed and provide some background and context for the allegations set forth in the current complaint. The Second Circuit opinion from 2000 sets forth the following Statement of Facts:

" a) Lapse in Union Membership and Initial Readmission Efforts

Wall and Cooksey were both long-time members of Local 230, one of several local unions affiliated with the Laborers' International Union of North America ("LIUNA"). By or about 1985, appellants had become dissidents clashing with the Union leadership, including appellees Lopreato, Pezzente, and LeConche. Believing they were being singled out for discriminatory treatment, appellants brought unfair labor practice charges against the Union before the NLRB. The NLRB found that the Union removed Wall as shop steward in November 1985 in retaliation for refusing to follow directions involving the "shake down" of laborers for money. The NLRB also found that the Union had discriminated against both Wall and Cooksey in the Union's hiring hall referral system in retaliation for their opposition to Union

management. The NLRB ordered the Union to make appellants whole for lost earnings suffered as a result of its discriminatory conduct.

In July 1990, Cooksey could not get work and stopped paying union dues. In January 1992, the unfair labor practice proceeding was settled with appellants' consent. Wall stopped paying union dues in February 1992, intending to dissociate from the Union. Disputes later arose, however, with respect to the effect of the settlement on Wall's and Cooksey's pension credits. Appellants contended that they were misled as to what they would receive.

Appellants apparently came to believe that their pension benefits might be enhanced if they renewed their membership in the Union. Cooksey first requested readmission to the Union in a letter dated April 24, 1992, to which he attached a check for \$351.00. The Union responded on April 28, 1992 that there was no work available and that it was the Union's policy not to "initiate or reinstate" members absent work opportunities. The letter suggested that Cooksey "defer [his] application of reinstatement until [he] bec[a]me employed" and returned the \$351.00 check. The letter said nothing about a one-year limitation on readmission.

In August 1993, Wall wrote to the Union to learn the amount of dues owed on his "book," a term synonymous for our purposes with union membership. The Union responded in a letter dated August 25, 1993, titled "Readmission to Local Union 230." The letter stated that, because Wall had been delinquent in the payment of his dues "in excess of one (1) year, [he was] not eligible for a readmission on [his] previous book but must be reinitiated as a new member, subject to payment of the initiation fee." The letter also stated that it was the Union's policy not to accept new members except where there are work opportunities "or where the applicant is working at the calling." The letter closed by explaining that

Presently, there are no significant referral opportunities in the jurisdiction. However, should you wish to sign the list for referral if and when such an opportunity should arise, you are free to do so. Upon your referral or employment at the calling, you will be considered eligible for membership, subject to payment of all required fees.

Thereafter, both appellants sought work through the local's hiring hall, as suggested by the Union's letters.

b) Readmission Efforts from 1995-1997

On February 13, 1995, LIUNA entered into an agreement with the United States Department of Justice. At or about this time, appellants retained an attorney, Marc P. Mercier. Mercier

suggested that appellants seek readmission through procedures established in the new agreement before filing suit. Both men thereafter sent letters to the Union again requesting readmission. Cooksey sent a letter dated March 1, 1995, "requesting to be readmitted" and noting that this was his "second request." The Union responded in a letter dated March 7, 1995:

[I]t is and has been the policy of Local Union 230 to take no new initiations or readmissions unless and until there is a job to which the applicant can be referred or unless the applicant has a position in covered employment. Regrettably, there is no work now available on a referral basis. However, you may register for referral at any time and will be referred to work in accordance with our existing referral system as vacancies may occur.

In a letter dated April 24, 1995, Wall also "request[ed] to be readmitted," referring specifically to his right to readmission under LIUNA's constitution. The Union responded on April 26, 1995, stating that Wall had "been advised previously that it is and has been the policy of Local Union 230 to take no new initiations or readmissions unless and until there is a job to which the applicant can be referred to unless the applicant has a position in covered employment." Neither response by the Union mentioned anything about a one-year rule.

In December 1995, several months after these rejections, the

Union barred appellants from signing the referral list. Appellants immediately complained to Michael S. Bearse, LIUNA's General Counsel, and, with Mercier's aid, were once again allowed to sign the referral list. Wall also wrote to the Union and asked, among other things, whether he could "interpret the meaning of being registered on Local Union 230 out of work list as meaning [the Union] will now allow us to exercise our rights to readmission. If so please tell me the amount of money needed and I will send it to you immediately." On January 5, 1996, LeConche responded to Wall's inquiry regarding readmission, stating that "it is my opinion that you may be a barred individual within the meaning of the LIUNA Ethics Code. Therefore, I will be referring this matter to the Inspector General's Office." On April 9, 1996, the Union's attorney, Robert M. Cheverie, wrote a letter to the Inspector General conveying his legal opinion that Wall and Cooksey were "barred persons."

During this time period, LIUNA's General Executive Board ("GEB") attorney, Robert D. Luskin, investigated appellants' complaint concerning their right to readmission into the Union. On June 26, 1996, Luskin wrote Cheverie and noted that he had read Cheverie's April 9, 1996 letter. However, Luskin stated

that he believed Cheverie's position to be untenable. Luskin noted that he "understand[s] Local 230's current position ... to be that ... re-initiation has been denied 'solely' on account of your conclusion that [Wall and Cooksey] have engaged in 'barred conduct.'" Luskin explained:

Any person may lodge a complaint with the Inspector General. However, no person may be denied membership in LIUNA, or have his membership rights limited or withdrawn, unless he or she has been charged by the GEB Attorney and has been afforded the due process rights guaranteed by the Ethics and Disciplinary Procedure.

Luskin further informed Cheverie that the Union "may not deny re-initiation to Messrs. Cooksey and Wall on the basis that you have articulated. [And i]n light of the fact that this is the sole basis on which their right to re-initiation has been denied, Local 230 should be advised to permit them promptly to exercise their right to re-initiate." The Union did not, however, take any steps to permit Wall and Cooksey "promptly to exercise their right" to readmission.

Several days later, on July 1, 1996, Wall was finally referred for work. When Wall reported to the work site, he asked the union steward to call Local 230 to inform the Union that he had reported to work and that he was requesting a book. The union steward informed Wall that the Union would not permit him

to buy a book. Membership was thus denied to Wall.

On July 16, 1996, Luskin wrote Cheverie another letter in which Luskin noted that he had been told that Local 230 "was not relying solely on ... [the alleged] 'barred conduct' as the basis for refusing [appellants'] readmission as members. Rather, [the Union also] believed that a local union member who voluntarily permitted his membership to lapse was not entitled to re-admission as a matter of right." Luskin stated that the position "represents a change from the position previously asserted" by the Union,

namely, that any person, whether or not a member of the union, may participate in the job referral list operated by Local 230, but, so long as members are out of work, no person will be re-initiated or initiated until he is dispatched or otherwise obtains a job with a covered employer. In reliance on this position, we anticipated that if Mr. Cooksey or Mr. Wall secured a job with a covered employer or were dispatched by the local, they could then exercise their right to re-initiate.

Luskin also informed Cheverie that the "current position is at odds with the plain language of Article III, Section 2(e) of the [LIUNA] [c]onstitution, which guarantees to each member the right '[t]o readmission.'" He stated that a "local union simply does not have discretion absolutely to refuse a request for re-admission. This is especially true in light of the additional change in local policy to refuse to permit non-members to have

their names placed on the out of work list." Accordingly, Luskin "directed [Local 230] to permit Messrs. Cooksey and Wall, if they choose, to exercise their right to readmission." Luskin so notified Mercier in a letter dated July 24, 1996.

Nevertheless, the Union did not readmit Wall and Cooksey. Rather, Bearnse wrote Luskin in October 1996 and took the position that Cooksey had no constitutional right to readmission because a year had passed following a lapse in dues. Luskin appears then to have taken the matter under prolonged reconsideration.

On May 15, 1997, Wall and Cooksey, represented by Mercier, filed the present action against the Union and its officers. On September 10, 1997, Luskin reversed his position as to appellants' right to readmission, stating:

Since the issuance of the [July 16, 1996] letter ..., I have been made aware of LIUNA's long standing interpretation of Article III, Section 2(e) and Article VIII, Section 6 of its Constitution.... Upon review of LIUNA's long established interpretation and application of its Constitutionally based readmission right, I concur that the readmission right afforded members of LIUNA must be exercised within twelve (12) months of a member's dues delinquency, except where there is evidence that such delay was the result of conduct prohibited by the LIUNA Ethical Practices Code, the LIUNA Ethics and Disciplinary Procedure, or the LIUNA Constitutions.

c) Post-Suit Proceedings

Appellants asserted three claims in their complaint. First,

they claimed that the Union violated Sections 101 and 609 of the LMRDA, 29 U.S.C. §§ 411, 529, because it: (i) refused to admit or readmit them into Local 230; (ii) refused and/or interfered with their ability to obtain employment; (iii) refused to provide them with rights afforded to other Local 230 members; and (iv) unlawfully disciplined them. Second, appellants claimed that they were "wrongfully terminated, constructively terminated and/or refused employment," in violation of Conn. Gen. Stat. § 31-51. Finally, they claimed that the Union "tortiously interfered" with their "employment and/or reasonable expectations of employment."

The Union's answer, filed in September 1997, asserted that all three claims were time-barred and that the state law claims were preempted by federal law. After answering, the Union moved, *inter alia*, for summary judgment on limitations grounds. The district court granted appellants an extension of time to respond to the motion and to conduct limited discovery. In December 1997, Mercier moved to withdraw as appellants' counsel. The district court granted the motion, and appellants proceeded *pro se* from that point until they retained new counsel on appeal.

The district court issued an interim ruling following oral argument, in which it concluded that "further submission by the [appellants] would assist the court." Thereafter both parties

filed numerous additional documents with the court. In May 1999, the district court dismissed the complaint.

The district court concluded that the LMRDA claim was barred because Cooksey and Wall failed to file suit within three years from the date the Union first denied their requests for readmission in 1992 and 1993, respectively. The district court rejected appellants' claims that the Union's conduct constituted a "continuing violation," Wall at 5-6, and that the statute of limitations had been tolled.

As to the state law claims, the district court first decided to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367. See Wall at 10. It nevertheless dismissed the claims on the ground that Section 301 of the LMRA, 29 U.S.C. § 185, preempts claims that are "inextricably intertwined with consideration of the terms of [a] labor contract," id. at 11 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985)), and both state law claims were considered to be "'inextricably intertwined' with interpretation of the Union's Constitution," id. at 11-12. "

Wall v. Constr. & Gen. Laborers' Union, Local 230, 224 F.3d 168 (2d Cir. 2000) (footnotes omitted).

The Second Circuit affirmed in part and reversed in part. It affirmed the dismissal of the state law claims but reversed the grant of summary judgment on the limitations grounds.

In the August 31, 2004, Ruling on the Union's re-newed motion for summary judgment, the Court granted summary judgment in favor of the defendants on two factual predicates made by Wall in support of his LMRDA retaliation claim but denied summary judgment on a third predicate. "In particular, the Court found that the genuine issues of material fact existed with regard to Wall's standing to bring suit under the LMRDA and the retaliation claim based on the denial of Wall's readmission rights, but dismissed Wall's LMRDA claims based on the 'pension' and 'unsafe work environment' schemes that had been identified in Wall's Complaint." *Id.* (citing *Wall v. Constr. & Gen. Laborers' Union, Local 230*, 3:97cv942 (JCH), Docket #245, pp. 14-15, 17-18). A four-day trial was held in November of 2005, and the jury returned a verdict for defendants.² Wall moved for a new trial, which was denied; he appealed; and the denial was affirmed on appeal. *Wall v. Constr. & Gen. Laborers' Union, Local 230*, 2009

² Defendants' motion in limine to preclude mention of the "pension scheme" theory in the original complaint was granted as that claim had been dismissed on summary judgment.

WL 230122 (2d Cir. Feb. 2, 2009).

In 1998, Wall also filed a complaint against LIUNA and its officers alleging that those defendants violated various provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") by failing to fully fund his pension and by denying him admission in the union. In July of 2000, the district court granted the defendants' motion to dismiss, and the Second Circuit affirmed this dismissal. *Wall v. Roman*, 18 Fed. Appx. 41 (2d Cir. 2001).

In 2004, Wall filed another civil RICO complaint against LIUNA, Local 230, and various officials. *Wall v. Union of NA*, 3:04cv91 (WVE). Defendants filed separate motions to dismiss arguing that plaintiff's claims were barred by collateral estoppel. The district court granted the defendants' motions to dismiss, and the Second Circuit affirmed these dismissals. *Wall v. Union of NA*, 276 Fed. Appx. 68 (2d Cir. 2008).

C. Plaintiff's Current Filing - the "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction

It is unclear from the current filing exactly what relief plaintiff is seeking. In fact, the seventeen (17) page, rambling dissertation in support of plaintiff's "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction" is patently unclear and contains

multiple, unfounded allegations. Additionally, in support of the "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction," plaintiff has not attached any relevant material and, instead, has only attached copies of affidavits from 1999 and 2004.

To the extent plaintiff is suing any of the defendants in their official capacities, plaintiff has failed to satisfy his burden of establishing that this Court has jurisdiction over his claims. In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court created a cause of action against federal agents in their individual capacities for money damages as a result of violations of the Fourth Amendment. The *Bivens* Court, however, did not authorize such suits against either federal officials acting in their official capacities, federal agencies, or the United States, and they retain their immunity from such claims. See *F.D.I.C. v. Meyer*, 510 U.S. 471, 484-85 (1994); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994)); *Pimental v. Deboo*, 411 F. Supp.2d 118, 126 (D. Conn. 2006).

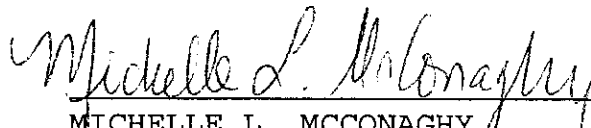
Additionally, to the extent that this recent filing seeks injunctive relief, these claims must also fail. "The only relief available in a *Bivens* action is an award of damages from the defendant." *Pimental*, 411 F.Supp. 2d at 125 (citing *Polanco v.*

DEA, 158 F.3d 647, 652 (2d Cir. 1998)). See also *Davidson v. C.I.R.*, 589 F. Supp. 158, 162 (S.D.N.Y. 1984) (noting that "[w]hile Bivens authorizes suits for monetary damages against federal officers in their individual capacities, it does not authorize a suit against the government or its agencies for injunctive or monetary relief."). For this reason, any filing seeking a Bivens injunction should be denied.

As the entire content of plaintiff's "Red Flag F.R.C.P. 65(a)(2) Bivens Injunction" is disjointed and confusing; does not identify the nature of the injunctive relief sought; and requests a form of relief not allowed under the law, the United States requests that this "Red Flag F.R.C.P. 65(a)(1) Bivens Injunction" be denied.

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY



MICHELLE L. MCCONAGHY
ASSISTANT U.S. ATTORNEY
ATTORNEY BAR # ct27157
157 CHURCH STREET
NEW HAVEN, CT 06510
TELEPHONE: (203) 821-3700
FAX: (203) 773-5373
Email: Michelle.McConaghy@usdoj.gov

CERTIFICATION OF SERVICE

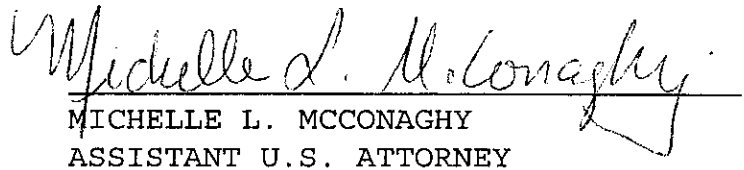
I hereby certify that on February 22, 2010, a copy of the foregoing Objection to Plaintiff's Red Flag F.R.C.P. 65(a)(2) Bivens Injunction was sent first-class, postage pre-paid mail to:

Gary R. Wall
60 Carriage Hill Drive
Weathersfield, CT 06109

The Honorable Sonia Sotomayor
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

The Honorable Janet C. Hall
United States District Court
For the District of Connecticut
915 Lafayette Boulevard
Bridgeport, CT 06510

Kerry W. Kircher
Office of General Counsel
219 Cannon House Office Bldg.
Washington, DC 20515-6532


MICHELLE L. MCCONAGHY
ASSISTANT U.S. ATTORNEY