

2008 WL 11349709

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United States District Court, D. Minnesota.

Carlos Hilario ARIAS; Vicente Cisneros Abonce, both individually and as “next friend for his minor children, E.C.A., V.C.A., Jr., and J.C.A.; Dulce Maria Hernandez Arias; Rosa De Jesus Barrajas Arrellano; Graciela Barragan, both individually and as “next friend” for her minor child, J.A.P.; Jose Manuel Ramirez Calix; Alejandro Cartagena; William Ramos Castillo; Fabiola Cisneros; Rosa Nely Duarte; Esau Eduardo Estrada-Menendez; L.G., both individually and as “next friend” for her minor child, A.G.; Francis Garcia, both individually and as “next friend” for her minor child, O.B.; Teresa De Jesus Guerrero; Wenscelao Padilla Guzman; Troy Hastings, both individually and as “next friend” for his minor child, B.H.; Joceline Sarai Lopez, both individually and as “next friend” for her minor child, J.M.; Rosa Sorto Lopez; Ana Danira Maldonado-Hernandez; Iris Janet Maldonado, both individually and as “next friend” for her three minor children, P.M., B.M., and E.M.; Jenny Maldonado, both individually and as “next friend” for her minor child, S.D.M.; Ermencia Mendez; Audrey Mithun; Barbara Anahi Moreno; Javier Moreno; Josefa C. Montalvo, both individually and as “next friend” to her minor grandchild, B.M.; Albis Muñoz; Francisco Muñoz, both individually and as “next friend” for one minor child, I.M.; Juan Muñoz; Saomara Muñoz; Manuela De Jesus Pineda; Jaime Reyes, both individually and as “next friend” for his two minor children, D.R.B. and J.R.B.; Marlen Alonso Soriano; Alex Josue Sorto; Andres Mendendez Vega; Raul Veliz, Jr.; Digna Munoz Xiomara; Jorge Zelaya; Samuel Zelaya; and Jose Erasmo Montalvan, the Consul of Honduras, as “next friend” to Honduran Nationals, Plaintiffs,<sup>1</sup>

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF the DEPARTMENT OF HOMELAND SECURITY; United States Department of Homeland Security; Michael Chertoff, Secretary of Department of Homeland Security; Julie L. Myers, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement; John P. Torres, Director of Detention and Removal Operations, Immigration and Customs Enforcement; Scott

Baniecke, St. Paul Field Office Director for Detention and Removal Operation; Peter Berg, Supervisory Detention & Deportation Officer, Detention and Removal; Allen Gay, Deportation Officer, Detention and Removal; John Doe ICE Agents ##1-30; James A. Kulset, Willmar Police Department Chief of Police; John Doe Willmar Police Officers ##1-10; Reed Schmidt, Atwater Police Department Chief of Police; Paul Schmidt, Atwater Police Officer; Dan Hartog, Kandiyohi County Sheriff; John Doe Kandiyohi County Sheriff's Deputies ##1-10; Jane Doe Kandiyohi County Probation Official, Defendants.

Civ. No. 07-1959 ADM/JSM

Signed 06/19/2008

#### Attorneys and Law Firms

Daniel R. Shulman, Esq., Gray Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN, and Gloria Contreras Edin, Esq., Centro Legal, Inc., St. Paul, MN, argued on behalf of Plaintiffs.

Gjon Juncaj, Esq., and Arthur Rizer, Esq., Trial Attorneys, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C., argued on behalf of the United States Immigration and Customs Enforcement Division of the Department of Homeland Security, and on behalf of Michael Chertoff, Julie L. Myers, John P. Torres, Scott Baniecke, Peter Berg, and Allen Gay, to the extent they are sued in their official capacities.

Lonnie F. Bryan, Esq., Assistant United States Attorney, Minneapolis, MN, argued on behalf of Michael Chertoff, Julie L. Myers, John P. Torres, Scott Baniecke, Peter Berg, and Allen Gay, to the extent they are sued in their individual capacities.

Jon K. Iverson, Esq., Iverson Reuvers, LLC, Bloomington, MN, argued on behalf of James A. Kulset, John Doe Willmar Police Officers ##1-10, Reed Schmidt, and Paul Schmidt.

Scott T. Anderson, Esq., Ratwik, Roszak & Maloney, P.A., Minneapolis, MN, argued on behalf of Dan Hartog, John Doe Kandiyohi Sheriff's Deputies ##1-10, and Jane Doe Kandiyohi County Probation Official.

## MEMORANDUM OPINION AND ORDER

ANN D. MONTGOMERY, U.S. DISTRICT JUDGE

### I. INTRODUCTION

\*1 The matters before the Court for consideration are Plaintiffs' Request for Rule 54(b) Certification [Docket No. 104] and Defendants Julie Myers ("Myers"), John Torres ("Torres"), and Scott Baniecke's ("Baniecke") May 30, 2008, letter [Docket No. 111] request to file a motion for reconsideration of this Court's May 16, 2008, Order [Docket No. 105] denying their motion for summary judgment. For the reasons set forth below, Plaintiffs' certification request is denied, and Myers, Torres, and Baniecke's reconsideration request is denied. The Court stays Plaintiffs' claims against Myers, Torres, and Baniecke.

### II. DISCUSSION

The facts of this case are set forth in the Court's Orders of April 23, 2008 [Docket No. 100], and May 16, 2008. Therefore, only a brief description is provided here. From April 10 to April 14, 2007, agents of the Immigrations and Customs Enforcement Division of the Department of Homeland Security ("ICE") and local law enforcement officers conducted a civil immigration enforcement operation—Operation Cross Check—in Willmar and Atwater, Minnesota. Plaintiffs allege that ICE and local law enforcement agents targeted them because of their race, forcibly entered their homes under false pretenses, and conducted warrantless, non-consensual searches.

#### A. Rule 54(b) Certification

Plaintiffs request that this Court certify as a final judgment the May 16, 2008, Order to the extent it dismisses the claims of Carlos Hilario Arias, Dulce Maria Hernandez Arias, Rosa de Jesus Barrajas Arrellano, Jose Manuel Calix, William Ramos Castillo, Fabiola Cisneros, Teresa de Jesus Guerrero, Rosa Nely Duarte, Esau Eduardo Estrada-Menendez, Iris Janet Maldonado, Jenny Maldonado, Ana Danira Maldonado-Hernandez, Juan Muñoz, and Samuel Zelaya (collectively the "Removal-Proceeding Plaintiffs"). Rule 54(b) provides in relevant part that "when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all ... parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). "[I]t is up to the sound discretion of the district court to determine when it should direct that a final judgment be entered under Rule 54(b)." Harris v. Sec'y, U.S. Dep't of the Army, 119 F.3d 1313, 1320 (8th Cir. 1997). Certifications " 'under Rule 54(b) should neither be granted routinely nor as an accommodation to counsel.' " Guerrero v. J.W. Hutton, Inc., 458 F.3d 830, 833 (8th Cir. 2006) (quoting Hardie v. Cotter & Co., 819 F.2d 181, 182 (8th Cir. 1987)). Instead, a court should enter a final judgment under Rule 54(b) only when there is "some danger of hardship or injustice through delay which could be alleviated by immediate appeal." Burlington N. R.R. Co. v. Bair, 754 F.2d 799, 800 (8th Cir. 1985) (quotation omitted).

The Removal-Proceeding Plaintiffs argue that Rule 54(b) certification is appropriate because they "have issues unique to them that they would like to raise on appeal ... which cannot be asserted in Immigration Court and which [they] should be permitted to raise immediately with the appellate court." Req. for R. 54(b) Certification at 2. After reviewing the parties' submissions regarding Rule 54(b) certification, the Court finds that the circumstances do not warrant entry of a final judgment as to the Removal-Proceeding Plaintiffs. Although the Removal-Proceeding Plaintiffs' immigration status presents unique legal issues, they have not identified a danger of hardship or prejudice that would result from their inability to take an immediate appeal. Presumably the Removal-Proceeding Plaintiffs would like to appeal to the Eighth Circuit before the removal proceedings conclude. However, some of the Removal-Proceeding Plaintiffs have been deported, and a Rule 54(b) certification would not delay pending removal proceedings. Fed. Employees' May 27, 2008, Letter [Docket No. 109]. Accordingly, Plaintiffs' request for Rule 54(b) certification is denied.

knowingly, and/or recklessly  
disregarded Plaintiffs'  
Constitutional protections.

## B. Reconsideration

\*2 Myers, Torres, and Banieceke request leave under Local Rule 7.1(g) to file a motion for reconsideration of the May 16, 2008, Order denying their alternative Motion for Summary Judgment. “Motions to reconsider are prohibited except by express permission of the Court, which will be granted only upon a showing of compelling circumstances.” Local R. 7.1(g).

Plaintiffs’ Third Amended Complaint [Docket No. 102]<sup>2</sup> asserts *Bivens*<sup>3</sup> claims against five federal officers and unknown John Doe ICE agents. Myers is the Assistant Secretary for the Department of Homeland Security, U.S. ICE. Myers Decl. [Docket No. 71] ¶ 1. She is the highest-ranking official within ICE and she oversees all the divisions within ICE, including the Office of Detention and Removal Operations (“DRO”). *Id.* Torres is the Director of Detention and Removal Operations with national supervisory authority over DRO operations. Torres Decl. [Docket No. 72] ¶¶ 1, 4. Banieceke is the Field Office Director with supervisory authority for DRO operations in North Dakota, South Dakota, Minnesota, Iowa, and Nebraska. Banieceke Decl. [Docket No. 73] ¶ 1. Plaintiffs have also sued Peter Berg (“Berg”), the Assistant Field Office Director in ICE’s Bloomington, Minnesota, office, and Allen Gay (“Gay”), Senior Field Training Officer for Detention and Removal in ICE’s Bloomington office. Berg Decl. [Docket No. 70]; Gay Decl. [Docket No. 69].

Except for describing the positions and duties of Myers and Torres, the Third Amended Complaint does not allege that these individuals participated in the execution or planning of the Willmar and Atwater raids. 3d Am. Compl. ¶¶ 52-54. Instead, Plaintiffs allege:

Upon information and belief, the techniques applied during the raids were organized and approved by Defendants and other federal government officials and were not the product of *ad hoc* decisions by field operatives. In short, U.S. Department of Homeland Security officials created and approved operations that willfully,

3d Am. Compl. ¶ 5. Plaintiffs allege that Banieceke was personally involved in or authorized the conduct of the ICE agents during the Willmar and Atwater raids. *Id.* ¶ 54.

Myers, Torres, and Banieceke<sup>4</sup> argued for summary judgment on the basis of qualified immunity. They submitted declarations stating that: (1) they did not personally participate in the planning or execution of Operation Cross Check in Willmar and Atwater, Minnesota; and (2) they neither adopted nor acquiesced in a policy, custom, or practice that would have resulted in the constitutional violations Plaintiffs allege. Myers Decl.; Torres Decl.; Banieceke Decl. Based on Plaintiffs’ Rule 56(f) Affidavit [Docket No. 101] addressing their need for discovery, this Court denied summary judgment for Myers, Torres, and Banieceke. 3d Am. Compl. ¶ 54.

\*3 Myers, Torres, and Banieceke request leave to file a motion for reconsideration on the basis that their declarations demonstrate they were not personally involved in the planning or execution of the Willmar and Atwater raids, and other declarations filed in this action have identified the federal employees—Berg and Gay—who were responsible for planning and implementing the raids. Myers, Torres, and Banieceke argue that subjecting them to discovery “will result in ‘social costs’ the qualified immunity doctrine is meant to prevent.” May 30, 2008, Letter.

At this stage of the litigation, the Court denies Myers, Torres, and Banieceke’s request for leave to file a motion for reconsideration. However, based on the current record, the Court will stay Plaintiffs’ claims against them pending discovery from Berg, Gay, and local law enforcement officers regarding the planning and execution of the Willmar and Atwater raids. “[T]here is no respondeat superior liability under *Bivens*.” *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 38 (8th Cir. 1995). Instead, a plaintiff must plead and prove an “‘affirmative link’ between the supervisor’s ‘personal participation, his exercise of control or direction, or his failure to supervise.’” *Bellecourt v. United States*, 784 F. Supp. 623, 633 (D. Minn. 1992) (quoting *McKay v. Hammock*, 730 F.2d 1367, 1374 (10th Cir. 1984)). Thus, to establish the liability of Myers, Torres, or Banieceke, Plaintiffs must

demonstrate that: (1) their constitutional rights were violated during the raids; and (2) Myers, Torres, or Baniecke, authorized the alleged unlawful conduct of the ICE agents or created or acquiesced in a policy that resulted in the unlawful conduct.

Based on Myers, Torres, and Baniecke's supervisory positions and their declarations that they neither authorized unlawful conduct nor personally participated in the planning or execution of the Willmar and Atwater raids, the Court finds that Plaintiffs must first obtain discovery from Berg, Gay, and others regarding the circumstances of the Willmar and Atwater raids. If the discovery from other parties suggests that Myers, Torres, and Baniecke authorized or are otherwise liable for the alleged unconstitutional conduct during the Willmar and Atwater raids, Plaintiffs can move to dissolve the stay and obtain discovery from Myers, Torres, and Baniecke. If discovery from other parties does not provide a basis for the liability of Myers, Torres, and Baniecke, the Court will grant their motion for summary judgment.

### III. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Request for Rule 54(b) Certification [Docket No. 104] is **DENIED**;
2. Defendants Myers, Torres, and Baniecke's request for leave to file a motion for reconsideration [Docket No. 111] is **DENIED**; and
3. Plaintiffs' claims against Myers, Torres, and Baniecke are **STAYED** pending discovery regarding the circumstances of the Willmar and Atwater immigration raids. Plaintiffs may not depose or obtain written discovery from Myers, Torres, and Baniecke until the Court authorizes such discovery.

#### All Citations

Not Reported in Fed. Supp., 2008 WL 11349709

#### Footnotes

- <sup>1</sup> Although certain Plaintiffs have been dismissed from the case, the caption still reflects their status as Plaintiffs.
- <sup>2</sup> Although Plaintiffs label their Third Amended Complaint as their Second Amended Complaint, they filed a Complaint [Docket No. 1] and two Amended Complaints [Docket Nos. 11 and 43].
- <sup>3</sup> In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that a cause of action for money damages against federal agents can be inferred directly from the Fourth Amendment.
- <sup>4</sup> Berg and Gay were included in the summary judgment motion, but they do not request leave to file a motion for reconsideration.