Case 1:11-cv-00151-LO -TCB Document 22 Filed 12/09/11 Page 1 of 2 PageID# 248

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

1-01-2	PageID# 248	n
	DEC - 9 2011	
	CLERK, U.S. DISTRICT COURT ALEXANDRIA, VIRGINIA	

KORI CIOCA, et al.,	)	
Plaintiffs,	)	
v.	) Civil Action No.: 1:11-cv-151-LO-TC	В
DONALD RUMSFELD, et al.,	)	
Defendants.	)	

## ORDER

Before the Court is Donald Rumsfeld and Robert Gates' (the "Defendants") Motion to Dismiss (Dkt. No. 10) the Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

Notwithstanding the troubling nature of the sexual assault allegations alleged in Plaintiffs' Complaint, the United States Supreme Court has repeatedly affirmed that the relief Plaintiffs seek under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is unavailable in these circumstances.

Ultimately, the Plaintiffs are suing the Defendants for their responsibility in allegedly fostering a military atmosphere and environment that resulted in the Plaintiffs becoming victims of sexual assault. Plaintiffs allege that the Defendants, as Secretaries of Defense, failed to prevent sexual assaults within the military forum and failed to properly punish those individuals guilty of committing these offenses. The Plaintiffs pursue a remedy under *Bivens*, alleging that the Defendants' failures violated the Plaintiffs' First, Fifth, and Fourteenth Amendment rights.

A *Bivens* cause of action permits a plaintiff to recover damages against a federal official who violates the plaintiff's constitutional rights, even when Congress has not "expressly authorized such

suits." *Chappell v. Wallace*, 462 U.S. 296, 298 (1983). This remedy is not available, however, when "special factors counseling hesitation" are present. *See id.* (citing *Bivens*, 403 U.S. at 396).

The "unique disciplinary structure of the military establishment" is a "special factor" that counsels against judicial intrusion. *Chappell v. Wallace*, 462 U.S. at 304; see also Orloff v. Willonghby, 345 U.S. 83, 93-94 (1953). Instead, matters of military discipline should be left to the "political branches directly responsible—as the judicial branch is not—to the electoral process." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). In *United States v. Stanley*, the Supreme Court clarified that a "major factor in determining at which point ... one should apply *Chappell's* 'special factors' analysis consists of the degree of disruption" that will be produced. 483 U.S. 669, 682 (1987).

In the present case, the Plaintiffs sue the Defendants for their alleged failures with regard to oversight and policy setting within the military disciplinary structure. This is precisely the forum in which the Supreme Court has counseled against the exercise of judicial authority. Where the Supreme Court has so strongly advised against judicial involvement, not even the egregious allegations within Plaintiffs' Complaint will prevent dismissal. *See id.* at 683 ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [the Plaintiff], or any other particular serviceman, an "adequate" federal remedy for his injuries. The special factor that counsels hesitation is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.") (internal quotations omitted).

For these reasons, as well as the reasons stated in open Court, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED.

December 9, 2011 Alexandria, Virginia Liam O'Grady

United States District Judge