

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

CURTIS J. NEELEY JR.,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 12-CV-5208-JLH
)	
FEDERAL COMMUNICATIONS)	
COMMISSION, MICROSOFT CORP.,)	
and GOOGLE INC.,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT**

This is the third lawsuit in which plaintiff Curtis J. Neeley, Jr. has attempted to raise claims against the FCC. The facts underlying these three actions are the same: plaintiff is troubled that, when using his name as a search term, internet search engines such as Google and Bing will return his artist creations depicting nude figures that he published in a book or uploaded to the internet. Plaintiff alleged in the first two suits that the FCC failed to enforce the Communications Act of 1934 and allowed the transmission of indecent art. These claims were properly rejected by this Court. The Court first refused to add them to plaintiff’s first suit and the Eighth Circuit affirmed. These claims were also dismissed in plaintiff’s second suit. Although this is the first case in which plaintiff served the FCC, the outcome should be the same: plaintiff’s claims against the FCC should be dismissed for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), and for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

I. CLAIMS ASSERTED AGAINST THE FCC BY PLAINTIFF

A. *Neeley I* (No. 09-5151-JLH (filed July 22, 2009 W.D. AR))

Plaintiff first filed suit against Google and others in 2009. Over a year after his complaint was filed, plaintiff sought leave to file an amended complaint to include allegations that the “FCC was nonfeasant by not regulating transmission of energy used to communicate by wire since the internet first developed.” Docket Entry 167-1 (Fourth Amended Complaint), ¶ 14. Plaintiff subsequently asked for an injunction ordering the FCC to regulate the internet as a wire communication, as defined in the Communications Act of 1934. Docket Entry 181.

On October 27, 2010, this Court denied leave to amend, finding that plaintiff repeatedly failed to cure pleading deficiencies in previously allowed amendments. Docket Entry 186. On that same date, this Court denied plaintiff’s request for an injunction, stating that the FCC was not a party to the case and leave to amend to add the FCC had been denied. Docket Entry 190.

Plaintiff then filed a motion to join the FCC as a party because it had failed to regulate wire communications while his suit was pending. Docket Entry 199. This Court denied the Motion for the reasons stated in its prior orders. Docket Entry 209. Plaintiff thereupon filed a Motion for Joinder of Claims, again seeking to add the FCC and alleging that the agency failed to obey the Communications Act. Docket Entry 256, ¶ 2, Conclusion. Plaintiff later filed a Motion for Required Joinder and Rule 60 Plea for Relief asking that the FCC be made a defendant for malfeasance in enforcement of the Communications Act and be ordered to adopt rules so that inappropriate visual art only be communicated by wire to adults. Docket Entry 258, at 11. On June 7, 2011, this Court denied these two motions because they did not seek any specific relief, and to the extent relief was sought, the request had already been denied. Docket Entries 267 and 269.

Plaintiff appealed the Court's orders. On February 15, 2012, the Eighth Circuit affirmed the district court's decision. With respect to the attempt to join the FCC and raise claims against it, the Eighth Circuit specifically concluded that the district court "did not abuse its discretion in denying Neeley further leave to amend after he filed a second amended complaint, as the proposed amendments he highlights on appeal would have been futile." *Neeley v. NameMedia, Inc. et al.*, No. 11-2558 (8th Cir. Feb. 15, 2012).

B. Neeley II (No. 5074-JLH (filed April 18, 2012 W.D. AR))

Barely two months after the Eighth Circuit's decision in *Neeley I*, plaintiff filed another suit, this time naming NameMedia, Google, Microsoft, the FCC and the United States. (*Neeley v. NameMedia Inc. et al.*, Case No. 12-5074 (W.D. AR) "*Neeley II*"). Plaintiff complained that the FCC refused to perform its statutory mission under the Communications Act to protect the safety of the public on world-wide wire communications, and allowed the display of indecent art to minors and anonymous viewers. Docket Entry 1 (Complaint), pgs. 15-16. Plaintiff sought an injunction requiring the FCC to regulate all wire communications defined in 47 U.S.C. § 153, and to create a FCC search engine. *Id.*, pgs. 18-22.

Plaintiff's preliminary motions were referred to a magistrate, who reviewed the motions and the complaint, and then recommended dismissal of the complaint. Docket Entry 18. The magistrate found 1) the FCC could only be liable if its sovereign immunity had been waived (*id.* at 17); 2) that plaintiff did not present evidence that he had presented an administrative claim under the Federal Tort Claims Act to the FCC, and, therefore, he failed to exhaust his administrative remedies (*id.* at 18); and 3) to the extent he sought injunctive relief against the FCC, he was not entitled to it under the Administrative Procedure Act. (*id.* at 18-19).

On August 1, 2012, this Court adopted the magistrate's recommendations and dismissed all claims against the FCC, finding that plaintiff had made no attempt to pursue an administrative remedy against the agency. Docket Entry 21 at 7. Plaintiff filed a motion to alter or amend the judgment, Docket Entry 22, which was denied. Docket Entry 24.

C. Neeley III (No. 12-5208-JLH (filed Sept. 17, 2012 W.D. AR))

Plaintiff then instituted yet another action against Google, Inc., Microsoft Corporation, and the FCC, seeking the same relief he sought in *Neeley II*. In his Amended Complaint, plaintiff alleges that “[t]he Federal Communications Commission fails to protect Plaintiff’s privacy on interstate and foreign communication by wire and radio and fails to protect the safety of communications for any citizens, including Plaintiff or Plaintiff’s children, as required by law.” Docket Entry 5, at 1. Plaintiff asserts that the court has jurisdiction pursuant to 28 U.S.C. § 2675(a), because the FCC failed to respond within six months to complaints he filed through the FCC’s electronic comment filings system. Docket Entry 5, at 3.

The gist of plaintiff’s complaint against the FCC appears to rest on two grounds. First, that the FCC has “failed to intervene or otherwise seek to prevent” what plaintiff believes to be erroneous judicial interpretations of a section of the United States Code, 47 U.S.C. § 230(c)(1). Docket Entry 5, at 2. *See also id.* at 12. And second, that the “display of indecent art” over “wire and radio communication” results from the FCC’s “refusal to perform the mission of protecting the safe use of interstate and world-wide wire communications” as specified in 47 U.S.C. § 151. Docket Entry 5, at 2.

It is difficult to discern the relief plaintiff seeks. As far as we can tell, he is asking the Court for an order directing the FCC to prohibit the display of indecent images on the Internet. Docket Entry 5, at 14 (“The FCC should protect minors and pornography addicts from harmful *

* * wire and radio communications”); *id.* at 17 (“Unsafe wire or radio communications should be ordered prevented by the FCC in the Western District of Arkansas by an injunction”). As we explain, this Court lacks jurisdiction to award plaintiff the relief he seeks. Even if this Court had jurisdiction over plaintiff’s claims, plaintiff has not articulated a duty to act, let alone a duty that was violated by the FCC, or that action to which he is lawfully entitled has been withheld. Accordingly, plaintiff’s claims against the FCC must be dismissed.

II. ARGUMENT

A. **PLAINTIFF'S CLAIMS AGAINST THE FEDERAL COMMUNICATIONS COMMISSION MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION**

Plaintiff argues that this court has jurisdiction over his claims, under 28 U.S.C. § 2675(a), because he has submitted them to the FCC by certified mail and through its electronic filing system, and the FCC failed to resolve the complaint within six months. Docket Entry 5, at 3. Plaintiff, however, has not complied with the administrative claim requirements of the Federal Tort Claims Act (“FTCA”), the statute upon which he relies. Accordingly, the Court should dismiss plaintiff’s claims for lack of subject matter jurisdiction under the doctrine of sovereign immunity.

With respect to suits against the federal government, district courts lack subject matter jurisdiction unless there has been an express waiver of sovereign immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976). The FTCA provides a limited waiver of sovereign immunity with respect to certain torts committed by federal employees, and provides for jurisdiction in the district courts for “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting

within the scope of his office or employment.” 28 U.S.C. §1346(b)(1). *See* 28 U.S.C. §§ 2671-2680.

As the Eighth Circuit has explained, “[t]he FTCA is a limited waiver of sovereign immunity which requires compliance with the conditions enacted by Congress. These conditions are construed narrowly and include the requirement that before filing an FTCA action the claimant ‘present’ an administrative claim requesting a sum certain in damages to the appropriate agency and that the claim be finally denied.” *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993); *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *McCoy v. United States*, 264 F.3d 792, 794 (8th Cir. 2001) (plaintiff must raise a claim first in an administrative claim to the agency before it can raise the claim later in court).

A claim is deemed properly “presented” when a federal agency receives: (1) written notification of the alleged claim sufficient to enable it to thoroughly investigate the claim, and (2) written notification of the amount of the claim. *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276, 277 (8th Cir. 1989); *see* 28 C.F.R. § 14.2 (2013) (“a claim shall be deemed to have been presented when a Federal agency receives from a claimant . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury or death alleged to have occurred by reason of the incident . . .”). The filing of an administrative tort claim with the appropriate federal agency is thus a mandatory prerequisite to filing a lawsuit under the FTCA and without it, the court lacks jurisdiction to entertain a tort claim against the United States.

Here, plaintiff failed to file the required administrative claim with the FCC. Exhibit 1, Declaration of Maureen Duignan. Plaintiff’s filings through the FCC’s electronic comment filing system, reflected in Exhibit A to plaintiff’s Amended Complaint, do not contain the

information required by 28 C.F.R. § 14.2 and the Standard Form 95, since, among other things, they do not ask for money from the FCC for its alleged commission of a tort. Exhibit 1.

Therefore, plaintiff has not presented his claim for damages to the FCC as required by the FTCA, and consequently, plaintiff failed to exhaust his administrative remedies. Accordingly, as in *Neeley II*, this Court lacks subject matter jurisdiction over plaintiff's claims and they should be dismissed.

Moreover, even if plaintiff had filed an administrative claim under the FTCA with the agency, this court would still have lacked jurisdiction to award injunctive relief, because "the FTCA waives the federal government's sovereign immunity only for money damages, not injunctive relief." *E. Ritter & Co. v. Department of the Army*, 874 F.2d 1236, 1244 (8th Cir. 1988); *Hatahley v. United States*, 351 U.S. 173, 182 (1956). Because the FTCA does not provide a jurisdictional basis for plaintiff's injunctive claims, they must be dismissed.

To be sure, the Administrative Procedure Act ("APA") generally provides a framework for judicial review of "final agency action," *see* 5 U.S.C. § 704, but here the FCC has not acted, so APA review is unavailable. *See, e.g., Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131-33 (D.C. Cir. 2007). Nor would the APA have provided this court with jurisdiction over plaintiff's claims for injunctive relief even if the agency had issued a decision on those claims. This is because Congress has set forth a precise method for judicial review of FCC orders that vests exclusive review of FCC orders in the courts of appeals. Specifically, 47 I.S.C. § 402(b) provides that "appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia" in nine specific categories of agency action, which mostly involve the FCC's exercise of various licensing responsibilities. Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the

Commission (except those appealable under [section 402(b)] shall be brought as provided by and in the manner prescribed” in 28 U.S.C. § 2342. That statute provides in turn that the court of appeals “has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a).”

Together, those provisions vest the courts of appeal with exclusive jurisdiction to review the validity of FCC rulings. *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000); *accord Sable Communications of California, Inc. v. FCC*, 827 F.2d 640 (9th Cir. 1987).¹ Thus, even if the FCC had acted, review of the agency’s decision would not lie in this court.

B. PLAINTIFF’S CLAIMS AGAINST THE FCC MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In the event that plaintiff’s claims are not dismissed for lack of jurisdiction, they should be dismissed because plaintiff’s complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) should be granted unless an adequately stated claim is “supported by showing any set of facts consistent with the allegations in the complaint.” *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 563 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The long and short of it in this case is that plaintiff has not identified any duty to act that has been violated by the FCC. Plaintiff repeatedly emphasizes that the FCC has authority, as part of its broad statutory mission under the Communications Act, to regulate “interstate and foreign commerce in communication by wire and radio * * * for the purpose of promoting safety

¹ Given that exclusive jurisdiction over FCC orders is in the courts of appeals, mandamus jurisdiction would likewise not lie in the district court. *See Telecommunications Research and Action Center v. FCC.*, 750 F.2d 70, 75 (D.C. Cir. 1984).

of life and property.” 47 U.S.C. § 151. See Docket Entry, at 2, 4, 5, 7, 18. But nothing in that provision requires the FCC to take any specific action, much less take action to regulate the activities of which plaintiff complains. Nor has plaintiff identified any duty imposed on the FCC to take issue with judicial interpretations (including those of the Eighth Circuit) of 47 U.S.C. § 230(c)(1), which states that a provider or user of an “interactive computer service” is not to be treated as “the publisher or speaker of any information provided by another information content provider.” See *Johnson v. Arden*, 614 F.3d 785, 790-92 (8th Cir. 2010).

The Administrative Procedure Act authorizes a reviewing court “to compel agency action that is unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). But “the only action that can be legally compelled under the APA is action *legally required*.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). Nor is it the “role of the courts to micro-manage agency action for compliance with broad, general statutory mandates.” *Darst-Webbe Tenant Ass’n v. St. Louis Housing*, 417 F.3d 898, 907 (8th Cir. 2005). The FCC has a broad general mandate to regulate wire and radio communication in the public interest, but plaintiff has not identified any duty imposed on the FCC to take the actions he seeks.

CONCLUSION

Plaintiff's claims against the FCC should be dismissed for lack of subject matter jurisdiction, or in the alternative for failure to state a claim upon which relief can be granted.

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CERTIFICATE OF SERVICE

I, Claude S. Hawkins, Jr., Assistant U.S. Attorney for the Western District of Arkansas, hereby certify that on February 5, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System. I further certify that I have mailed a copy of the foregoing to the following non CM/ECF participant:

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