IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

ROGER AND SHERYL GARLING,
R AND D ENTERPRISES, INC.,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

Case No. 1:15-CV-0036-SWS

ORDER GRANTING MOTION TO DISMISS

This matter comes before the Court on the United States' *Motion to Dismiss Plaintiffs' Second Amended Complaint* (ECF No. 18). The Court, having considered the briefs and materials submitted in support of the motion and Plaintiffs' response thereto, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

Plaintiffs Roger and Sheryl Garling, appearing pro se, are residents of Wyoming and former employees, managers, owners, and directors of Energy Laboratories, Inc. ("ELI").[1] (Second Am. Compl. ("SAC") at 3, ECF No. 17). Plaintiffs established and operated the Casper, Wyoming branch of ELI, a commercial laboratory business certified by the National Environmental Laboratory Accreditation Program and under the Safe

[1] Plaintiffs are also owners of R and D Enterprises, Inc., which owned the properties ELI leased for its Casper, Wyoming business operations. (SAC at 3.)

Drinking Water Act. *Id.* ¶ 5. Following submission of a complaint from an ELI employee in February 2007, the United States Environmental Protection Agency ("EPA") initiated an investigation of ELI based on the suspicion ELI was submitting falsified water quality records. *Id.* at 7-8. According to Plaintiffs, this investigation led to federal agents from EPA's Criminal Investigation Division, along with U.S. Marshals and "other unidentified personnel," executing "an armed raid of the ELI facilities" on October 30, 2007. *Id.* ¶ 9.

Plaintiffs allege they were the targets of the raid and subsequent investigation for allegedly being responsible for allowing employees to falsify data. *Id.* ¶ 10. "On February 25, 2008, [Plaintiffs] were forced to sever their employment, after 23 years as owners, managers, business development, directors and property owners for ELI *as a result of the October 30, 2007, armed raid.*" *Id.* ¶ 14 (emphasis added). The investigation and case against Plaintiffs was allegedly closed sometime in January 2012. *Id.* ¶¶ 7, 13.

Plaintiffs waited more than five years after the loss of their employment before filing an administrative claim with the EPA on May 15, 2013 pursuant to the Federal Tort Claims Act ("FTCA"). *Id.* ¶ 16. Plaintiffs' claim sought damages incurred by them "due to EPA's 2007 raid and subsequent investigation." *Id.* Plaintiffs' claim was denied initially and upon reconsideration. *Id.* In this lawsuit, Plaintiffs claim EPA officials "acted with reckless and grossly negligent disregard when conducting the armed raid and, but for this abuse of process, the plaintiffs would not have suffered the injuries alleged[.]" *Id.* at 2. Specifically, Plaintiffs allege that "EPA's armed raid and all subsequent actions

taken against Plaintiffs were conducted without sufficient evidence and outside the scope of the United States' discretionary function, as well as all available agency guidance and procedures." *Id.* ¶ 20. Plaintiffs' Second Amended Complaint brought pursuant to the FTCA asserts claims for reckless and/or grossly negligent criminal investigation, false imprisonment, false arrest, abuse of process, defamation, intentional infliction of emotional distress, and conspiracy under the laws of the State of Wyoming. *Id.* at 17.

STANDARD OF REVIEW

Defendant brings its motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(1) addresses the subject matter jurisdiction of the court. "Unless the United States waives its sovereign immunity, thereby consenting to be sued, the federal courts lack jurisdiction to hear claims against it." *San Juan Cnty., Utah v. United States*, 754 F.3d 787, 792 (10th Cir. 2014). "The FTCA operates as a limited waiver of sovereign immunity, rendering the United States amenable to suit for certain, but not all, tort claims." *Rashad v. D.C. Cent. Det. Facility*, 570 F. Supp. 2d 20, 23 (D.D.C. 2008) (citing *Richards v. U.S.*, 369 U.S. 1, 6 (1962)). *See also* 28 U.S.C. § 1346.

Rule 12(b)(6) provides for dismissal when a plaintiff's complaint fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss under Rule 12(b)(6), this Court must likewise accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In order to survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible

on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "plausibility standard" is not a probability requirement, but requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

DISCUSSION

"A tort claim against the United States shall be forever barred unless presented in writing to the appropriate Federal agency **within two years** after such claim accrues[.]" 28 U.S.C. § 2401(b) (emphasis added). Under the FTCA, the general rule is that a tort claim accrues at the time of the plaintiff's injury (injury-occurrence rule), and *not* when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action (discovery rule).[2] *Dahl v. U.S.*, 319 F.3d 1226, 1229 (10th Cir. 2003); *Cannon v. U.S.*, 338 F.3d 1183, 1190 (10th Cir. 2003). "The 'proper approach' is to depart from the general rule only in 'exceptional case[s] in which the plaintiffs *could not* have immediately known of [their] injur[ies].'" *Dahl*, 319 F.3d at 1229 (quoting *Plaza Speedway Inc. v. U.S.*, 311 F.3d 1262, 1268 (10th Cir. 2002)) (emphasis added in *Dahl*).

Plaintiffs repeatedly assert that their damages resulted primarily from the "armed raid" which occurred on October 30, 2007. *See, e.g.*, SAC at 1-2 ("specifically EPA's

[2] Determination of when a claim accrues is a matter of federal law. *Harvey v. U.S.*, 685 F.3d 939, 947 (10th Cir. 2012) (a non-medical malpractice cause of action under the FTCA accrues at the time the plaintiff is injured).

unwarranted armed raid into a test laboratory"); at 2 ("damages sustained by the plaintiffs directly and proximately due to the unwarranted and unsupported armed raid into the ELI Casper facilities"); at 2 ("EPA officials acted with reckless and grossly negligent disregard when conducting the armed raid and, but for this abuse of process, the plaintiffs would not have suffered the injuries alleged herein"); at 11 ("the [Plaintiffs] were forced to sever their employment . . . as a result of the October 30, 2007, armed raid"); at 13 ("beginning with the circumstances of the 2007 EPA armed raid of ELI"); at 15 ("failure to properly obtain adequate information prior to executing the armed raid . . . is the direct and proximate cause of the injuries suffered by Plaintiffs"). Plaintiffs' injury occurred on the date of the "armed raid." Moreover, there can be no legitimate dispute that their injury occurred no later than February 25, 2008 when they were "forced to sever their employment . . . as a result of the October 30, 2007 armed raid." Therefore, Plaintiffs' administrative claim was due no later than February 25, 2010.

Although some of Plaintiffs' claimed *damages* may have resulted from the subsequent investigation and civil action, a "[l]ack of knowledge of the injury's permanence, extent and ramifications does not toll the statute." *Cannon*, 338 F.3d at 1190 (internal quotation and citation omitted). *See also Robbins v. U.S.*, 624 F.2d 971, 973 (10th Cir. 1980) (uncertainty as to "ultimate damage" does not toll FTCA's statute of limitation). Plaintiffs argue that the discovery rule should apply because, although they were aware of the investigation and armed raid, "it was not until recently that they could properly understand the scope of EPA's investigation and the circumstances leading to the allegation supporting colorable claims under the FTCA." (Pls.' Resp. Br. at 4.)

Under the discovery rule, "an FTCA claim accrues at the time when a reasonably diligent plaintiff would have known of the injury and its cause." *Cannon*, 338 F.3d at 1190. Plaintiffs knew of the injury on the date of the raid, and certainly no later than the date they severed their employment. Even under the discovery rule, then, Plaintiffs action accrued at the time of the injury (or shortly thereafter) because they knew at that time they were the targets of the raid, which resulted in the termination of their employment.

Still, Plaintiffs argue they were unable to "formulate the basis for a colorable claim" until after receiving documents and information in response to their multiple requests under the Freedom of Information Act ("FOIA").[3] However, Plaintiffs admit that in February of 2009 they had reason to believe the raid was improper when an EPA representative advised them of his opinion that the EPA lacked a basis to conduct the raid. (SAC ¶ 15.) At that point Plaintiffs still had a year to prepare and file their claim. Regardless, the accrual date is when a plaintiff knows he has been hurt and who has inflicted the injury – "[t]here are others who can tell him if he has been wronged, and he need only ask." *United States v. Kubrick*, 444 U.S. 111, 122 (1979). Congress did not intend for the accrual of a claim to "await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123.

Finally, Plaintiffs urge the Court to apply the doctrine of equitable tolling here because they did not receive information responsive to their FOIA requests until recently.

[3] Plaintiffs' assertion of diligence in attempting to discover the basis for their claims is contradicted by the fact that they did not even request information under FOIA until after the two year statute of limitations had already passed. (*See* Pls.' Resp. Br. at 4 n.4) (first FOIA request June 7, 2011). Further, the documents received from their FOIA requests apparently had no bearing on Plaintiffs' ability to file their claims because Plaintiffs admit that they received "no substantive responses until after Plaintiffs filed all three of their administrative claims and their initial complaint before this Court." *Id.* at 4.

The United States Supreme Court has recently held that § 2401(b)'s time limits are nonjurisdictional and therefore subject to equitable tolling. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015). However, the Court finds Plaintiffs have failed to make the requisite showing for application of this doctrine. "[G]enerally a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Barnes v. U.S.*, 776 F.3d 1134, 1150 (10th Cir. 2015) (internal quotations and citations omitted). As noted above, the first of Plaintiffs' FOIA requests was not made until June 7, 2011, more than three years after their injury occurred. Further, in addition to the fact that Plaintiffs cite no legal authority for application of the doctrine here, those documents had no bearing on Plaintiffs' ability to file their claims or this lawsuit. *See supra,* n.4. Accordingly, their premise for equitable tolling is factually unsupported.

The Court finds that under the circumstances presented in this case, the discovery rule does not apply. This is not an exceptional case in which Plaintiffs could not have immediately known of their injuries. Plaintiffs' injury occurred and thus, their claim accrued, no later than February 25, 2008, when they were forced to sever their employment with ELI as a result of the October 30, 2007 armed raid. Because their administrative claim was filed more than two years after that date,[4] this action is untimely and must be dismissed under Rule 12(b)(6) for failure to comply with the statute of

[4] Plaintiffs' administrative claim was actually filed more than five years after accrual of their claim.

limitations. *See Reid v. U.S.*, --- F. App'x ---, 2015 WL 5672624, *1 (10th Cir. Sept. 28, 2015). THEREFORE, it is hereby

ORDERED that the United States' *Motion to Dismiss Plaintiffs' Second Amended Complaint* (ECF No. 18) is GRANTED and this action is DISMISSED.

Dated this 8th day of February, 2016.

Scott W. Skavdahl
United States District Judge