

A member of Congress fired a female employee because he believed that male employees are better workers. The female employee sued the member of Congress in federal court to recover monetary damages. She claimed that the termination of her employment constituted sex-based discrimination in violation of the Fifth Amendment. No federal statute authorizes an employment discrimination claim for damages against a member of Congress.

The member of Congress has moved to dismiss the female employee's suit for failure to state a claim upon which relief can be granted.

Is the court likely to grant the motion?

- A. No, because the federal court may fill a gap in a federal statutory scheme.
- B. No, because the female employee's claim presents an implied cause of action.
- C. Yes, because the female employee's claim is not explicitly authorized by a federal statute.
- D. Yes, because the member of Congress filed the motion before filing his answer.

Explanation:

Implied causes of action for damages

SCOTUS precedent	Implied cause of action recognized*
<i>Bivens v. Six Unknown Fed. Narcotics Agents</i>	Fourth Amendment claim for unlawful search & seizure
<i>Davis v. Passman</i>	Fifth Amendment due process claim for sex-based employment discrimination
<i>Carlson v. Green</i>	Eighth Amendment cruel & unusual punishment claim for failure to provide medical treatment

SCOTUS = Supreme Court of the United States.

*SCOTUS has not recognized implied cause of action for damages in the last 40 years.

A federal court generally may award damages against a federal official only if expressly authorized by statute. But in the **absence of authorization**, federal common law may imply that **damages are recoverable** in rare instances involving unconstitutional conduct.

These implied causes of action (ie, *Bivens* actions) are disfavored because Congress can best determine the liability of federal officials. As a result, SCOTUS has recognized only **three**

***Bivens* actions:**

- A **Fourth Amendment** claim for an **unlawful search and seizure**
- A **Fifth Amendment** due process claim for **sex-based employment discrimination**
- An **Eighth Amendment** cruel and unusual punishment claim for **failure to provide medical treatment**

Here, no federal statute explicitly authorized the female employee's claim for damages against the member of Congress, who is a federal official. But since a Fifth Amendment sex-based employment discrimination claim is a recognized *Bivens* action, the female employee presented a claim upon which damages can be granted. Therefore, the federal court will likely deny the member's motion (**Choice C**).

(Choice A) A federal court may use federal common law to fill a gap in a federal statutory scheme (eg, by interpreting statutory terms). But since no federal statute is on point here, there is no gap to fill.

(Choice D) The defense of failure to state a claim upon which relief can be granted may be raised at any time before the end of trial without being **waived** (as seen here). However, the

member's motion should be denied since the female employee asserted a *Bivens* action upon which damages can be granted.

Educational objective:

The following implied causes of action permit the recovery of damages against a federal official: (1) a Fourth Amendment claim for unlawful search and seizure, (2) a Fifth Amendment claim for sex-based employment discrimination, and (3) an Eighth Amendment claim for failure to provide medical treatment.

References

- *Bivens v. Six Unknown Named Agents of the Bureau of Fed. Narcotics*, 403 U.S. 388, 389 (1971) (establishing implied causes of action for certain constitutional violations by federal officials).
- *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (holding that an implied cause of action exists to recover damages against a member of Congress who violated the Fifth Amendment).