

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>NORMAN LOMAX HARVEY,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>DAVID EICHELBERGER, et al.,</b>	:	<b>No. 04-0646</b>
<b>Defendants.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**July 6, 2004**

Proceeding pro se, Plaintiff Norman Lomax Harvey filed for and was granted in forma pauperis status. Subsequently, he filed a complaint against Defendants Police Officer David Eichelberger in his official capacity, Amity Township Police Department, “Berks County PA./Amity Township,” and Alisa R. Hobart, alleging violations of his constitutional rights under 42 U.S.C. § 1983. Presently before the Court are Defendants’ motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Defendants’ motions are denied and Plaintiff is granted leave to amend his complaint to fully set forth all allegations against each defendant.

**I. BACKGROUND**

In his complaint, Plaintiff alleges that Officer David Eichelberger violated his Fourth Amendment rights when Officer Eichelberger “maliciously racially profiled” Plaintiff, pulled him over for an alleged traffic violation, and “confiscated [his] property without so much as a traffic ticket or criminal charge being filed.” (Compl. at 4.) In addition, Plaintiff alleges that Officer Eichelberger did not have probable cause and lacked evidence for the traffic stop. Plaintiff states that “[a]ll other parties conspired with Officer Eichelberger to hide these malicious acts.” (*Id.*)

Furthermore, Plaintiff alleges that Assistant District Attorney Alisa Hobart violated his Fourteenth Amendment right to due process.<sup>1</sup> (Compl. at 4.) Plaintiff seeks punitive damages in the amount of \$250,000.00 and \$1,750.00 in damages for a computer that was seized and not returned by Amity Township Police. As stated above, all Defendants moved to dismiss Plaintiff's Complaint. In his response to the motions to dismiss, Plaintiff makes the additional allegation that "the township had a Policy or custom depriving the plaintiff of his Constitutional Rights." (Resp. to Mot. to Dismiss at 3.)

## **II. DISCUSSION**

Defendants filed their motions to dismiss pursuant to Rule 12(b)(6), contending that Plaintiff fails to sufficiently allege a cause of action against them. Specifically, Defendant County of Berks asserts that Plaintiff's Complaint ambiguously names it as a defendant. Defendants Hobart and County of Berks contend that the Complaint does not allege that Ms. Hobart or any County employee was present for or participated in the seizure of Plaintiff's property. Finally, Defendants Officer Eichelberger and Amity Township Police state that the motion to dismiss should be granted because: (1) "the vague allegations of civil rights violations are conclusions of law"; (2) Plaintiff "fails to allege a policy or custom having the effect of violating Plaintiff's civil rights"; and (3) as such, Plaintiff has failed to set forth any claim for which relief can be granted. (Defs.' Mot. to Dismiss at 4.)

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<sup>1</sup> Plaintiff attached documents to his Complaint that indicate that Plaintiff instituted an action for the return of his property in the Court of Common Pleas of Berks County. In this same action, Assistant District Attorney Alisa Hobart, on behalf of Berks County, filed an answer to Plaintiff's Petition for Return of Property.

In order to determine the sufficiency of a pro se complaint, a court must be mindful to construe it liberally in favor of the plaintiff. *Haines v. Kerner*, 404 U.S. 519, 520-21(1972); *see also Alston v. Parker*, 363 F.3d 229, 234 (3d Cir. 2004), *cert. denied sub nom., Adamson v. Mazzuca*, 124 S. Ct. 2033 (2004). The Court must “accept as true all of the allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff.” *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). A pro se complaint may be dismissed for failure to state a claim only if it appears ““beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”” *Haines*, 404 U.S. at 521 (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Milhouse v. Carlson*, 652 F.2d 371, 373 (3d Cir. 1981).

In *Grayson v. Mayview State Hospital*, 293 F.3d 103 (3d Cir. 2002), the Third Circuit instructed that “even when a [pro se] plaintiff does not seek leave to amend, if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile.” *Alston*, 363 F.3d. at 235 (*citing Grayson*, 292 F.3d at 108). Specifically, the Third Circuit has repeatedly advised that before dismissing a complaint for failure to state a claim, district judges should:

[E]xpressly state, where appropriate, that the plaintiff has leave to amend within a specified period of time, and that application for dismissal of the action may be made if a timely amendment is not forthcoming within that time. If the plaintiff does not desire to amend, he may file an appropriate notice with the district court asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate.

*Id.* (*quoting Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000)); *see also Grayson*, 293 F.3d at 108 (holding that before dismissing case, district court should have, absent inequity or futility of

amendment, specifically advised plaintiff that he could amend his complaint).

In the present case, the gravamen of Defendants' motions is that Plaintiff has failed to sufficiently set forth allegations to state a claim. Accordingly, I grant Plaintiff leave to amend his Complaint. By **August 6, 2004**, Plaintiff must either: (1) amend his Complaint and fully set forth allegations against each Defendant; or (2) advise the Court that he does not intend to amend his complaint. Defendants' motions are denied without prejudice to refile in the event that Plaintiff amends his complaint or to renewing their motions in the event that Plaintiff advises the Court that he wishes to proceed on the Complaint as it stands. An appropriate Order follows.

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<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this 6<sup>th</sup> day of **July, 2004**, upon consideration Defendants' Motions to Dismiss, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. By **August 6, 2004**, Plaintiff shall either: (1) amend his complaint and fully set forth allegations against each Defendant; or (2) advise the Court that he does not intend to amend his complaint.
2. Defendant Hobart's Motion to Dismiss (Document No. 12), Defendants Eichelberger and Amity Township Police Department's Motion to Dismiss (Document No. 13), and Defendant Berks County's Motion to Dismiss (Document No. 15) are **DENIED without prejudice**.

**BY THE COURT:**

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**Berle M. Schiller, J.**