

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

GREGORY BUSH, : CIVIL ACTION  
 :  
 Plaintiff, : NO. 07-3172  
 :  
 v. :  
 :  
 LANCASTER CITY BUREAU OF :  
 POLICE, et al., :  
 :  
 Defendants. :

**MEMORANDUM**

Giles, J.

August 26, 2008

**I. INTRODUCTION**

Before the court is Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff filed his Amended Complaint alleging various violations of his constitutional rights, state law tort claims as well as a violation of the Federal Privacy Act of 1974 against defendants Lancaster City Bureau of Police and Office Ray M. Corll, II ("Corll").

For the reasons that follow, the Motion to Dismiss is granted on all counts with respect to defendant Lancaster City Bureau of Police and the Motion to Dismiss is granted on Counts II, IV and VII only with respect to defendant Corll.

**II. STANDARD OF REVIEW**

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled

to relief.” Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)) (stating that this statement of the Rule 12(b)(6) standard remains acceptable following the U.S. Supreme Court’s decision in Bell Atlantic Corp. v. Twombly, 127 S.Ct. at 1955 (2008)); see id. at 231 (stating that Twombly does not undermine the principle that the court must accept all of plaintiff’s allegations as true and draw all reasonable inferences therefrom). To withstand a motion to dismiss under Rule 12(b)(6), “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Id. at 234 (quoting Twombly, 127 S.Ct. at 1965). Thus, “stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest the required element.” Id. (quoting Twombly, 127 S.Ct. at 1965); see Wilkerson v. New Media Tech. Charter Sch., Inc., No. 07-1305, 2008 U.S. App. LEXIS 7526, at \*13 (3d Cir. Apr. 9, 2008) (following Phillips). This standard “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements.” Phillips, 515 F.3d at 234 (quoting Twombly, 127 S.Ct. at 1965).

### **III. FACTUAL BACKGROUND**

The facts, as alleged in Plaintiff’s Amended Complaint, follow. On May 17, 2007, Plaintiff was visiting the home of his cousin in the city of Lancaster. (Amend. Compl. ¶ 12.) During his visit, there were six to eight other adult men in the residence. (Id. ¶ 14.) At some point in the afternoon, an argument arose among several individuals in the home, and someone in the home made a phone call to 911 and stated that someone in the home had a gun. (Id. ¶ 15.)

Following the call, several officers from the Lancaster City Bureau of Police arrived at

the residence and entered the home with their guns drawn. (Id. ¶16.) The officers advised the individuals in the home that they had received a report about a gun. (Id. ¶ 17.)

The officers then conducted a pat-down search of each adult man in the home, including Plaintiff, which revealed no guns. (Id. ¶18.) Next, the officers removed the men from the home and directed them to sit in the driveway with their legs outstretched and feet crossed. (Id. ¶18.)

The police then searched the residence, which did not reveal any gun. (Id. ¶ 21.)

The police officers asked each of the men seated on the driveway for his name and social security number. (Id. ¶ 22.) Plaintiff provided his name to the officers and, shortly thereafter, heard his name broadcast from the police radio located inside one of the police cruisers. (Id. ¶ 22.) The broadcast indicated that Plaintiff was on probation or parole in Montgomery County, Pennsylvania. (Id. ¶ 23.) Plaintiff was on probation and parole at the time, but his presence in Lancaster County was not a violation of his probation or parole. (Id. ¶ 24.)

Next, the police determined that none of the men seated in the driveway had any outstanding warrants. (Id. ¶¶ 25-26.) The police then requested to take a photograph of each man using a digital camera belonging to the Lancaster City Bureau of Police. (Id. ¶¶ 27-28.) Lancaster City Bureau of Police has a policy and practice of photographing detainees “without probable cause.” (Id. ¶ 29.) When defendant Corll and other officers approached Plaintiff, as he sat in the driveway, Plaintiff told them that he did not wish to be photographed, and he covered his face with his hands. (Id. ¶ 30.) The officers, including defendant Corll, ordered Plaintiff to remove his hands from his face, which Plaintiff did not. (Id. ¶ 31.) Defendant Corll then ordered the officers to “get him,” and together they smashed Plaintiff’s face into the driveway, which caused an injury to Plaintiff. (Id. ¶ 33.) Plaintiff did not resist. (Id. ¶ 35.)

Defendant Corll and other officers then arrested Plaintiff for a violation of 18 Pa.C.S. § 5101, “Obstructing Administration of Law or Other Governmental Function.” (Id. ¶ 36.) Plaintiff was imprisoned awaiting trial. (Id. ¶¶ 40-45.) On October 31, 2007, Plaintiff was acquitted of the charge against him. (Id. ¶ 45.)

The detention on May 17, 2007 in Lancaster County lasted approximately thirty minutes. (Id. ¶ 19.)

#### **IV. DISCUSSION**

##### **A. Section 1983 Claims**

Plaintiff brings Counts II through VII under 42 U.S.C. § 1983, which provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983. “Section 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws.” Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996). To establish a Section 1983 claim, “a plaintiff must demonstrate the defendant, acting under color of state law, deprived him or her of a right secured by the Constitution or the laws of the United States.” Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006).

**1. Section 1983 claims against Defendant Lancaster City Bureau of Police.**

Plaintiff has named two defendants in this action: the Lancaster City Bureau of Police and Officer Ray M. Corll, II, in his official capacity as a Lancaster City Bureau of Police Officer and in his individual capacity. With the exception of one paragraph, the entire complaint references these two defendants by name. In Paragraph 10, Plaintiff states that:

10. Defendant, Lancaster City, is a third class Pennsylvania City . . . and acts through its agents and employees. The City operates under a Mayor/Council form of government with authority over all city functions including law enforcement, to include the Lancaster City Bureau of Police, and the enactment and enforcement of legislation, ordinances, and regulations governing the city.

The complaint also contains a paragraph regarding defendant Corll specifically. There is no such paragraph for any defendant named “Lancaster City Bureau of Police.” However, the court finds that the entity named by Plaintiff as a defendant is “Lancaster City Bureau of Police,” as that is the name of the defendant appearing in the caption, the name of the defendant on whose behalf counsel have entered their appearance, and that is the name of the defendant cited in the allegations of the complaint. It is not readily apparent from the face of the complaint that Plaintiff intended to sue “Lancaster City” as a defendant rather than the defendant that it named, the Lancaster City Bureau of Police. The court cannot substitute its judgment for that of Plaintiff.

Plaintiff’s naming of the Lancaster City Bureau of Police as a defendant, however, is problematic for Plaintiff’s Section 1983 claims. It is well-established that police departments

that are a subdivision of, or operated by, a municipality are not proper defendants under a Section 1983 action. See, e.g., Martin v. Red Lion Police Dep't, 146 F. App'x 558, 562 n.3 (3d Cir. Aug. 16, 2005); see also Benckini v. Upper Saucon Twp., No. Civ. A. 04-4304, 2005 U.S. Dist. LEXIS 4529 (E.D. Pa. March 23, 2005) (collecting cases). A police department, as an “administrative arm of the local municipality” is not a “person” under the meaning of Section 1983. Benckini, 2005 U.S. Dist. LEXIS 4529 (citations omitted).

In this case, Plaintiff has asserted six Section 1983 claims against defendant Lancaster City Bureau of Police. Because the Lancaster City Bureau of Police is not a “person” subject to suit under Section 1983, the court must dismiss Counts II through VII as to defendant Lancaster City Bureau of Police for failure to state a claim upon which relief can be granted. Therefore, the court will proceed to analyze the Motion to Dismiss the Section 1983 claims with respect to defendant Corll only.

## **2. Section 1983 claims against defendant Corll.**

### **a. Count II**

In Count II, Plaintiff alleges that Defendant conducted an unreasonable seizure in violation of the Fourth Amendment<sup>1</sup> when Defendant “seize[ed] the photographic image” of Plaintiff. (Amend. Compl. ¶ 53.) Defendant argues that Plaintiff has no protected privacy interest in his own photographic image, and that, in addition, Defendant had reasonable suspicion at the time to conduct an investigatory detention.

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<sup>1</sup> The Fourth Amendment is made applicable to the states by the Fourteenth Amendment, which Plaintiff also cites in this Count. See Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 180 (2004).

It is clear that in Count II, Plaintiff only seeks redress for the alleged seizure of his photographic image, not for any allegedly unreasonable seizure of his person. Plaintiff's allegations in his Amendment Complaint follow:

27. Finding no probable cause to arrest anyone and learning that no one had outstanding warrants, Officer Corll and the other officers then took their conduct one step further by requesting to take the photographs of the adult males, including [Plaintiff's] photograph, with a digital camera.
30. When Officer Corll and the other officers approached [Plaintiff] as he sat cross-legged on the ground at the direction of the police (in police detention) [Plaintiff] told the officers that he did not wish to be photographed and passively placed his hands over his own face.
31. Officer Corll and the other officers ordered [Plaintiff] to remove his hands from his face so that he could be photographed.
32. [Plaintiff] refused to remove his hands from his face.

(Amend. Compl. ¶¶ 27, 30-32.) Plaintiff does not allege that his photograph was actually taken by Defendant or any other officer at the scene.

Because Plaintiff has not alleged that his photograph was taken, his contention under Count II, is that Defendant attempted to seize Plaintiff's photographic image. The court finds that an attempt to take a photograph of Plaintiff is not a seizure of Plaintiff's photographic image within the meaning of the Fourth Amendment, and is, at best, an attempted seizure, which is afforded no protection by the Fourth Amendment. Therefore, Plaintiff has failed to state a claim under the Fourth Amendment and Section 1983 upon which relief can be granted. Defendant's Motion to Dismiss Count II is granted.

By this ruling, the court does not make any determination as to any claim Plaintiff has

made that the seizure of his person was an unreasonable seizure in violation of the Fourth Amendment, or that the attempted seizure of his photographic image was in violation of another right guaranteed by the U.S. Constitution.

**b. Count III**

The court understands Plaintiff's third cause of action to seek declaratory judgment under Section 1983 that Defendants' practice of detaining individuals for the purpose of taking their photograph is a violation of those individuals' right to due process guaranteed by the Fourteenth Amendment. In his Motion to Dismiss, Defendant does not explicitly state that he seeks the dismissal of Count III, nor does he make any arguments as to why dismissal of Count III is warranted under the applicable legal standard under Rule 12(b)(6). Therefore, the court does not consider the Motion to Dismiss with respect to this count.

**c. Count IV**

Plaintiff brings Count IV under 42 U.S.C. § 1983 and the Eighth Amendment, alleging that Defendant used excessive force when the officers forcibly "smashed" his face onto the concrete driveway after Plaintiff shielded his face from their camera, causing Plaintiff to require emergency medical treatment. On this count, Plaintiff has failed to state a claim upon which relief can be granted. "The Eighth Amendment 'was designed to protect those convicted of crimes and consequently the Clause applies only after the State has complied with constitutional guarantees traditionally associated with criminal prosecutions.'" Hubbard v. Taylor, 399 F.3d 150, 165 (3d Cir. 2005) (quoting Whitley v. Albers, 475 U.S. 312, 318 (1986)); see also Nelson

v. Mattern, 844 F. Supp. 216 (E.D. Pa. 1994). Therefore, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply until “after sentence and conviction.” Hubbard, 399 F.3d at 165 (quoting Graham v. Connor, 490 U.S. 386, 392 n.6 (1989)).

From the allegations of Plaintiff’s complaint, it is clear that he was not convicted of a crime at the time of the alleged excessive force.<sup>2</sup> Nor was Plaintiff imprisoned in a correctional facility at any time during the relevant period at issue. Plaintiff was subject to an investigative detention at the time the alleged excessive force took place. Therefore, Plaintiff has not stated a claim of excessive use of force under the Eighth Amendment. The court must grant the motion to dismiss Count IV.

**d. Count V**

In Count V, pursuant to 42 U.S.C. § 1983, Plaintiff alleges that defendants violated his rights as guaranteed by the Fourth and Fourteenth Amendments of the U.S. Constitution when he was unreasonably seized and imprisoned. Specifically, Plaintiff alleges that 1) he was unreasonably seized and detained after the police knew his identity; 2) that he was unreasonably seized and detained after police knew that he was not in violation of parole; 3) that Defendant attempted to unreasonably seize his image by photograph; 4) that he was arrested without probable cause; 5) that he was wrongly charged with a violation of 18 Pa.C.S. § 5101, “Obstructing Administration of Law or Other Governmental Function;” and 6) he was unconstitutionally imprisoned as a result of the charge.

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<sup>2</sup> Although Plaintiff was previously convicted of a crime, that conviction is unrelated to the circumstances giving rise to this complaint, and has no bearing on whether the Eighth Amendment applies to Plaintiff for the alleged misconduct of Defendant occurring on May 17, 2007, as pled in Plaintiff’s Amended Complaint.

Upon review of the allegations of the complaint, the court finds that Plaintiff has stated a claim that he was unreasonably detained in violation of the Fourth and Fourteenth Amendments after the Defendants knew he was not in violation of his term of probation and parole.<sup>3</sup> In reaching this conclusion, the court has considered the totality of the circumstances, while taking Plaintiff's allegations as pled in the complaint as true. Plaintiff has stated a claim upon which relief can be granted under Section 1983, and Defendant's Motion to Dismiss Count V is denied.

**e. Count VI**

In Count VI, Plaintiff brings an "as applied" constitutional challenge to the statute under which he was charged, 18 Pa.C.S. § 5101, "Obstructing Administration of Law or other Governmental Function." Section 5101 states:

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

18 Pa. C.S. § 5101. Plaintiff argues that the conduct for which he was arrested, covering his face in order to prevent his photograph from being taken, does not even rise to the level of "flight by a person charged with a crime" or a "refusal to submit to arrest" both of which are specifically excepted from the conduct prohibited by the statute. Plaintiff argues that the application of this

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<sup>3</sup> To the extent that this count attempts to state a cause of action under the Fourth Amendment for the attempted seizure of Plaintiff's photographic image, that claim is not cognizable, as the court found in its discussion of Count II.

statute to his actions, and in the absence of reasonable suspicion that he was engaged in criminal conduct, violates the Fourth Amendment proscription of unreasonable seizures.

In its Motion to Dismiss, Defendant argues that because the Magisterial District Judge, at a Preliminary Hearing on June 19, 2007, found that the Government had established a prima facie case of a violation of § 5101, this court should find that there was probable cause that Plaintiff violated the statute and, therefore, Plaintiff cannot state a constitutional challenge to the application of the statute to his conduct. This argument is circular and unpersuasive.

Plaintiff has alleged in his complaint that the refusal to submit to a photograph does not rise to the level of a refusal to submit to arrest, which is conduct that falls outside of the proscriptions of this statute. Plaintiff has alleged that his arrest and charge with a violation of § 5101, in addition to his subsequent imprisonment, was an unreasonable seizure of his person. Plaintiff has also alleged that he did identify himself to the police officers when asked. Further, in the testimony<sup>4</sup> of defendant Corll at the preliminary hearing on the criminal charge, Corll stated that Plaintiff covered his face with his hands, that Defendant tried to pull Plaintiff's hands from his face, and that Plaintiff pulled away from Defendant, and then the officers "subdued" Plaintiff. (Amend. Compl. Ex. 1, Prelim. Hr'g Tr. 9-10, June 19, 2007.) The court finds that Plaintiff has sufficiently pled that the above statute was applied in a manner that deprived Plaintiff of his right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment.

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<sup>4</sup> The transcript of an excerpt of this hearing was attached to Plaintiff's Amended Complaint as Exhibit 1.

**f. Count VII**

Finally, Plaintiff brings Count VII under 42 U.S.C. § 1983, alleging that Defendant's request of his social security number was in violation of section 7 of the Privacy Act of 1974, Public Law 93-579, 88 Stat. 1896, 2194, 5 U.S.C. § 552a (note).

Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Gonzaga Univ. v. John Doe, 536 U.S. 273, 282 (2002). In Gonzaga, the Court "emphasized that it is only violations of *rights*, not *laws*, which give rise to § 1983 actions." Id. at 283 (citing Blessing, 520 U.S. at 340). "Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section." Id. (emphasis in original). Section 1983 does not automatically provide a remedy for a violation of a federal statute if that statute does not accord specific rights to individuals. Thus, the threshold issue is "whether Congress *intended to create a federal right*." Id. at 283 (emphasis in original). In other words, a court must determine "whether or not Congress intended to confer individual rights upon a class of beneficiaries." Id. at 285. "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit . . . under § 1983." Id.

To determine whether Congress intended to create a federal right by a federal statute, the court must consider several factors. First, the court must determine whether there is any "rights-creating" language in the statute. Id. at 287. Second, the court must examine the structure of the statute. Sabree v. Richman, 367 F.3d 180, 191 (3d Cir. 2004) (citing Gonzaga Univ., 536 U.S. at 286). Third, should a plaintiff establish that "federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs," "there is only a rebuttable presumption

that this right is enforceable under § 1983.” City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) (internal quotations and citations omitted). The court then determines whether Defendant has rebutted “this presumption by demonstrating that Congress did not intend” for that right to be enforceable under § 1983. Id.

In order to confer rights, Congress must use “rights-creating language.” Gonzaga Univ., 536 U.S. at 287. “For a statute to create such private rights, its text must be ‘phrased in terms of the persons benefitted.’” Id. at 283-84 (quoting Cannon v. University of Chicago, 441 U.S. 677, 692 n. 13 (1979)). “Where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit whether under § 1983 . . . .” Gonzaga Univ., 536 U.S. at 286. The court must first ask whether Congress created an “unambiguously conferred right” in section 7 of the Privacy Act. Id. at 283. Plaintiff claims a violation of subsection (b) of section 7, which states that

- (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Upon review of this statutory language, the court cannot conclude that Congress created an “unambiguously conferred right” in subsection (b) of section 7 of the Privacy Act. The statutory language is not phrased with respect to a right conferred upon a group of individuals, but focuses on the obligations of governmental agencies. Thus, this language is different from the “explicit” rights-conferring language discussed in Gonzaga:

Title VI provides: “*No person* in the United States *shall* . . . be subjected to discrimination under any program or activity receiving Federal financial assistance” on the basis of race, color, or national origin. 78 Stat. 252, 42 U.S.C. § 200d (1994 ed.) (emphasis added). Title IX provides: “*No person* in the United States *shall*, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 86 Stat. 373, 20 U.S.C. § 1681 (a) (emphasis added).

536 U.S. at 284 n.3 (emphasis and citations included).

To the extent that Plaintiff alleges that Defendant’s conduct violates subsection (a)(1) of section 7 of the Privacy Act, the court need not even reach the question of whether subsection (a)(1) explicitly confers a right upon individuals because Plaintiff has not alleged such facts that would constitute a violation of this subsection. Subsection (a)(1) states:

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security number.

88 Stat. at 2194 (emphasis added). This subsection clearly only addresses an instance in which an individual refuses to disclose his social security number, and is then denied a right, benefit or privilege provided by law as a result. Plaintiff does not allege in his complaint that he refused to provide his social security number to Defendant. Therefore, this subsection is inapplicable.

Having found that the language of subsection (b) of Section 7 does not confer an individual right, and that subsection (a)(1) is not applicable to the facts of the case as pled in Plaintiff’s complaint, the court must follow the dictate of Gonzaga to look to the structure of the statute to determine whether it establishes that Congress intended to create a specific individual right in subsection (b). The court has examined the remainder of the Federal Privacy Act and has

found no such language evidencing this intent.

Thus, the court concludes that Congress did not create an “unambiguously conferred right” in subsection (b) of section 7 of the Privacy Act. Therefore, Plaintiff cannot state a claim under Section 1983 for a violation of subsection (b) of section 7 of the Privacy Act. Defendant’s Motion to Dismiss Count VII is granted.

## **2. Qualified Immunity**

Defendant Corll argues that he is entitled to qualified immunity on Plaintiff’s Section 1983 counts. Pursuant to the court’s findings above, the remaining Section 1983 counts include Counts III, V, and VI.

It is the burden of the individual defendants to establish that they are entitled to qualified immunity. Ryan v. Burlington County, 860 F.2d 1199, 1204 n.9 (3d Cir. 1988), cert. denied, 490 U.S. 1020 (1989). Courts must conduct a two step inquiry to determine the merits of a claim of qualified immunity: 1) whether the facts alleged show the officer’s conduct violated a constitutional right and 2) whether the constitutional right was clearly established at the time of the violation. Saucier, 533 U.S. at 201. Further, public officials are entitled to qualified immunity if they acted “reasonably in the good-faith fulfillment of their responsibilities.” Wilson v. Schillinger, 761 F.2d 921, 929 (3d Cir. 1985), cert. denied, 475 U.S. 1096 (1986). “Clearly established rights are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates that right. A plaintiff need not show that the very action in question has previously been held unlawful, but needs to show that in light of the preexisting law the unlawfulness was apparent.” McLaughlin v. Watson, 271 F.3d 566, 571 (3d

Cir. 2001) (citing Shea v. Smith, 966 F.2d 127, 130 (3d Cir. 1992)), cert. denied, 535 U.S. 989 (2002).

The court concludes that at the pleading stage of this litigation, defendant Corll has not met his burden of establishing qualified immunity, taking the allegations of fact in the complaint to be true.

**B. Assault and battery claim.**

Count I is asserted against both defendants. In Count I, Plaintiff contends that Defendants' conduct constitutes an assault and battery. Defendants argue that such a claim is barred by Pennsylvania's Governmental Immunity Statute, and must therefore be dismissed.

Pennsylvania law provides for general governmental immunity in actions against local government agencies: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S. § 8541. As defendant Lancaster City Bureau of Police is a local agency, it has governmental immunity, with some exceptions. There are eight "acts" excepted from the immunity granted by § 8541. 42 Pa.C.S. § 8542. Assault and battery are not included among these "acts." Id. Therefore, Defendant's Motion to Dismiss Count I against defendant Lancaster Bureau of Police must be granted.

Municipal employees, including police officers, are generally immune from liability to the same extent as their employing agency, if the act committed was within the scope of the employee's employment. 42 Pa.C.S. § 8545. There is an exception to this municipal employee immunity: employees are not immune from liability under § 8545 when their conduct constitutes

“willful misconduct” or “actual malice”:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of section[] 8545 . . . shall not apply.

42 Pa.C.S. § 8550. With regard to alleged police officer misconduct, the Pennsylvania Supreme Court has held that “willful misconduct” is not simply synonymous with committing an intentional tort. Walker v. North Wales Borough, 395 F. Supp. 2d 219, 231 (E.D. Pa. 2005) (citing Renk v. Pittsburgh, 537 Pa. 68, 641 A.2d 289, 294 (1994)). “Rather, ‘willful misconduct’ means that a police officer committed an intentional tort subjectively knowing that his or her conduct was wrong.” Walker, 395 F. Supp. 2d 231 (citations omitted) (Plaintiff’s allegation that officer acted “willfully, deliberately, maliciously and/or with reckless disregard” for Plaintiff’s constitutional and statutory rights, and that officer engaged in willful misconduct for the “purpose” of violating Plaintiff’s constitutional rights was sufficient to plead willful misconduct.”); see also Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 600-01 (3d Cir. 1998). Willful misconduct “means willful misconduct aforethought.” Pettit v. Namie, 931 A.2d 790, 801 (Pa. Cmwlth. 2007) (quoting Kuzel v. Krause, 658 A.2d 856, 860 (Pa. Cmwlth. 1995)).

In Count I, Plaintiff alleges that defendant Corll did knowingly, intentionally, negligently, maliciously and/or recklessly commit an assault and battery upon Plaintiff. Plaintiff further alleges that defendant Corll’s actions were willful, malicious, oppressive and outrageous. Taken as true, these allegations are sufficient to allege willful misconduct. Defendant Corll’s Motion to

Dismiss Count I on the basis that he is immune from suit on assault and battery is denied.

**V. CONCLUSION**

For the reasons stated below, the Motion to Dismiss is granted with respect to all claims alleged against defendant Lancaster City Bureau of Police. The Motion to Dismiss is granted with respect to Counts II, IV and VII, and denied with respect to Count I, III, V and VI, as alleged against defendant Corll. An appropriate order follows.

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

GREGORY BUSH,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 07-3172
	:	
v.	:	
	:	
LANCASTER CITY BUREAU OF	:	
POLICE, et al.,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 26th day of August, 2008, upon review of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 9), and Plaintiff's Response thereto, for the reasons stated in a Memorandum issued on this date, the following is hereby ORDERED:

1. Defendants' Motion to Dismiss is GRANTED on all counts with respect to defendant Lancaster City Bureau of Police; and
2. Defendant's Motion to Dismiss is GRANTED on Counts II, IV and VII only and DENIED on Counts I, III, V and VI with respect to defendant Corll.

BY THE COURT:

S/ James T. Giles

J.