

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

ALI ABU LUMUMBA	:	CIVIL ACTION
	:	
vs.	:	
	:	
PHILADELPHIA DEPARTMENT OF HUMAN SERVICES; THE CITY OF PHILADELPHIA; and DANA POINDEXTER	:	NO. 98-5195
	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 21st day of May, 1999, upon consideration of Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. No. 8, filed Dec. 14, 1998),¹ **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED** as to (1) all claims against the defendants Philadelphia Department of Human Services and the City of Philadelphia, and (2) the claim for negligent infliction of emotional distress against defendant Dana Poindexter, and **DENIED** as to all other claims against defendant Dana Poindexter. A preliminary pretrial conference will be scheduled with respect to the remaining claims against defendant Dana Poindexter in due course.²

¹Plaintiff was given an extension of time for responding to this Motion but did not do so.

²The Court notes that plaintiff filed a motion for a preliminary injunction. The Court will address the issues raised by that motion at the preliminary pretrial conference.

MEMORANDUM

This action is presently before the Court on the motion of the defendants, City of Philadelphia, Philadelphia Department of Human Services, and Dana Poindexter, to dismiss plaintiff Ali Abu Lumumba's Amended Complaint pursuant to Federal Rule of Procedure 12(b)(6). For the reasons set forth below, the Court will grant defendants' Motion to Dismiss as to defendants City of Philadelphia and the Philadelphia Department of Human Services, and the claim for negligent infliction of emotional distress against defendant Dana Poindexter, and deny the motion as to the civil rights and state law intentional tort claims against defendant Dana Poindexter.

I. BACKGROUND

This action was commenced by a pro se Complaint filed by plaintiff Ali Abu Lumumba on July 27, 1998 in the Court of Common Pleas of Philadelphia County. This Complaint named only the Philadelphia Department of Human Services as defendant, and contained allegations that on July 15, 1998, the Department of Human Services ("DHS") had illegally removed plaintiff's daughter, Shakia Lumumba, from plaintiff's home at 2724 W. Master Street, Philadelphia. According to the Complaint, a May 28, 1998 court order had given plaintiff "primary physical and legal custody of Shakia," and that agents of DHS had entered his home without his permission and removed his daughter "unlawfully" and with malicious intent. Plaintiff asserted that this action violated his Fourteenth Amendment rights and "intentionally and negligently inflicted high of emotional distress" [sic] on both himself and his daughter. Plaintiff also claimed that the incident constituted "assault, unlawfull theft, unlaw full entry and tenant

violations,” [sic] and demanded \$50,000 in damages, as well as the assessment of punitive damages, legal fees and court costs.

On September 30, 1998, defendant DHS filed a Notice of Removal in the United States District Court for the Eastern District of Pennsylvania, removing the case to this Court pursuant to 28 U.S.C. §§ 1441, 1443. On October 8, 1998, defendant DHS filed a motion to dismiss plaintiff’s complaint. In an Order dated November 19, 1998, the Court noted that plaintiff had already filed and served an Amended Complaint on November 12th, and therefore denied the DHS motion without prejudice to its right to file a motion to dismiss the Amended Complaint. Defendant DHS, along with newly-named defendants, Dana Poindexter and the City of Philadelphia, then filed a Motion to Dismiss the Amended Complaint (Doc. No. 8, filed Dec. 14, 1998).

Plaintiff’s Amended Complaint, also filed pro se, differs from his initial complaint in several aspects: 1) it names two additional defendants, the City of Philadelphia and Dana Poindexter, a DHS agent who allegedly entered plaintiff’s home and removed his daughter; 2) it asserts that defendant’s acts violated his rights under the Eighth as well as the Fourteenth Amendments; 3) it does not contain any specific allegations of infliction of emotional distress by defendants; and 4) it asserts that the conduct of the defendants was “willful, knowing, intentional, outrageous, and done fraudulently with full knowledge.” Amended Complaint at ¶¶ 1-4. Additionally, the Amended Complaint purports to incorporate all allegations made in his original Complaint. Amended Complaint at ¶ 5.

II. DISCUSSION

When deciding a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, “the court primarily considers the allegations in the complaint, although ... exhibits attached to the complaint may also be taken into account.” 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, Civil 2d § 1357 (1990); see also Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3rd Cir. 1990). The Court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citation omitted). The Court may not dismiss on a Rule 12(b)(6) motion unless it “is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” H.J. Inc. v. Northwest Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Therefore, the facts and allegations in the Amended Complaint are presumed to be true for the purposes of deciding this motion.

In addition, when considering the legal sufficiency of plaintiff's Amended Complaint, the Court is mindful that pro se plaintiffs are not held to as high a pleading standard as other litigants, and that pro se pleadings must be construed liberally by the Court. See Haines v. Kerner, 404 U.S. 519, 520 (1972). This does not mean, however, that the Court may infer facts or legal arguments central to plaintiff's claims which are not set forth in plaintiff's Amended Complaint. See, e.g., Hamilton v. Jamieson, 355 F.Supp. 290, 298 (E.D. Pa. 1973). In light of the liberal standard forth in Haines, the Court will consider the Amended Complaint to have incorporated all claims and allegations made by plaintiff in his original complaint, as is explicitly stated in the text of his Amended Complaint. Amended Complaint at ¶ 5.

The Court's Order of November 19, 1998 permitted defendants to incorporate the arguments made in their motion to dismiss plaintiff's original complaint into the instant Motion to Dismiss, and they have done so, excepting only their new objections to plaintiff's claims under the Eighth Amendment. Defendants argue that plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, and is thus subject to dismissal under Federal Rule of Civil Procedure 12(b)(6), for the following reasons: 1) plaintiff's Eighth Amendment claim fails, because the Eighth Amendment applies only to persons in custody; 2) the Philadelphia Department of Human Services has no legal existence apart from the City of Philadelphia, and thus cannot be sued under 53 Pa.C.S. § 16257; 3) plaintiff has failed to state a claim under 42 U.S.C. § 1983; and 4) any state law claims against the City of Philadelphia are barred by the Political Subdivision Tort Claims Act, 42 Pa C.S. §§ 8541-8564.

The Court concludes that plaintiff has failed to state a claim against either DHS or the City of Philadelphia under 42 U.S.C. § 1983; that DHS is not legal entity which can be sued under 53 Pa.C.S. § 16257; that the City of Philadelphia is immune from liability for plaintiff's state law claims under 42 Pa.C.S. § 8541 et seq.; and that all of plaintiff's claims against these defendants must therefore be dismissed. The Court further concludes that plaintiff has stated claims against the individual defendant, Dana Poindexter, under § 1983 and for state law intentional torts, but not for negligent infliction of emotional distress.

1. Claims against DHS and the City of Philadelphia under 42 U.S.C. § 1983

Plaintiff has alleged that defendants DHS and the City of Philadelphia violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. As an initial matter, the Court notes that defendants are entirely correct that the Eighth Amendment's prohibition of cruel and unusual punishment applies only to prisoners who have been convicted of a crime. See Ingraham v. Wright, 430 U.S. 651, 671-72 (1977). Plaintiff does not allege that he was a prisoner who had been convicted of a crime. Accordingly, plaintiff cannot assert a claim for an Eighth Amendment violation against defendants, and such claims must be dismissed. Id.

To bring a complaint under § 1983,³ a plaintiff must allege a violation of a right secured by the Constitution and laws of the United States, and that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48-49 (1988); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978); Shaw v. Stackhouse, 920 F.2d 1135, 1142 (3d Cir.1990). Plaintiff has alleged that agents of the City of Philadelphia, in their official capacity, violated his rights by taking his daughter from his home without justification or authority. The Court will treat the Amended Complaint as alleging a prima facie civil rights claim under the Fourteenth Amendment as it incorporates the Fourth Amendment right against unreasonable searches and seizures.

³Section 1983 imposes civil liability upon one:

... who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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...

42 U.S.C. § 1983.

A threshold question before the Court is whether DHS is a legal entity which can be held liable under Pennsylvania law. DHS is neither an individual nor a corporation; it is an agency of the City of Philadelphia. See 53 Pa.C.S. § 16257.⁴ For that reason plaintiff's claims against DHS must be dismissed. See Miller v. City of Philadelphia et al., No. 96-3578, 1997 WL 476352, at *6 (E.D. Pa. Aug. 19, 1997) (dismissing claims against DHS under § 16257); see also Irvin v. Borough of Darby, 937 F. Supp. 446, 450 (E.D. Pa. 1996) (dismissing claims against municipal police department); Agresta v. City of Philadelphia, 694 F. Supp. 117, 119 (E.D. Pa. 1988) (dismissing claims against Philadelphia police department because police department does not have separate corporate existence).

A municipality will be held liable under § 1983 only if the municipality has itself caused a constitutional violation; municipal liability cannot be based on respondeat superior, that is, on the theory that the master is responsible for the acts of its servants. See Monell v. New York Dept. of Social Services, 436 U.S. 658, 694-695 (1978). Accordingly, a plaintiff alleging a § 1983 claim against a municipality must allege that a constitutional violation occurred as a result of an approved municipal policy or governmental custom. Id. at 690-691. Thus, a municipality

⁴53 Pa.C.S. § 16257 provides:

All bonds, contracts and obligations heretofore executed, judgments entered, claims filed, and suits now pending in the name of any department of said city, formerly having had a corporate existence, are declared to be good and valid, and to inure to the use of the city; but no such department shall be taken to have had, since the passage of the act to which this is a supplement, a separate corporate existence, and hereafter all suits growing out of their transactions, and all claims to be filed for removing nuisances, together with all bonds, contracts and obligations, hereafter to be entered into or received by the said departments, shall be in the name of the city of Philadelphia.

may not be held liable for civil rights violations committed by its agents “unless there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.” City of Canton v. Harris, 109 S.Ct. 1197, 1203 (1989). “[P]roof of the mere existence of an unlawful policy or custom is not enough to maintain a § 1983 action. A plaintiff bears the additional burden of proving that the practice was the proximate cause of the injuries suffered.” Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) (citing Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984).

Plaintiff’s Amended Complaint simply contains no allegations that some unlawful policy or custom of the City (or DHS) was responsible in any way for the alleged violation. Because he has not alleged any such facts, plaintiff’s civil rights claims against the City of Philadelphia must be dismissed.

2. State law claims against the City of Philadelphia

Because the Court concludes that plaintiff has successfully stated a claim against defendant Poindexter under § 1983, see section 3, infra, the Court may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over plaintiff’s state law tort claims against the City of Philadelphia which “are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). As noted in section 1, supra, plaintiff’s claims against DHS must be dismissed because DHS is not a legal entity and cannot be sued as such.

The state law tort claims asserted against the City of Philadelphia include negligent infliction of emotional distress, intentional infliction of emotional distress, assault, “unlawfull

theft” [sic], “unlaw full entry” [sic] and “tenant violations,” all as a result of DHS’ allegedly wrongful removal of plaintiff’s daughter. These claims “form part of the same case or controversy” as the § 1983 claims against defendant Poindexter, and are therefore subject to supplementary jurisdiction under 28 U.S.C. § 1367.

However, these claims are barred in their entirety by Pennsylvania’s Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8541 et seq. (“PSTCA”), which, inter alia, immunizes the City and its agencies from liability “for any damages on account of any injury to a person or property caused by any act of the local agency or any employee thereof or any other persons.” 42 Pa.C.S. § 8541. None of the claims asserted by plaintiff fall under the statutory exceptions to the rule of § 8541. See 42 Pa.C.S. § 8542(b). While it is true that § 8550 of the PSTCA provides an exception to this general rule of immunity when a governmental employee causes an injury and that “act constituted a crime, actual fraud, actual malice or willful misconduct...,” 42 Pa.C.S. § 8550, it is only the immunity of the governmental employee that caused the injury which is eliminated under this provision. The immunity of the local government entity is not abolished even if the requirements of § 8550 are satisfied. See Parsons v. City of Philadelphia Coordinating Off. of Drug & Alcohol Abuse, 833 F. Supp. 1108, 1118 (E.D. Pa. 1993); Paul v. John Wanamakers, Inc., 593 F. Supp. 219, 223 (E.D. Pa. 1984) (citing Buskirk v. Seiple, 560 F. Supp. 247, 252 (E.D. Pa. 1983)). Thus, defendant City of Philadelphia is immune from all of plaintiff’s state law tort claims. The Court therefore grants defendants’ Motion to Dismiss as to plaintiff’s state law claims against the City of Philadelphia.

3. Claims against Dana Poindexter under 42 U.S.C. § 1983

As set forth above, in order to state a claim under § 1983 a plaintiff must allege a violation of a right secured by the Constitution and laws of the United States, and that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48-49 (1988). An individual defendant in a civil rights action must have personal involvement in the alleged wrongs. See Baker v. Monroe Township, 50 F.3d 1186, 1190 (3d Cir. 1995). Personal involvement can be demonstrated either through allegations of actual participation, personal direction of or actual knowledge and acquiescence to the alleged violations. Id. at 1190-91. To satisfy the “under color of state law” requirement, the plaintiff can show that the defendant “exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” West, 487 U.S. at 49.

In the instant case, plaintiff has alleged that defendant Poindexter, a DHS agent, personally entered his home and removed his daughter, and that defendant did so in a manner which was “willful, knowing, intentional, outrageous, and done fraudulently with full knowledge.” Assuming all of the allegations in the Amended Complaint to be true, as this Court must when ruling on a motion under Federal Rule of Civil Procedure 12(b)(6), plaintiff has stated a claim against defendant Poindexter under § 1983. Viewing the facts as alleged, defendant Poindexter entered plaintiff’s home and seized his daughter illegally, and did so by virtue of the powers granted to defendant as an agent of DHS, an agency of the City of Philadelphia. Although plaintiff has not specifically pleaded a Fourth Amendment violation in his Amended Complaint, construing plaintiff’s Amended Complaint liberally, as the Court must, plaintiff has pled a violation of his Fourth Amendment right against unreasonable searches and seizures, as incorporated by the Fourteenth Amendment. See Brower v. County of Inyo, 489 U.S. 593, 599

(1989) (unreasonable seizure in violation of the Fourth Amendment gives rise to § 1983 liability). Thus plaintiff has successfully pled that his rights under the Constitution were violated by an individual acting under color of state law, and the Motion to Dismiss must therefore be denied as to plaintiff's civil rights claim against defendant Poindexter.

4. State law claims against Dana Poindexter

The Amended Complaint also sets forth claims against defendant Poindexter for negligent infliction of emotional distress, intentional infliction of emotional distress, assault, “unlawfull theft” [sic], “unlaw full entry” [sic] and “tenant violations.” Plaintiff alleges in his Amended Complaint that the conduct of defendant Poindexter was “willful, knowing, intentional, outrageous, and done fraudulently with full knowledge.” The Court has supplemental jurisdiction over these state law tort claims under 28 U.S.C. § 1367.

Pursuant to the PSTCA, local governments and their officials are generally immune from civil liability for state law tort claims. See 42 Pa.C.S. §§ 8541, 8545. Section 8550 of the PSTCA, however, provides an exception to this general rule of immunity when a governmental employee causes an injury and that “act constituted a crime, actual fraud, actual malice or willful misconduct....” 42 Pa.C.S. § 8550.⁵ Under the circumstances covered by § 8550, there is no

⁵42 Pa.C.S. § 8550 provides, in pertinent part:

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 sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

immunity for the governmental employee who caused the injury. “Willful misconduct,” as used in § 8550, requires evidence that the defendant actually knew that his conduct was illegal. See Renk v. City of Pittsburgh, 641 A.2d 289, 293-94 (1994); see also In re City of Philadelphia Litig., 938 F. Supp. 1264, 1271 (E.D. Pa. 1996).

In the instant case, the plaintiff claims that defendant Poindexter’s actions rose to the level of “willful misconduct.” Plaintiff’s claim for negligent infliction of emotional distress does not meet this standard, and defendant Poindexter is therefore immune from any liability for that claim under 42 Pa.S.C. §§ 8545, 8550, see Illiano v. Clay Township, 892 F. Supp. 117, 121 (E.D. Pa. 1995). However, plaintiff also alleges that defendant Poindexter committed a number of intentional torts willfully and with knowledge of the illegality of the actions. If these allegations are eventually proven, defendant Poindexter would not be immune from liability for those claims under § 8550 of the PSTCA. Thus plaintiff’s state law tort claims for intentional torts are not subject to dismissal on the present state of the record.

III. CONCLUSION

For the foregoing reasons, the Court will grant the defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) as to all claims against defendants Philadelphia Department of Human Services and the City of Philadelphia, and the claim for negligent infliction of emotional distress asserted against defendant Dana Poindexter, and will deny the motion as to the civil rights claims and state law intentional tort claims against defendant Dana Poindexter.

BY THE COURT:

JAN E. DUBOIS