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United States District Court, E.D. Pennsylvania.

Anna Marie L. DI MATTESA
v.
William DAVIES, Esquire; John A. Reilly, Esquire; Irwin L. Eisenberg, D.O. and Dennis O'Leary; William Hannum; Richard Shott and County of Delaware
Audrey BROWN
v.
William DAVIES, Esquire; John A. Reilly, Esquire; Irwin L. Eisenberg, D.O.; Dennis O'Leary; William Hannum; Richard Shott and County of Delaware

Civ. A. Nos. 85–3426, 85–3427. | Nov. 22, 1985.

Attorneys and Law Firms

A. Charles Peruto, Stacey L. Schwartz, Peruto, Ryan & Vitullo, Philadelphia, Pa., for plaintiffs.

Gene E.K. Pratter, Philadelphia, Pa., for Irwin L. Eisenberg, D.O.

Ralph B. D'Iorio, Media, Pa., for William Davies, John A. Reilly and Dennis O'Leary, William Hannum, Richard Shott and County of Delaware.

Opinion

MEMORANDUM

O'NEILL, District Judge.

***1** In these related civil rights damage actions plaintiffs allege in Counts I of their complaints that certain Delaware County officials, a physician and the County of Delaware acted under color of state law to deprive plaintiffs of their constitutional rights in violation of 42 U.S.C. § 1983. Plaintiffs also assert pendant state claims in Counts II and III for intentional and negligent wrongs.

Plaintiffs name as defendants William Davies, Assistant District Attorney, and John A. Reilly, District Attorney of Delaware County; Dennis O'Leary, William Hannum and Richard Shott of the Delaware County Detective's Office; Irwin L. Eisenberg, D.O.; and the County of Delaware. All of the defendants except Eisenberg have filed motions to dismiss in both actions.

"In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 46–47 (1957) (footnote omitted).

The complaints aver that on or about June 18, 1983, at approximately 5:15 A.M., plaintiffs were arrested and charged with prostitution by the Delaware County Detective's Office and were forced by defendants, against their wills, to undergo "gynecological examination/strip search[es]." (¶¶ 15, 16).

Plaintiffs characterize the examinations[1] as strip and body cavity searches and allege that they were carried out "without probable cause to believe that any weapon or contraband was secreted on their bodies." (¶ 18). These examinations were "forced" because plaintiffs were advised that unless they underwent the examinations, they would not be arraigned, or in the alternative, if arraigned, high bail would be recommended. (¶ 20). The complaints allege that the examinations were authorized by Davies and Reilly and were conducted by Eisenberg. (¶ 17). During the examinations Eisenberg allegedly "removed the plaintiff[s'] clothing and fondled the plaintiff[s'] body and inserted a speculum into the plaintiff[s'] vagina and anus. (¶ 17).

A.

Davies and Reilly assert that as prosecutors they are entitled to absolute immunity in a § 1983 damages suit. Prosecutors receive absolute immunity when they act as an advocate in "initiating a prosecution and presenting the State's case," *Imbler v. Pachtman,* 424 U.S. 409, 430–31 (1976), but receive qualified immunity when they act in an administrative or investigative capacity. *Henderson v. Fisher,* 631 F.2d 1115, 1120 (3d Cir.1980); *Mancini v. Lester,* 630 F.2d 990, 994 (1980). *See also, Mitchell v. Forsyth,* 105 S.Ct. 2806, 2812–2814 (1985); *Hicks v. Feeney,* Civ. No. 84–820, Slip op. at 7 n. 2 (August 26, 1985).

Defendants' motions and memoranda of law failed to recognize the difference between those prosecutorial activities which receive absolute immunity and those which receive qualified immunity. Lacking this assistance from counsel, we at this point are unable to conclude that defendants are entitled to absolute immunity.

***2** Defendants also argue that the § 1983 claim should be dismissed because they are charged with authorizing the examinations, but not with having participated in or

assisted in the examination. To sustain a motion to dismiss, plaintiffs are requested to plead only that a defendant participated in, or had personal knowledge of and acquiesced in the alleged unconstitutional acts. *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077, 1082 (3d Cir.1976); *U.S. ex rel. Smith v. Robinson,* 495 F.Supp. 696, 698 (E.D.Pa.1980). The complaints meet this requirement.

Defendants next argue that to the extent that they state claims for negligence the § 1983 claims should be dismissed. Allegations of "mere negligence," are not cognizable under § 1983 in this Circuit, *Davidson v. O'Lone,* 752 F.2d 817, 829 (3d Cir.1984), *cert. granted sub nom., Davidson v. Cannon,* 105 S.Ct. 2673 (1985); however, defendants' argument is inapposite because the § 1983 claims aver "malice" and "wanton disregard" rather than negligence. (¶ 22). Such averments state a § 1983 claim. *Davidson v. O'Lone,* 752 F.2d at 827–829.[2]

Finally, defendants argue that Counts II and III of the complaints, alleging pendant state claims for intentional and negligent wrongs, should be dismissed because (a) the Court lacks jurisdiction to hear the state claims and (b) defendants are immune from suit pursuant to the Pennsylvania sovereign immunity act, Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §§ 8542, 8545–8546. With respect to the first contention, the Court may assert jurisdiction over the pendant state claims if the state and federal claims derive from a common nucleus of operative facts. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). There is no question but that the claims rise from the same facts, *see* ¶¶ 24, 27.

However, defendants' contention that they are immune under the state sovereign immunity act is correct. The Act, *inter alia,* waives sovereign immunity for specified classes of negligent acts or omissions on the part of a government and its employees, but does not waive immunity for causes of actions based on willful and intentional torts. *See* 42 Pa.C.S.A. § 8542(a); *Picariello v. Cammon,* 54 Pa.Commw. 252, 255, 421 A.2d 477, 479 (1980). Accordingly, Counts II, which state claims for intentional wrongs, will be dismissed. Counts III, stating claims for negligence, will also be dismissed because the alleged negligence acts are not among those for which sovereign immunity has been waived. 42 Pa.C.S.A. § 8542(b).[3]

B.

Defendants O'Leary, Hannum and Shott, Delaware County detectives, contend that the § 1983 claim should be dismissed because the complaints fail to allege specific facts involving them in the acts complained of. While the complaints allege various acts by "defendants", they do not identify which defendant or defendants of the individual defendants did what. *See, e.g.* ¶¶ 15, 18, 21, 22, 23. Specifically, the complaints fail to state what involvement O'Leary, Hannum and Shott had with the examinations. Accordingly, Counts I will be dismissed with leave to amend. *Darr v. Wolfe,* 787 F.2d 79 (3d Cir.1985).

***3** These defendants also argue that they are entitled to qualified immunity and urge the Court to dismiss the § 1983 claim because the complaints fail to aver that the defendants acted in bad faith. Defendants mischaracterize the qualified immunity test and rely on an outdated formulation of that test. In *Wood v. Strickland,* 420 U.S. 308, 322 (1975), the Supreme Court established a two-prong qualified immunity test: Under the objective prong, an official is immune if he "knew or reasonable should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiffs]", *id.,* and under the subjective prong, he would not receive immunity if "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* The Court revised this test in *Harlow v. Fitzgerald,* 457 U.S. 800, 816–819 (1982) to remove the subjective prong apparently to prevent wide-ranging discovery of officials' motivation. Under the new qualified immunity test, "government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, *People of Three Mile Island v. Nuclear Regulatory Commission,* 747 F.2d 139, 143–144 (3d Cir.1984). Defendants' contention that plaintiffs' complaint is defective because it fails to allege bad faith might have been relevant under the former test, but is irrelevant under the current test.

C.

The County of Delaware argues that the § 1983 claims fail to allege facts sufficient to establish that the individual defendants' actions resulted from a county policy or custom as required by *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). Plaintiffs' responses include copies of newspaper articles purporting to report an incident relevant to this litigation and recite a chronology of events which plaintiffs believe constitutes a policy.[4] Motions to dismiss pursuant to Fed.R.C.P. 12(b)(6) test the sufficiency of a complaint and a court may not go beyond the complaint to consider materials such as those incorporated in plaintiff's response. Accordingly, the Court will dismiss the § 1983 claim with

leave to amend the complaints to specify which customs or policies of the county were the "moving force" of the constitutional violation. 436 U.S. at 694–695.

ORDER

AND NOW this 21st day of November, 1985, upon consideration of defendants' motions to dismiss and the responses thereto, it is hereby ORDERED that:

1. Defendants Davies and Reilly's motions to dismiss Counts I are DENIED. With respect to Counts II and III, said motions are GRANTED.

2. Defendants O'Leary, Hannum, and Shott's motions to dismiss Counts I are GRANTED but plaintiffs may amend within twenty days. With respect to Counts II and III said motions are GRANTED.

***4** 3. Defendant County of Delaware's motions to dismiss Counts I are GRANTED but plaintiffs may amend within twenty days. With respect to Counts II and III, said motions are GRANTED.

[1] The Court will refer to the "gynecological examination/strip searches" as examinations. By using that term we express no view on the merits of the cases.

[2] The motions to dismiss on behalf of the other defendants, discussed in parts B and C, *infra,* make the identical argument. Our discussion of this argument applies with equal force to their motions.

[3] The motions to dismiss on behalf of the other defendants, discussed in Parts B and C, *infra,* make the identical argument with respect to Counts II and III. Our discussion of this argument applies with equal force to these defendants.

[4] From the motions to dismiss and the responses thereto, it appears that the examinations were made pursuant to a Pennsylvania venereal disease prevention law, 35 Pa.S.A. § 521.8, which states in pertinent part:

> "(a) Any person taken into custody and charged with any crime involving lewd conduct or a sex offense, or any person to whom the jurisdiction of a juvenile court attaches, may be examined for a venereal disease by a qualified physician appointed by the department or by the local board or department of health or appointed by the court having jurisdiction over the person so charged."

See Block v. Rutherford, 104 S.Ct. 1411 (1984); *Bell v. Wolfish,* 441 U.S. 520, 558–560 (1979); *Logan v. Shealy,* 660 F.2d 1007, 1013, *cert. denied,* 455 U.S. 942 (1982); *Tinetti v. Wittke,* 479 F.Supp. 486, 490–91 (E.D.Wis.1979).