IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00819-BNB

LEILA MARIE MCCOY,

Plaintiff,

v.

STATE OF KANSAS,
TOPEKA PUBLIC SCHOOLS USD 501,
KS DEPARTMENT OF CHILDREN & FAMILIES,
TOPEKA METROPOLITAN TRANSIT AUTHORITY, and
RENEE NETHERTON, ESQ.,

Defendants.

ORDER OF DISMISSAL

Plaintiff, Leila Marie McCoy, resides in Colorado Springs, Colorado. She submitted *pro se* a Complaint (ECF No. 1) for money damages, a Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 (ECF No. 3), and a Motion [to] Appoint Pro Bono Counsel (ECF No. 4).

On March 25, 2014, Magistrate Judge Boyd N. Boland entered an order granting the § 1915 motion, denying the motion to appoint counsel as premature, and directing Ms. McCoy to file an amended Complaint within thirty days.

Ms. McCoy asserted jurisdiction as follows: "Violation of constitutional & ADA rights; involves a Federal Crime, Amount of damage exceeds state limit, Plaintiff and Defendants in separate [sic] states." ECF No. 1 at 3. Plaintiff alleged she is blind, and asked the Court to accept the Complaint she filed as is as a reasonable accommodation under the Americans with Disabilities Act (ADA). The ADA's applicability to the

Complaint was not otherwise apparent. Title II of the ADA is not applicable to the federal government. *Cellular Phone Taskforce V. F.C.C.*, 217 F.3d 72, 73 (2d Cir. 2000); *see also* 42 U.S.C. § 12131(1) ("The term 'public entity' means . . . any State or local government" or "any department, agency, special purpose district, or other instrumentality" thereof). In the March 25 order, Ms. McCoy was informed that this Court is not obligated to accept the Complaint as submitted.

Magistrate Judge Boland explained to Ms. McCoy that venue may be improper with respect to claims asserting violations of her civil rights pursuant to 42 U.S.C. § 1983 or diversity jurisdiction, 28 U.S.C. § 1332. Section § 1391(b) of Title 28 United States Code sets forth the rules that govern venue in federal courts. In general, a civil action may be brought in:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b).

The Defendants appear to reside in Topeka, Kansas, although Plaintiff failed to provide each Defendant's address. Magistrate Judge Boland explained it was unclear whether a substantial part of the events or omissions giving rise to the asserted claims occurred in Kansas or Colorado.

Magistrate Judge Boland also explained to Ms. McCoy that she lacked standing to assert violations of criminal law. Courts universally endorse the principle that private citizens cannot prosecute criminal actions. *See, e.g., Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 86-87 (2d Cir. 1972) ("It is a truism, and has been for many decades, that in our federal system crimes are always prosecuted by the Federal Government, not as has sometimes been done in Anglo-American jurisdictions by private complaints."); *Winslow v. Romer*, 759 F. Supp. 670, 673 (D. Colo.1991) ("Private citizens generally have no standing to institute federal criminal proceedings."). Ms. McCoy lacks standing to invoke the authority of United States attorneys under 28 U.S.C. § 547 to prosecute for offenses against the United States.

In the Complaint, Plaintiff alleged that the named Defendants facilitated her federal kidnapping as a minor child when she was in foster care in the State of Kansas Department of Social Rehabilitation Services and educated through the Topeka 501 school district special education staff. She alleged that Renee Netherton was her guardian *ad litem* at the time of the kidnapping. She complained that none of the Defendants alerted the authorities to her kidnapping. She further alleged she was a victim of human trafficking held against her will in Denver, Colorado, by her kidnapper, a school bus driver, apparently employed by the Topeka Metropolitan Transit Authority, who subjected her to mental, physical, and sexual abuse. Plaintiff presently appears to be 39 years old, and the actions she challenges appeared to have taken place 22 years ago when she was below the age of 18. Plaintiff was reminded that a two-year limitations period applies to each of her federal claims. *See Fogle v. Pierson*, 435 F.3d

1252, 1258 (10th Cir. 2006) ("[T]he statute of limitations for § 1983 actions brought in Colorado is two years from the time the cause of action accrued."); Colo. Rev. Stat. § 13-80-102(l)(a), (g) (2013); *see also Vaughan v. Ellis County*, No. 13-2283-CM, 2014 WL 910125, at *2 (D. Kan. Mar. 10, 2014) (not published) ("Constitutional claims pursuant to 42 U.S.C. § 1983 are subject to Kansas's two-year statute of limitations set forth in Kan. Stat. Ann. § 60-513(a)(4).").

Magistrate Judge Boland pointed out that Ms. McCoy may not sue the State of Kansas for money damages. The State of Kansas and its entities are protected by Eleventh Amendment immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Meade v. Grubbs*, 841 F.2d 1512, 1525-26 (10th Cir. 1988). "It is well established that absent an unmistakable waiver by the state of its Eleventh Amendment immunity, or an unmistakable abrogation of such immunity by Congress, the amendment provides absolute immunity from suit in federal courts for states and their agencies." *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 588 (10th Cir. 1994), overrruled on other grounds by *Ellis v. University of Kansas Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998). Neither the State of Colorado nor the State of Kansas has waived its Eleventh Amendment immunity, *see Griess v. Colorado*, 841 F.2d 1042, 1044-45 (10th Cir. 1988), and *Jones v. Courtney*, 466 F. App'x 696, 700-701 (10th Cir. 2012), and congressional enactment of § 1983 did not abrogate Eleventh Amendment immunity, *see Quern v. Jordan*, 440 U.S. 332, 340-345 (1979). The Eleventh Amendment applies to all suits against the state and its agencies, regardless of the relief sought. *See Higganbotham v. Okla. Transp. Comm'n*, 328 F.3d 638, 644 (10th Cir. 2003).

Even if venue was proper, which was not apparent, the Complaint still failed to comply with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Ms. McCoy failed to assert any claims, relying instead upon various allegations, some of which are chronological and others of which are vague and conclusory.

Magistrate Judge Boland afforded Ms. McCoy the opportunity to cure the deficiencies in her Complaint by submitting an amended Complaint within thirty days that asserted claims clearly and concisely in compliance with Fed. R. Civ. P. 8, asserted the statutory basis for this Court's jurisdiction, clarified which claims are asserted pursuant to which statute, alleged specific facts that demonstrate how each named Defendant personally participated in the asserted constitutional violations, and provided the address for each named Defendant. Ms. McCoy was warned that, even if the Court dismissed the instant action without prejudice for failure to comply with this order, the dismissal may bar recovery if Ms. McCoy sought to refile in this Court because the two-year statute of limitations may have run on her § 1983 claims.

The copies of the March 25 order mailed to Ms. McCoy on March 25 and again on April 4, 2014, pursuant to a minute order (ECF No. 7) were returned to the Court as undeliverable. See ECF Nos. 6 and 9. Ms. McCoy has failed to comply with the March 25 order within the time allowed or otherwise communicate with the Court in any way. Therefore, the Complaint and the action will be dismissed.

Finally, the Court certifies pursuant to § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438

(1962). If Ms. McCoy files a notice of appeal she also must pay the full $505.00 appellate filing fee or file a motion to proceed *in forma pauperis* in the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

Accordingly, it is

ORDERED that the Complaint (ECF No. 1) and the action are dismissed without prejudice pursuant to Rules 8 and 41(b) of the Federal Rules of Civil Procedure for the failure of Plaintiff, Leila Marie McCoy, within the time allowed to file an amended Complaint as directed in the order of March 25, 2014 (ECF No. 5), and for her failure to prosecute. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied. It is

FURTHER ORDERED that any pending motions are denied as moot. It is

FURTHER ORDERED that the clerk of the Court mail a copy of this order to Plaintiff at her last known address.

DATED at Denver, Colorado, this 14th day of May, 2014.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court