IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Great Elk Dancer for his Elk Nathion,	:	
Plaintiff	:	Civil Action 2:13-cv-0565
v.	:	Judge Watson
City of Logan, *et al.*,	:	Magistrate Judge Abel
Defendants	:	

Initial Screening Report and Recommendation

Plaintiff Great Elk brings this civil rights action under 42 U.S.C. §1983. Plaintiff's motion to proceed without prepayment of fees and costs is GRANTED.

This matter is before the Magistrate Judge for screening of the complaint under 28 U.S.C. §1915(e)(2) to identify cognizable claims, and to recommend dismissal of the complaint, or any portion of it, which is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *See, McGore v. Wrigglesworth,* 114 F.3d 601, 608 (6th Cir. 1997). The Magistrate Judge finds that the complaint fails to plead claims against any defendant except Fire Chief Brian Roberton and, therefore, recommends that all defendants except Robertson be dismissed from this lawsuit.

The complaint names as defendants the City of Logan, Police Chief Aaron Miller, Lt. Gregg Cluley, Officer Josh Mowery, Officer Tony Byron, Prosecution Attorney Liana Fetherolf, Mayor J. Martin Irviine, former Law Director Bob Lilly, Fire Chief Brian

Roberston, and the Hocking County Probation Office and Employees. The complaint alleges a number of events that occurred more than two years ago. The statute of limitations for claims under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 is two years. See, *Browning v. Pendleton,* 869 F.2d 982, 992 (6th Cir. 1989)(*en banc*)(statute of limitations for § 1983 suit is two years); *Owens v. Okure,* 488 U.S. 235 (1989); *Friedman v. Estate of Jackie Presser,* 929 F.2d 1151, 1159 (6th Cir. 1991)(statute of limitations for *Bivens* suit is two years). A statute of limitations begins to run when the plaintiff knows or has reason to know of the injury that is the basis of his action. *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007); *Kelly v. Burks*, 415 F.3d 558, 561 (6th Cir. 2005). Consequently, all of the actionable events alleged to have occurred before June 12, 2011 are barred by the statute of limitations.

The complaint contains the following allegations. On an unspecified date, Officer Josh Mowery tried to frame Elk when he told a woman he had pulled over and found marijuana in her possession that he would release her if she said she got it from his store. On an unspecified date, Law Director Bob Lilly brought criminal charges against Elk and his non-profit corporation. On an unspecified date, Officer Tony Byron stopped Elk's car without probable cause. Elk requested that a supervisor be called to the scene. Lt. Gregg Cluley appeared. He told Elk that he had been pulled over because he "was under an indictment on a different case and had no Ohio License . . . ." Elk showed them a New York license and they let him go.

In October 2011, Fire Chief Brian Robertson posted a made up violation of

occupancy and stop work order on a building housing Elk's internet café. As a result, the business was shut down for seven months.

On an unspecified date, a new skill games company was allowed to do business in Logan. This was after the court, prosecutor Liana FetherHolf and Police Chief Aaron Miller had told Elk he could not operate skill games. The complaint further alleges this was "prejudicial treatment, okay for someone else to operate and not me." In April 2013, Elk moved his business, and Fire Chief Brian Bobertson "sent a letter to my new Landlord that our business needs to file for Occupancy of Change as an assembly. Another violation that has no merit." The complaint concludes that "Defendants have intended to impair, and destroy Plaintiffs' business and relationships with the third parties and that denial of licenses and Police harassment was caused as a result of Plaintiffs' National Origin, in that he is Native American."

When considering whether a complaint fails to state a claim under Rule 12(b)(6), Federal Rules of Civil Procedure, a court must construe it in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). Rule 8(a), Federal Rules of Civil Procedure provides for notice pleading. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The United States Supreme Court held in *Erickson v. Pardus,* 127 S.Ct. 2197 (June 4, 2007):

> . . . Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts showing that the pleader is entitled to relief are not necessary; the statement need only

> "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.': *Bell Atlantic Corp. v. Twombly,* 550 U.S. __, ___, 127 S.Ct. 1955, __ (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957).

Analysis. There are no allegations in the complaint regarding what the City of Logan or the Hocking County Probation Office and Employees did to violate Elk's civil rights. The complaint fails to state a claim for relief against them.

The allegations about Liana Fetherolf and Bob Lily all involve their performance of their duties as prosecutors. *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976). Consequently, the claims pleaded against them are barred by absolute prosecutorial immunity.

The complaint fails to give Lt. Gregg Cluley and Officer Tony Byron fair notice of the claims against them. It does not say when the traffic stop occurred. Further, Elk was released after he produced his driver's license. Similarly the complaint fails to give Officer Josh Mowery fair notice of the claim against him. Again no date(s) were pleaded for the alleged actionable conduct. Further, it is not clear what Elk believes Mowery did that, in fact, deprived him of a constitutional or other right.

The complaint fails to give Mayor J. Martin Irviine or Police Chief Aaron Miller fair notice of what they allegedly did to deprive Elk of a constitutional or statutory right. There are no factual allegations about their actionable conduct. No dates are pleaded. The complaint does not explain what they did, when to deprive Elk of a constitutional or statutory right.

On initial screening, the complaint does arguably state claims for relief against Fire Chief Brian Robertson.

Accordingly, the Magistrate Judge RECOMMENDS that the City of Logan, Police Chief Aaron Miller, Lt. Gregg Cluley, Officer Josh Mowery, Officer Tony Byron, Prosecution Attorney Liana Fetherolf, Mayor J. Martin Irviine, former Law Director Bob Lilly, and the Hocking County Probation Office and Employees be DISMISSED because it fails to state a claim under 42 U.S.C. §1983. These defendants do not have to respond to the complaint unless the Court rejects this Report and Recommendation. The lawsuit will continue as to the claims against Fire Chief Brian Roberston. He should answer or otherwise respond to the complaint within 45 days of being served with summons and complaint.

IT IS FURTHER ORDERED that plaintiff's application to proceed without prepayment of fees be GRANTED. The United States Marshal is ORDERED to serve upon each defendant named in the complaint a copy of the complaint and a copy of this Order.

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Report and Recommendation, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1)(B); Rule 72(b), Fed. R. Civ. P.

The parties are specifically advised that failure to object to the Report and

Recommendation will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-52 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also, Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk of Court is DIRECTED to mail a copy of the complaint and this Report and Recommendation to each defendant.

s/Mark R. Abel
United States Magistrate Judge