

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TROY K. SCHEFFLER,

Plaintiff,

v.

MARTIN FOLCZYK, ROCHELLE KROENING
and CITY OF MENOMONIE, WISCONSIN,

Defendants.

ORDER

10-cv-370-bbc

In this civil action under 42 U.S.C. § 1983 and state law, plaintiff Troy Scheffler alleges that defendants Rochelle Kroening, a private citizen, and Martin Folczyk, a police officer for the City of Menomonie, engaged in a series of harassing and unlawful acts, such as threatening him, bringing false criminal charges and a false restraining order against him, detaining him without probable cause of criminal conduct and obstructing his civil lawsuit against Kroening. He asserts federal claims for a violation of his right to free speech and his right to be free from unreasonable searches and seizures and state law claims for malicious prosecution and abuse of process.

Defendants City of Menomonie and Martin Folczyk have filed a motion to dismiss

for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). (Defendant Kroening did not file her own motion or join the other defendants' motion. Accordingly, for the remainder of the opinion, I will refer to the city and Folczyk collectively as "defendants."). With respect to the city, defendants argue that plaintiff has not stated a claim under federal law because he has not alleged that the city had an unconstitutional policy, as required by Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), and that the city is immune from the state law claims under Wis. Stat. § 893.80(4). (Curiously, defendants do not argue that the plaintiff's claims against the city are barred under the doctrine of claim preclusion, even though they attach to their motion a decision of this court from 2008, dismissing a claim against the city arising out of the same facts.) With respect to defendant Folczyk, they argue that plaintiff may not recover punitive damages against him under state or federal law.

Plaintiff's five-page opposition brief is not as clear as it could be. With respect to his federal claim against the city, he says that he is not suing "Menomonie for actions that infringe on constitutional rights as the result of an unlawful Menomonie policy." Plt.'s Br., dkt. #12, at 2. Although he does not say expressly that he has no federal claims against the city, that is the only reasonable interpretation of his response. Municipalities may not be held liable for the constitutional violations of their employees; it is only when an alleged violation "may fairly be said to represent official policy . . . that the government as an entity

is responsible under § 1983.” Monell, 436 U.S. at 694. Thus, if plaintiff does not have a claim against the city under Monell, he has no federal claim at all. To the extent plaintiff did not intend to concede that he has no federal claims against the city, he has waived those claims by failing to develop any argument in support of them. County of McHenry v. Insurance Co. of the West, 438 F.3d 813, 818 (7th Cir. 2006) (“When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.”) (internal quotations omitted).

With respect to state law claims against the city, plaintiff concedes in his brief that the city may not be sued for abuse of process or malicious prosecution. However, he says that the city may be held liable as an indemnitor. Because the city does not object to its presence in the lawsuit as a potential indemnitor, I will not dismiss the city from the case.

Defendants’ argument regarding the availability of punitive damages against defendant Folczyk is more properly construed as a motion to strike under Fed. R. Civ. P. 12(f) than a motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). The Court of Appeals for the Seventh Circuit has stated that the request for relief “is not itself a part of the plaintiff’s claim,” Bontkowski v. Smith, 305 F.3d 757, 762 (7th Cir. 2002), suggesting that an improper request for a particular form of damages is not a failure to state a claim. E.g., BJC Health System v. Columbia Casualty Co., 478 F.3d 908, 916 (8th Cir. 2007) (considering motion to strike request for punitive

damages under Fed. R. Civ. P. 12(f)).

Again, plaintiff seems to concede that he cannot obtain punitive damages against defendant Folczyk under Wis. Stat. § 893.80(3), or, if he did not intend to make this concession, he has waived any argument to the contrary. However, I agree with plaintiff that it is too soon to tell whether he may be able to recover punitive damages against Folczyk for his claims under § 1983.

Defendants are correct that punitive damages are not available for § 1983 claims against a defendant acting in his “official capacity,” but plaintiff is suing Folczyk in his personal capacity as well. Defendants seem to assume that “official capacity” is the same thing as “within the scope of employment” and that plaintiff cannot obtain punitive damages against Folczyk because all of his alleged actions occurred while he was on duty as a police officer. That is incorrect. When a plaintiff asserts a claim against a public official in his “official capacity,” this is simply “another way of pleading an action against an entity of which an officer is an agent.” Kentucky v. Graham, 473 U.S. 159, 166 (1985) (quoting Monell, 436 U.S. at 690 n.55). In other words, a claim against defendant Folczyk in his official capacity is a claim against the city, which cannot be required to pay punitive damages in a case under § 1983. Robinson v. City of Harvey, Illinois, 617 F.3d 915, 916 (7th Cir. 2010) (“Municipalities are not subject to punitive damages in suits under 42 U.S.C. § 1983.”)

However, punitive damages are permissible against defendants being sued in their personal capacity. Smith v. Wade, 461 U.S. 30 (1983). A claim against a defendant in his “personal capacity” simply means that the plaintiff wishes "to impose personal liability upon a government official for actions he takes under color of state law.” Kentucky, 473 U.S. at 165. Accordingly, plaintiff may be awarded punitive damages against Folczyk under § 1983 if plaintiff meets the requisite standard, even if all of Folczyk’s actions were within the scope of his employment.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants City of Menomonie and Martin Folczyk, dkt. #10, is GRANTED to the extent that plaintiff Troy Scheffler intended to assert any claims against defendant City of Menomonie other than a claim for indemnification. Plaintiff’s request for punitive damages against defendant Folczyk is STRICKEN as to plaintiff’s claims under state law. Defendants’ motion is DENIED in all

other respects.

Entered this 4th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge