

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

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KEVIN P. BRADLEY,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,  
CATHY STEPP, Secretary of the Department of Natural Resources,  
in her official capacity, MACK HANNON, Conservation Officer,  
in his official capacity, TIMOTHY EBERT, Conservation Officer  
in his official capacity and JOHN DOE,

Defendants.  
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ORDER

11-cv-694-bbc

In this civil action for monetary relief, plaintiff Kevin Bradley contends that defendants Mack Hannon, Timothy Ebert, Cathy Stepp and the Wisconsin Department of Natural Resources violated his rights under the United States Constitution and state law when they entered his vacant property, searched his van, chased him and used physical force against him. On December 2, 2011, I granted plaintiff leave to proceed on his Fourth Amendment claim against defendants Mack Hannon and Timothy Ebert, denied him leave to proceed on his Fourteenth Amendment claim against all defendants and stayed a decision regarding his state law claims because it was unclear whether plaintiff had complied with Wisconsin's notice of claim statute. I instructed plaintiff to file a supplement to his

complaint with information about his compliance with the notice requirements under Wis. Stat. ch. 893.

Plaintiff filed a supplement on December 12, 2011, stating that he filed a notice of claim that was rejected by the Wisconsin attorney general's office. He admits that his notice was unsworn, in violation of the notice of claim requirements in Wis. Stat. § 893.82(5). However, the state responded to plaintiff's notice of claim, stating that it had investigated his claims and had found "no basis to substantiate any liability of the part of any State of Wisconsin employee." Dkt. #9-1. Thus, it appears that the state waived any objection it had to plaintiff's failure to file a sworn notice. Although defendants may challenge plaintiff's compliance with the relevant notice of claim statutes, at this stage, plaintiff's allegations regarding his notice of claim are sufficient to allow the court to screen his state law claims.

On December 27, 2011, plaintiff filed an amended complaint, in which he adds new allegations and claims to his original complaint and attempts to revive some of the claims that I dismissed previously. Because plaintiff's amended complaint is now the operative pleading, I must screen it and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B).

Plaintiff asserts several claims in his amended complaint, including that (1) all defendants violated his right to be free from unreasonable searches and seizures under the Fourth Amendment; (2) all defendants violated his right to equal protection under the law;

(3) all defendants violated his right to be free from cruel and unusual punishment under the Eighth Amendment; (4) defendants Wisconsin Department of Natural Resources and Cathy Stepp negligently failed to train, supervise and control defendants Hannon and Ebert; (5) all defendants negligently inflicted emotional distress on plaintiff; (6) defendants Hannon and Ebert falsely imprisoned plaintiff; and (7) all defendants harassed him in violation of Wis. Stat. § 947.013.

As an initial matter, the Wisconsin Department of Natural Resources is not a proper defendant in this case. Plaintiff cannot assert his federal claims under 42 U.S.C. § 1983 against the Department because it is not a “person” within the meaning of the statute. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989). Additionally, plaintiff cannot assert his state tort claims against the department because it is a state agency that is entitled to sovereign immunity under Wisconsin law. Canadian National Railroad v. Noel, 2007 WI App 179, ¶ 6, 304 Wis. 2d 218, 736 N.W.2d 900 (state agencies are entitled to sovereign immunity because “an action against a state agency is an action against the state”) (citations omitted). Accordingly, I will dismiss the Wisconsin Department of Natural Resources from this case.

After reviewing plaintiff’s complaint, I conclude that he may proceed on his claim that defendants Hannon and Ebert violated his rights under the Fourth Amendment by conducting an unreasonable search of his van and arresting him without probable cause. Also, plaintiff may proceed on his claim that Stepp implemented a policy that encouraged

unlawful searches and seizures. Plaintiff may not proceed on his claims that defendants violated his right to equal protection or that they violated his right to be free from cruel and unusual punishment. With respect to his state law claims, plaintiff may proceed on his claim for negligent training and supervision against Stepp and may proceed on his claim of negligent infliction of emotional distress against Hannon, Ebert and Stepp. He may also proceed on his false imprisonment claim against Hannon and Ebert. He may not proceed on his claim for harassment. Finally, I will dismiss John Doe from the case because plaintiff has not made any allegations involving a John Doe.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

On October 22, 2010, plaintiff Kevin Bradley was sleeping in his van on his vacant property in Minocqua, Wisconsin. His van was parked in a driveway and was not visible from the public road. At approximately 10:38 p.m., defendants Mike Hannon and Timothy Ebert, both conservation wardens for the Wisconsin Department of Natural Resources, drove up to plaintiff's van and began rummaging through his personal property outside his van. Then they banged on plaintiff's van and began searching through it with their flashlights. At this point, defendants had not identified themselves as conservation wardens. Plaintiff has a heart condition that is aggravated by stressful situations and he began to feel a high level of anxiety. He got out of the van and began to run away. Defendants chased

him and defendant Hannon shouted “Police!” Plaintiff stopped running and waited on the ground for defendants to catch up to him. When Hannon arrived, he struck plaintiff violently on the head. After this, plaintiff thought defendants might not be police and he stood up. Hannon punched plaintiff in the chest, knocking him down, and the two engaged in a struggle on the ground. Ebert arrived on the scene and plaintiff noticed defendants’ badges.

Plaintiff began to shout angrily at defendants and threatened to take legal action against defendant Hannon for excessive force. Hannon accused plaintiff of battery. Plaintiff was arrested. He asked defendants to refrain from handcuffing him because he has claustrophobia but when they refused he allowed himself to be handcuffed. Plaintiff was taken to a jail and held in a cell for three days. He felt claustrophobic. He could not contact his family because of a problem with his phone messaging system. Plaintiff was informed that he could face 10 years in prison and a \$20,000 fine. This caused him to become suicidal.

Ultimately, plaintiff was charged with battery to an officer and fleeing an officer. He pleaded no contest to fleeing an officer in order to avoid the felony charge of battery.

Defendant Cathy Stepp is Secretary of Wisconsin’s Department of Natural Resources. She has implemented a policy that encourages conservation officers to conduct warrantless searches and seizures of people and vehicles on vacant land.

## DISCUSSION

### A. Fourth Amendment

Plaintiff contends that defendants violated his right to be free from unlawful searches and seizures under the Fourth Amendment. The Fourth Amendment, as applied to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their persons, homes and effects, without a warrant supported by probable cause. U.S. Const. amend. IV. The protections afforded by the Fourth Amendment apply not only to the activities of criminal authorities, but to those of civil authorities as well. Michael C. v. Gresbach, 526 F.3d 1008, 1014 (7th Cir. 2008) (citing New Jersey v. T.L.O., 469 U.S. 325, 335 (1985)).

#### 1. Search

Plaintiff contends that defendants Hannon and Ebert violated his right to be free from unreasonable searches when they searched his vehicle with flashlights while it was parked on his private land. I concluded in the previous screening order that plaintiff may proceed on his claim that defendants Hannon and Ebert conducted an unlawful search of his van because he may be able to prove that he had a reasonable expectation of privacy in it and that defendants violated his rights by searching it with flashlights. Dkt. #8 at 5-6. Plaintiff's amended complaint contains the same allegations regarding the allegedly unlawful search. For the reasons explained in the previous order, plaintiff may proceed against

Hannon and Ebert on this claim.

## 2. Arrest

In his amended complaint, plaintiff contends that defendants Hannon and Ebert violated his right to be free from unlawful seizures when they arrested him for no reason. Under the Fourth Amendment, law enforcement officers must have probable cause to believe that the individual committed a crime before they can arrest the individual. Ray v. City of Chicago, 629 F.3d 660, 663 (7th Cir. 2011).

Plaintiff alleges that defendants Hannon and Ebert arrived on his property, searched his van, chased him, knocked him down and then arrested him. Plaintiff states that there was no reason for defendants to believe he was involved in the commission of a crime and thus, there was no reason to arrest him. If plaintiff's allegations are true, they support a claim that Hannon and Ebert violated his rights under the Fourth Amendment. Therefore, plaintiff may proceed against these defendants on his unlawful arrest claim.

## 3. Defendant Cathy Stepp

In his amended complaint, plaintiff states that he is asserting his Fourth Amendment claims against Cathy Stepp in addition to defendants Hannon and Ebert. In the order screening plaintiff's original complaint, I dismissed plaintiff's claims against Stepp because plaintiff had alleged no facts to support his claim that Stepp was involved personally in the

search and arrest of plaintiff. In his amended complaint, plaintiff alleges that Hannon and Ebert were acting pursuant to Stepp's policy that encourages unlawful searches and seizures of people and vehicles on vacant lands. Because plaintiff suggests that the officers were acting under Stepp's direction, plaintiff may proceed with his Fourth Amendment claims against Stepp at this time. However, plaintiff should know that he will eventually be required to produce admissible evidence establishing the existence of Stepp's alleged policy. If he is unable to prove that such a policy exists, his Fourth Amendment claims against Stepp will be dismissed.

#### B. Equal Protection

In the order screening plaintiff's original complaint, I dismissed plaintiff's claim that defendants Hannon and Ebert violated his right to equal protection under the Fourteenth Amendment by targeting his van for search because it was in poor condition. Plaintiff attempts to revive his equal protection claim in his amended complaint, contending that the facts suggest that defendants treated him differently on the basis of his apparent low economic status. However, plaintiff adds no new allegations to his amended complaint that would support a claim under the equal protection clause. Plaintiff's allegations suggest that defendants Hannon and Ebert had a rational basis for investigating plaintiff's van, namely, that it appeared to have been abandoned on vacant land. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (government must have rational basis for different



treatment). Therefore, I will dismiss plaintiff's equal protection claim.

### C. Eighth Amendment

In his amended complaint, plaintiff adds a claim that defendants Hannon, Ebert and Stepp violated his right to be free from cruel and unusual punishment under the Eighth Amendment by arresting him for sleeping in his van. Plaintiff cannot state a claim under the Eighth Amendment, which applies only to convicted prisoners. Williams v. Rodriguez, 509 F.3d 392, 401 (7th Cir. 2007). Although plaintiff was protected by the Fourteenth Amendment, which provides protection against cruel and unusual punishment that is “at least as at least as extensive as that afforded to prisoners by the Eighth Amendment,” Sain v. Wood, 512 F.3d 886, 893 (7th Cir. 2008), plaintiff's allegations do not support a claim that he was subjected to cruel and unusual punishment. Plaintiff does not suggest that he was denied necessary medical treatment for a serious medical need while he was in jail, that he was subjected to unconstitutional conditions of confinement or that defendants otherwise disregarded a substantial risk of serious harm to him. Therefore, I will dismiss this claim.

### D. State Law Claims

Plaintiff raises several state law tort claims against defendants Stepp, Hannon and Ebert. Federal courts may exercise supplemental jurisdiction over state law claims that are “so related to claims in the action within [the court's] 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). Plaintiff’s tort claims are part of the same case or controversy as his federal claims for violation of his Fourth Amendment rights. Therefore, the court will exercise supplemental jurisdiction over them.

It is likely that plaintiff’s tort claims are barred by the doctrine of governmental immunity, which protects state officers and employees from tort liability for injuries resulting from acts performed within the scope of their official duties. Pries v. McMillon, 2010 WI 63, ¶ 20, 326 Wis. 2d 37, 784 N.W.2d 648. Under Wisconsin law, “immunity from tort liability [for state employees] is the rule and liability is the exception.” Yao v. Chapman, 2005 WI App 200, ¶ 26, 287 Wis. 2d 445, 705 N.W.2d 272 (citing Lodl v. Progressive Northern Insurance Co., 2002 WI 71, ¶¶ 22-23, 253 Wis. 2d 323, 646 N.W.2d 314). However, because the doctrine of governmental immunity is subject to various exceptions and its applicability may depend on the specific facts of a case, Pries, 2010 WI 63, ¶ 21, I will wait until the parties brief this issue before applying the doctrine to plaintiff’s claims.

1. Negligent failure to properly train, supervise and control conservation officers

Plaintiff asserts a claim against defendant Stepp for her failure to properly train, supervise and control defendants Hannon and Ebert. “[T]he tort of negligent hiring, training or supervision is a valid claim in Wisconsin.” Miller v. Wal-Mart Stores, Inc., 219

Wis. 2d 250, 267, 580 N.W.2d 233, 241 (1998). The Wisconsin Supreme Court has explained that to state a claim for such negligence, the plaintiff must show that “the employer has a duty of care, that the employer breached that duty, that the act or omission of the employee was a cause-in-fact of the plaintiff’s injury, and that the act or omission of the employer was a cause-in-fact of the wrongful act of the employee.” Id.

Plaintiff alleges that defendant Stepp failed to provide defendants Hannon and Ebert the appropriate training with respect to using warrants, conducting searches of vehicles parked on private property and using force against citizens. Assuming this is true, I can infer that Stepp’s failure to train was a “cause-in-fact” of Hannon’s and Ebert’s treatment of plaintiff and that their actions caused injury to plaintiff. Therefore, plaintiff may proceed on his claim that Stepp negligently failed to train, supervise and control Hannon and Ebert.

## 2. Negligent infliction of emotional distress

Plaintiff asserts a claim for negligent infliction of emotional distress against defendants Hannon, Ebert and Stepp. Under Wisconsin law, a claim for negligent infliction of emotional distress contains three elements: “(1) that the defendant’s conduct fell below the applicable standard of care, (2) that the plaintiff suffered an injury, and (3) that the defendant’s conduct was a cause-in-fact of the plaintiff’s injury.” Bowen v. Lumbermens Mutual Casualty Co., 183 Wis. 2d 627, 632, 517 N.W.2d 432, 434 (1994). Additionally, “a plaintiff must prove . . . severe emotional distress.” Id.

Plaintiff alleges that defendants Hannon and Ebert entered his property when it was dark and without permission, proceeded to search his van while he was inside, chased him, arrested him and took him to jail for no reason. Additionally, plaintiff alleges that Hannon struck him twice without provocation. Finally, plaintiff alleges that Hannon and Ebert were acting pursuant to a policy implemented by defendant Stepp. Plaintiff says that the entire episode caused him to become suicidal. At this stage, I can infer that defendant Hannon's and Ebert's alleged treatment of plaintiff fell below the applicable standard of care and caused plaintiff to suffer severe emotional distress. In addition, I can infer that Stepp's alleged policy was a cause of plaintiff's emotional distress. Therefore, plaintiff may proceed on this claim against defendants Hannon, Ebert and Stepp.

### 3. False imprisonment

Plaintiff asserts a claim of false imprisonment against defendants Hannon and Ebert. Wisconsin law recognizes the intentional tort of false imprisonment, which is defined as the intentional and unlawful restraint by one person of the physical liberty of another. Dupler v. Seubert, 69 Wis. 2d 373, 381, 230 N.W.2d 626, 631 (1975). The Wisconsin Supreme Court has adopted the definition of false imprisonment found in Restatement (Second) of Torts, § 35. Maniaci v. Marquette University, 50 Wis. 2d 287, 295, 184 N.W.2d 168, 172 (1971). According to the Restatement, an individual is liable for false imprisonment if (1) he acts intending to confine another within boundaries fixed by the actor; (2) his act directly

or indirectly results in such confinement; and (3) the person confined is conscious of the confinement or is harmed by it. Plaintiff's allegations are sufficient to state a claim for false imprisonment under Wisconsin law against defendants Hannon and Ebert. Therefore, he may proceed with this claim.

#### 4. Harassment

Finally, plaintiff attempts to bring a claim for harassment against defendants Hannon, Ebert and Stepp under Wis. Stat. § 947.013. This is a criminal statute that does not create a private right of action for civil plaintiffs. Therefore, I will dismiss this claim.

### ORDER

IT IS ORDERED that

1. Plaintiff Kevin Bradley is GRANTED leave to proceed on the following claims:
  - a. Defendants Mark Hannon, Timothy Ebert and Cathy Stepp violated his right to be free from unreasonable searches and seizures under the Fourth Amendment;
  - b. Defendant Stepp was negligent in her duty to train, supervise and control Hannon and Ebert in violation of Wisconsin law;
  - c. Defendants Hannon, Ebert and Stepp negligently inflicted emotional distress on plaintiff in violation of Wisconsin law; and
  - d. Defendants Hannon and Ebert falsely imprisoned plaintiff in violation of

Wisconsin law.

2. Plaintiff is DENIED leave to proceed on the following claims:

a. Defendants Hannon, Ebert and Stepp violated his right to equal protection under the Fourteenth Amendment;

b. Defendants Hannon, Ebert and Stepp violated his right to be free from cruel and unusual punishment under the Eighth Amendment; and

c. Defendants Hannon, Ebert and Stepp harassed plaintiff in violation of Wis. Stat. § 947.013.

3. Defendants Wisconsin Department of Natural Resources and John Doe are DISMISSED from the case.

4. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended complaint, the December 2, 2011 order, dkt. #8, and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the

court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 17th day of February, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge