

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

ROBERT HARRY KUNFERMAN,

Plaintiff,

v.

MEMORANDUM and ORDER

XCEL ENERGY DOMESTIC CORPORATION,
JOHN FARWELL JUNIOR, KENNETH R.
RASMUSSEN, MARY E. OSBORNE and
BRUCE A. VANVALKENBURG,

06-C-710-S

Defendants.

Plaintiff Robert Harry Kunferman brought this civil action claiming that defendants Xcel Energy, Mary Osborne, John Farwell, Jr., Kenneth R. Rasmussen and Bruce A. VanValkenberg violated his constitutional rights. In his complaint he alleges that the defendants brought state criminal charges against him.

On June 22, 2007 defendants Xcel Energy and Mary Osborne moved to dismiss plaintiff's complaint for failure to state a claim for relief. This motion has been fully briefed and is ready for decision.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6)

a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

FACTS

For purposes of deciding the motion to dismiss of Xcel Energy and Mary Osborne the facts alleged in the complaint are taken as true.

Plaintiff Robert Harry Kunferman is an adult resident of McFarland, Wisconsin. Defendant Xcel Energy is a corporation and defendant Mary Osborne is an Xcel Energy employee.

Plaintiff was over billed \$100.00 in December 2005 by defendant Xcel Energy. He phoned Xcel numerous times to attempt to resolve this error.

Xcel Energy and Mary Osborne decided along with Officer Rasmussen and Officer Farwell, Eau Claire police officers, to have him arrested on criminal charges for harassment.

Plaintiff was charged with four counts of violating §947.012(1)(b) which is a Class B Misdemeanor. The statute prohibits the use of the telephone to frighten, intimidate, threaten or abuse. Plaintiff pled guilty to these charges. He is seeking four million dollars in damages from the defendants.

MEMORANDUM

Plaintiff claims that defendants Excel Energy and Mary Osborne conspired with state actors to violate his constitutional rights under 42 U.S.C. § 1983. To plead a conspiracy a litigant must do more than allege in a conclusory fashion that a conspiracy exists. He must allege a "meeting of the minds." Brokaw v. Mercer County, 235 F. 3d 1000, 1009 (7th Cir. 2000).

Construing plaintiff's complaint liberally he does allege a meeting of the minds. He alleges that Excel Energy and Mary Osborne decided along with the police officers to have him arrested on criminal charges. Plaintiff has sufficiently pled a conspiracy.

Plaintiff alleges that his constitutional rights were violated when he was charged with violating a Wisconsin statute. He pled guilty to these charges and has been convicted of them. A 42 U.S.C. § 1983 claim for a violation of constitutional rights cannot be maintained where the underlying criminal conviction remains valid. Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff's claims under 42 U.S.C. § 1983 are barred by Heck because his underlying misdemeanor convictions remain valid. VanGilder v. Baker, 435 F.3d 689, 692 (7th Cir. 2006).

The motion to dismiss of defendants Xcel Energy and Mary Osborne will be granted. Because any claims against defendants Ken Rasmussen, John Farwell and Bruce Van Valkenberg also relate to plaintiff's underlying convictions, these claims are also barred by

Heck and will be dismissed on the Court's own motion. Judgment will be entered in favor of all defendants against plaintiff dismissing his complaint and all claims contained therein with prejudice and costs.

Defendants Xcel Energy and Mary Osborne move for attorney fees under 42 U.S.C. § 1988. A prevailing defendant can recover attorney fees when the court finds that the action was vexatious, frivolous or brought to harass the defendant, Hensley v. Eckerhart, 461 U.S. 424, 429 (1983), or if the action was meritless in the sense that it was groundless or without foundation. Hughes v. Rowe, 449 U.S. 5, 14 (1980).

Based on the present record, the Court cannot find it was totally groundless or without foundation or that it was brought for an improper purpose. Accordingly, the motion for attorney fees under 42 U.S.C. § 1988 will be denied.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that the motion to dismiss of defendants Xcel Energy and Mary Osborne is GRANTED.

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IT IS FURTHER ORDERED that the motion of defendants Xcel Energy and Mary Osborne for attorney fees under 42 U.S.C. § 1988 is DENIED.

IT IS FURTHER ORDERED that judgment is entered in favor of all defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 9th day of July, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge