

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

THOMAS SMITH,	:
Plaintiff	:
v.	: Case No. 3:21-cv-193-KRG-KAP
FEDERAL BUREAU OF	:
INVESTIGATION IN JOHNSTOWN,	:
<i>et al.</i> ,	:
Defendants	:

Report and Recommendation

Recommendation

I recommend that the complaint be dismissed without leave to amend.

Report

For complaints prosecuted *in forma pauperis*, 28 U.S.C. § 1915(e)(2) commands that:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal--
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim on which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

This is plaintiff Thomas Smith's fifteenth civil complaint in this court, *see* Smith v. Northern Cambria Police Department, Case No. 3:14-cv-180-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:14-cv-198-KRG-KAP (W.D.Pa.); Smith v Northern Cambria Police Department, Case No. 3:15-cv-117-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:15-cv-184-KRG-KAP (W.D.Pa.); Smith v. Doe, Case No. 3:16-cv-4-KRG-KAP (W.D.Pa.); Smith v. Hassen, Case No. 3:16-cv-75-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:16-cv-152-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:16-cv-165-KRG-KAP (W.D.Pa.); Smith v. Hassen, Case No. 3:16-cv-207-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:17-cv-146-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:18-cv-194-KRG-KAP (W.D.Pa.); Smith v. FBI of Pittsburgh, Case No. 3:18-cv-210-KRG-KAP (W.D.Pa.); and Smith v. FBI, Case No. 3:19-cv-18-KRG-KAP (W.D.Pa.); Smith v. FBI, Case No. 3:21-cv-74-KRG-KAP (W.D.Pa.).

This complaint is based on substantially the same allegations as the others: plaintiff alleges that named and unnamed agents of the FBI, sometimes working together with police officers in the Borough of Northern Cambria, harass him about a long-closed criminal matter. The harassment allegedly includes, at some point many years ago, someone placing a device in plaintiff's body that allows "the police" to listen to and speak to the plaintiff.

The current complaint includes as defendants other local police departments (for the boroughs of Carrolltown, Hastings, and Cherry Tree, and for Cambria Township) based on the supposition that those departments might have had something to do with the alleged harassment."

As with the pending case from earlier this year, the complaint fails to comply with Fed.R.Civ.P. 8(a) because its description of alleged harassment does not state a plausible claim for relief against any defendant. See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The FBI is also immune from suit, see F.D.I.C. v Meyer, 510 U.S. 471 (1994)(federal agency cannot be sued for the torts of its employees); Cortez v. E.E.O.C., 585 F.Supp.2d 1273, 1287 (D.N.M. 2007)(United States cannot be sued under Federal Tort Claims Act for agency's law enforcement and investigatory actions). And although not implausible, the allegation that a general "they" took \$10 from plaintiff's bank account on June 4, 2021 and an unstated amount from a prepaid card "4 years ago" fails to state a claim against any defendant.

Res judicata would also bar any claims for alleged events taking place prior to the dismissal of plaintiff's last complaint in May 2019. And just as the statute of limitations bars any prosecution of plaintiff by anyone on the subject of an allegedly stolen moneybag, the statute of limitation would bar any suit by plaintiff based on events that plaintiff alleges that took place more than two years before the filing of this complaint. To the extent plaintiff intends to allege any events since October 2019 in this complaint, the complaint, although less bizarre than its predecessors, is frivolous. Frivolous claims under 28 U.S.C. § 1915(e)(2)(B) include those "describing fantastic or delusional scenarios." Neitzke v. Williams, 490 U.S. 319, 328 (1989) (interpreting predecessor *in forma pauperis* statute); see also DeGrazia v. F.B.I., 316 Fed. Appx. 172 (3d Cir.2009)(applying same standard to fee paid complaint). Claiming without specifics that someone implanted a listening device in one's body is so implausible that it can be rejected under the *Neitzke* standard. The other conduct that plaintiff alleges that is not connected to the implantation of a listening device - mostly assuring plaintiff in response to his calls that no one is interested in prosecuting him - is not actionable.

Plaintiff's allegation of harassment includes alleged FBI agents Dave Hassen and Ron Sharkey having "had me in jail before." A check of the public docket indicates that

plaintiff is periodically prosecuted (by some local municipal police officer, not by the FBI) for harassment or false reports to authorities, possibly arising out of plaintiff's contact with various police departments on the subject of their alleged participation in the harassment of the plaintiff. As the attached court summaries indicate, when these charges are filed plaintiff usually pleads guilty to some nonfelony charge and receives probation.

There is a prosecution for harassment currently pending against plaintiff based on alleged events on September 11, 2021. Plaintiff appears in this civil complaint to be generally repeating the allegations of the last decade, but to the extent he is intending to refer to any events on September 11, 2021, he cannot collaterally attack a pending criminal prosecution by filing a civil complaint. See Younger v. Harris, 401 U.S. 37, 41 (1971), *modified by* Sprint Communications, Inc. v. Jacobs, 571 U.S. 69, 72 (2013)(stating without limitation that “[w]hen there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution”), *as noted by* Harmon v. Department of Finance, 811 Fed.Appx. 156, 157 (3d Cir. 2020). The duty to avoid pre-empting state jurisdiction is an issue to be raised *sua sponte*. O'Neill v. City of Philadelphia, 32 F.3d 785, 786 n.1 (3d Cir. 1994).

Because no likely amendment will cure the defect in plaintiff's complaint, no leave to amend should be granted. Pursuant to 28 U.S.C. § 636(b)(1), plaintiff can within fourteen days file written objections to this Report and Recommendation. Plaintiff is advised that in the absence of timely and specific objections, any appeal would be severely hampered or entirely defaulted. See EEOC v. City of Long Branch, 866 F.3d 93, 100 (3d Cir. 2017) (describing standard of appellate review when no timely and specific objections are filed as limited to review for plain error).

DATE: November 8, 2021



Keith A. Pesto,
United States Magistrate Judge

Notice by U.S. Mail to:

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