

15948-7
KEF/tlp

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

BRYTON G. MELLOTT,)	
)	
Plaintiff,)	
)	
vs.)	No.: 2:17-cv-02006-CSB-EIL
)	
KENNETH D. SPRAGUE, JEREMY A. HALE,)	
MATTHEW E. MCELHOE, and ANDREW J.)	
CHARLES, in their individual capacities,)	
)	
Defendants.)	

DEFENDANTS’ MOTION TO DISMISS PLAINTIFF’S COMPLAINT

NOW COME the Defendants, KENNETH D. SPRAGUE, JEREMY A. HALE, MATTHEW E. MCELHOE and ANDREW J. CHARLES, by Keith E. Fruehling of Heyl, Royster, Voelker & Allen, their attorneys, and for their Motion to Dismiss Plaintiff’s Complaint, state as follows:

1. On January 11, 2017 Plaintiff Bryton Mellott filed his Complaint in the United States District Court, Central District of Illinois, alleging that the Defendants violated his constitutional rights pursuant to the United States and Illinois Constitutions. The Defendants fully incorporate their Memorandum of Law in Support of Their Motion to Dismiss herein, filed in conjunction with this motion.

2. Plaintiff has pled four counts against the Defendants, generally. Count One of Plaintiff’s Complaint alleges that the Defendants violated Plaintiff’s First Amendment rights under the United States Constitution. Count Two alleges that the Defendants violated Plaintiff’s Fourth Amendment rights under the United States Constitution. Count Three alleges that the Defendants violated Plaintiff’s rights under Article I, Section 4 of the Illinois Constitution. Count

Four alleges that the Defendants violated Plaintiff's rights under Article I, Section 6 of the Illinois Constitution.

3. Federal Rule of Civil Procedure 12(b)(6) permits a Motion to Dismiss for failing to state a claim for which relief can be granted. To state such a claim, Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." This means that the complaint "must describe the claim in sufficient detail to give the defendant 'fair notice of what. . . the claim is and the grounds upon which it rests.'" *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007); (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The complaint must actually "suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court." *Id.* (citation omitted).

4. "To survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* (citation omitted).

5. Defendants are entitled to qualified immunity as to Plaintiff's U.S. Constitutional claims, as Plaintiff has not nor can plead facts suggesting that Plaintiff's constitutional rights were clearly established, in light of the Illinois Flag desecration statute.

6. The Illinois Flag desecration statute, in its present form, enacted in 2013, is presumptively valid state criminal law, recently approved by the Illinois Legislature and Executive. See 720 ILCS 5/49-1; See also, P.A. 97-1108. Further, the current Illinois Flag desecration statute has not been interpreted by Illinois State Courts and/or Federal Courts, and as such, has not been struck down as unconstitutional and/or invalid.

7. The Defendants are entitled to Illinois Tort Immunity from Plaintiff's state law claims, as the actions they took leading to the alleged violations were pursuant to a presumptively valid state law, and Plaintiff has not alleged facts suggesting that the Defendants acted with malice.

8. Additionally, Plaintiff is not entitled to his claims under the Illinois Constitution, Article I, Sections 4 and 6, as separate causes of action under these sections are not available to Plaintiff.

9. Based on the face of the pleadings, Plaintiff is not entitled to relief on any of his claims, as the Defendants are immune from liability, and Plaintiff's Complaint should be dismissed in its entirety.

WHEREFORE the Defendants KENNETH D. SPRAGUE, JEREMY A. HALE, MATTHEW E. MCELHOE and ANDREW J. CHARLES, respectfully request this Court enter an Order Dismissing Plaintiff's Complaint, with prejudice, and for any other and further relief this Court deems just and proper.

Respectfully submitted,

KENNETH D. SPRAGUE, JEREMY A. HALE, MATTHEW
E. MCELHOE and ANDREW J. CHARLES, Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I electronically filed the foregoing DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Rebecca Glenberg, Esq.
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I also hereby certify that I have mailed by United States Postal Service the above-referenced document to the following non-CM/ECF participants: None.

BY: s/Keith E. Fruehling
Heyl, Royster, Voelker & Allen

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