

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**PENNY ALLISON and ZORAN HOCEVAR,
individually and on behalf of a class of others
similarly situated,**

Plaintiffs,

v.

**THE GEO GROUP, INC, in its official and individual
capacities, and JOHN DOES 1 – 100, in their official
and individual capacities,**

Defendants.

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: **2:08-cv-00467-JD**
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**MEMORANDUM OF LAW IN SUPPORT OF
THE MOTION OF DEFENDANT THE GEO GROUP, INC. TO DISMISS
COUNTS IV, VI, AND VII OF PLAINTIFFS' COMPLAINT**

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I. INTRODUCTION

Defendant, The GEO Group, Inc. (“GEO”), moves this Court to examine the lack of factual foundation for several counts of Plaintiffs’ Amended Complaint, and, under the recent clarification in the standard required for withstanding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), dismiss Counts IV, VI, and VII of Plaintiffs’ Amended Complaint. Plaintiffs Penny Allison and Zoran Hocevar (collectively, “Plaintiffs”) purport to bring this lawsuit against Defendant GEO and as yet unnamed other defendants on behalf of himself as an individual, and those similarly situated to him, as alleged in the Complaint.

As shown below, Plaintiffs’ Amended Complaint fails to allege the necessary facts to state claims under three counts of their Complaint: Battery (Count IV), Intentional Infliction of Emotional Distress (Count VI), and Negligent Infliction of Emotional Distress (Count VII). Because Plaintiffs’ Amended Complaint fails to allege these essential elements, these counts should be dismissed.

II. FACTS AS ALLEGED BY PLAINTIFF

A. The Allegations Regarding GEO’s Conduct

1. Penny Allison

Plaintiff Allison (“Allison”) contends that she was arrested for driving under the influence (“DUI”) in November 2005. Amended Complaint ¶ 25. She contends that she was placed into Pennsylvania’s Accelerated Rehabilitative Disposition program (“ARD”). Amended Complaint ¶ 25. Allison paid court costs in July 2006, but contends that she failed to appear for the required ARD hearing. Amended Complaint ¶ 25; Pa. R. Crim. P. 312, 313. The missed court hearing resulted in a bench warrant being issued for Allison’s arrest. Amended Complaint ¶ 26.

During a traffic stop for expired registration by Springfield Township Police on July 25, 2006, Allison was arrested for the failure-to-appear outstanding bench warrant. Amended Complaint ¶ 26. Upon her arrest, she was ultimately brought to George W. Hill Correctional Facility in Delaware County (“GWH”). Amended Complaint ¶ 26. Allison contends that she was strip-searched visually by a female corrections officer, despite the lack of a reasonable suspicion that she was carrying any contraband. Amended Complaint ¶ 27. Alison was released approximately eight days later. Amended Complaint ¶ 28.

Allison further contends that she was later arrested again for another unrelated DUI, to which she pled guilty. Amended Complaint ¶ 29. She entered into a DUI weekend program at GWH in November 2007, serving her conviction over approximately fifteen weekends. Amended Complaint ¶ 29. She contends that upon each entry into the weekend facility, she was strip searched visually. Amended Complaint ¶ 29.

2. Zoran Hocevar

Zoran Hocevar (“Hocevar”) was arrested in March 2005 after a domestic dispute with his wife. Amended Complaint ¶ 32. In August 2007, he contends that all of his charges were dismissed except the charge for harassment. Amended Complaint ¶ 32. On June 26, 2006, a bench warrant was issued for his arrest after he failed to appear for a required court hearing. Amended Complaint ¶ 33.

In July 2007, Hocevar was stopped “in his car” – apparently for a routine traffic violation – and was arrested pursuant to the outstanding bench warrant. Amended Complaint ¶ 34. He was brought to GWH, where he contends that he was visually strip searched. Amended Complaint ¶ 34.

B. Plaintiffs' Claims Against GEO

Plaintiffs' Amended Complaint purports to assert seven counts against GEO: 1) Monetary Damages for Violation of § 1983; 2) Declaratory Judgment [under § 1983]; 3) Preliminary and Permanent Injunction [under § 1983]; 4) battery; 5) negligence; 6) intentional infliction of emotional distress; and 7) negligent infliction of emotional distress. The first three counts are essentially all a single § 1983 count, broken out by the type of relief sought. Plaintiffs demand compensatory and punitive damages, as well as a judgment declaring the strip search policy unconstitutional and an injunction against enforcement of the policy. Plaintiffs also seek attorneys' fees and costs. Plaintiffs demand monetary damages from Defendants in their individual, official, and personal capacities – although to date, only GEO has been named as a defendant in this case.

C. Lack of Factual Allegations Regarding Multiple Counts of Plaintiffs' Complaint

Plaintiffs' Amended Complaint lacks the essential factual allegations to properly state claims for battery (Count IV), intentional infliction of emotional distress (Count VI), and negligent infliction of emotional distress (Count VII) under Pennsylvania law. Plaintiffs allege, at most, that they were subjected to visual strip searches. Allison contends that after disrobing in front of a female corrections officer, she was instructed to squat and cough. Amended Complaint ¶ 27. Hocevar contends he was “subject to a strip search in a room with a number of other individuals.” Amended Complaint ¶ 34.

Nowhere in Plaintiffs' Amended Complaint do they allege that they, or any other potential plaintiff, were ever subject to more invasive searching than that described above. Furthermore, Plaintiffs' Amended Complaint fails to allege that either named Plaintiff, or any other potential plaintiff here, suffered any physical injury, harm or illness caused by any alleged

act by Defendant GEO. Nor does Plaintiffs' Amended Complaint allege that either named Plaintiff, or any other potential plaintiff here, witnessed any family member subjected to any wrongful and/or traumatizing act by Defendant GEO.

As set forth below, the dearth of factual allegations in Plaintiffs' Amended Complaint necessitates that, under Pennsylvania law, this Court dismiss their purported claims for Battery (Count IV), Intentional Infliction of Emotional Distress (Count VI), and Negligent Infliction of Emotional Distress (Count VII).

III. ARGUMENT

The factual allegations in Plaintiffs' Amended Complaint are insufficient to state claims for the torts of battery, intentional infliction of emotional distress, and negligent infliction of emotional distress under Pennsylvania law. The legal sufficiency of a complaint is tested by a motion to dismiss. *Whitehead v. Craftmatic Organization*, No. Civ. A. 94-7770, 1995 WL 327987, at *3 (E.D. Pa. May 30, 1995) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994)); *see also ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994); *Lee v. Maleski*, Civ. A. No. 94-6331, 1995 WL 3669, at *1 (E.D. Pa. Jan. 4, 1995) (citing *Pennsylvania ex. rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 179 (3d Cir. 1988)).

A. A Complaint Must Allege "More Than Labels And Conclusions" But Must Plead Enough Facts To Raise A Right To Relief Above "Speculative"

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. ---, 127 S. Ct. 1955 (May 21, 2007), the Supreme Court expressly "retired" the 50-year old statement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." As stated by the Supreme Court, "after puzzling the profession for

50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Twombly*, 127 S.Ct. at 1969.

Instead, “Rule 8(a)(2) . . . requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” *Twombly*, 127 S. Ct. at 1965 n.3. “Rule 8(a) ‘contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented’ and does not authorize a pleader’s ‘bare averment that he wants relief and is entitled to it.’” *Twombly*, 127 S. Ct. at 1965 n.3 (quoting 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 94, 95 (3d ed. 2004)). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 127 S. Ct. at 1964-65 (citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level,” and “the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Twombly*, 127 S. Ct. at 1965 (quoting 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235-236).

“Labels and conclusions” or “a formulaic recitation of the elements of a cause of action” are insufficient to withstand a motion to dismiss; rather, the factual allegations in the complaint “must be enough to raise a right to relief above the speculative level.” *Twombly*, 127 S. Ct. at

1964-65; *see Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (§ 1983 suit) (“After *Twombly*, it is no longer sufficient to allege mere elements of a cause of action; instead, ‘a complaint must allege facts suggestive of [the proscribed] conduct.’”) (quoting *Twombly*, 127 S. Ct. at 1969 n.8). As the Third Circuit has recently held, “without *some* factual allegation[s] in the complaint, a claimant *cannot* satisfy the requirement that he or she provide not only ‘fair notice,’ but also the ‘grounds’ on which the claim rests.” *Phillips*, 515 F.3d at 232 (emphasis added) (construing 12(b)(6) standard pursuant to *Twombly*).

Further, on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). In deciding whether a claim for relief is supported, a court must consider only the facts that are alleged, and not un-alleged facts that a plaintiff might later prove. *Assoc. Contractors of California, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897, 902, 74 L.Ed.2d 723 (1983); *see also Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (on a motion to dismiss, a court need not assume that the plaintiff can prove facts that were not alleged in the complaint or credit a complaint’s “bald assertions” or “legal conclusions”). A complaint must be dismissed where a plaintiff fails to make “some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation.” *Phillips*, 515 F.3d at 235.

B. Plaintiffs’ Battery Claim Must Be Dismissed

Under Pennsylvania law, to state a claim for the tort of battery, a plaintiff must allege in the Amended Complaint “a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.” *Levenson v. Souser*, 557 A.2d 1081, 1088 (Pa. Super. 1989) (quoting Prosser and Keeton, *Law of Torts*, at 39 (5th ed. 1984)).

Plaintiffs' Amended Complaint contains only bald assertions that recite these familiar legal elements – but in no way specifies any factual allegations that support these legal elements. *See* Amended Compl. ¶¶ 78-80. As noted above, there is no allegation that any person touched Plaintiffs Allison or Hocevar during the alleged strip searches, and there is no allegation that Plaintiffs Allison or Hocevar ever had an apprehension that any physical contact was imminent. Furthermore, there are no allegations that any other potential plaintiffs here were touched or had apprehension that physical contact was imminent.

Accordingly, under the standard testing the sufficiency of allegations as stated in *Twombly*, and in consideration of the essential elements in a claim of battery, Defendant GEO respectfully requests that this Court dismiss Plaintiffs' purported claim for Battery in Count IV of their Amended Complaint.

C. Plaintiffs' Intentional Infliction of Emotional Distress Claim Must Be Dismissed

Intentional infliction of emotional distress arises when “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.” *Corbett v. Morgenstern*, 934 F. Supp. 680 (E.D. Pa. 1996) (citing Restatement (Second) of Torts § 46(1)). Even if the allegations in Plaintiffs' Amended Complaint rise to the level of “outrageous” conduct as required under Pennsylvania law, to state a claim for intentional infliction of emotional distress, a plaintiff must allege some physical injury, harm or illness caused by the defendant's conduct. *Corbett*, 934 F. Supp. at 684.

Here, Plaintiffs do not allege any facts sufficient to establish the requisite physical injury, harm or illness necessary to state a claim for intentional infliction of emotional distress under Pennsylvania law. Rather, Plaintiffs at most aver empty recitations of the legal requirements as follows:

- ¶ 24: As a direct and proximate result of the unlawful strip searches conducted pursuant to this written and/or de facto policy, the victims of the unlawful strip searches have suffered and in the future will suffer psychological pain, humiliation, and mental anguish.
- ¶ 31: As a direct and proximate result of the unlawful strip-searches conducted pursuant to Defendants' policy, practice and custom, Plaintiff Allison has suffered injuries.
- ¶ 35: As a direct and proximate result of the unlawful strip-searches conducted pursuant to Defendants' policy, practice and custom, Hocevar has suffered injuries.
- ¶ 88: Defendants' extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to Plaintiff and Class members.

Under the *Twombly* standard of pleading discussed *supra*, Plaintiffs have failed to plead factual assertions sufficient to establish the injury element of this purported claim. Because Plaintiffs' Amended Complaint fails to plead this essential element of intentional infliction of emotional distress, Count IV purporting to allege intentional infliction of emotional distress must be dismissed.

**D. Plaintiffs' Negligent Infliction of
Emotional Distress Claim Must Be Dismissed**

Under Pennsylvania law, negligent infliction of emotional distress is a narrow tort, which generally requires the plaintiff to have witnessed an accident or traumatic injury to a close relative, caused by the defendant. *See, e.g., Love v. Cramer*, 606 A.2d 1175 (Pa. Super. 1992). If a person "does not experience a sensory and contemporaneous observance of the injury," then they cannot state a claim. *Id.* The person seeking the damages must suffer physical injury as a result of actually witnessing the harm to a close relative. *Id.* (citing *Mazzagatti v. Everingham by Everingham*, 512 Pa. 266, 516 A.2d 672 (1986)).

Plaintiffs' Complaint clearly lacks the essential elements to state a claim of negligent infliction of emotional distress. *See* Amended Compl., Count VII. Plaintiffs merely allege that

they himself were subject to an unconstitutional visual strip search, and that others similarly situated to him were subject to the same alleged searches. They do not even allege that they witnessed any strip searches of any close relative. *See id.* Nor does Plaintiffs' Amended Complaint that they, or any potential plaintiff, witnessed a close relative come to harm by any act of Defendant GEO. *See id.*

Thus, once again, Plaintiffs' bald assertions that merely recite the requisite elements of the purported claim are insufficient to survive Defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Accordingly, this Court should dismiss Count VII of Plaintiffs' Amended Complaint.

IV. CONCLUSION

For the foregoing reasons, Defendant GEO respectfully requests that this Court dismiss Count IV (Battery), Count VI (Intentional Infliction of Emotional Distress), and Count VII (Negligent Infliction of Emotional Distress) of Plaintiffs' Amended Complaint, with prejudice.

Respectfully submitted,

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Dated: May 2, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Memorandum of Law in Support of the Motion of Defendant GEO Group, Inc. to Dismiss Counts IV, VI, and VII of Plaintiffs' Amended Complaint* has been filed electronically this 2nd day of May, 2008, and is available for viewing and downloading from the federal court's Electronic Case Files system. A copy of the foregoing has been served today upon the following *via* electronic mail:

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