

Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

PAUL MURPHY)	
)	
v.)	Windsor Superior Court
)	Docket No. 320-5-08 Wrcv
ROBERT HOFMANN, Commissioner of the)	
Department of Corrections, OFFICER DALY,)	
JIM KAMEL, MAURICE PATOINE,)	
ELLEN McWARD, MARK POTANAS,)	
JOHN DULING, and JACKIE JOHNSON)	

DECISION ON MOTION TO DISMISS

Plaintiff Paul Murphy is an inmate committed to the custody of the Department of Corrections. On December 2, 2007, he was placed in disciplinary segregation after he physically assaulted his cellmate. His *pro se* complaint seeks money damages for emotional injuries (with accompanying physical manifestations) allegedly suffered as a result of his placement in disciplinary segregation.

According to the complaint, Mr. Murphy has a "long history" of physically assaulting other inmates on the basis of either their status as convicted sex offenders or Mr. Murphy's belief that they were sex offenders. The underlying physical assault in this case is no exception. In his complaint, Mr. Murphy offers no explanation for the origins of the physical assault other than that the cellmate "was a sex offender and we were not getting along." Mr. Murphy describes the assault as follows:

[The other inmate] came over to me in the day room and tried to talk to me. I told [him] to stay away from me and I would stay away from him and we would get along just fine. [He] continued to still talk to me so I got up and I punched him.

The gravamen of Mr. Murphy's complaint is his belief that he "never should have been placed in this situation." In other words, he contends that the various named defendants (who are all employees of the Department of Corrections) knew or should have known of his propensity to assault sex offenders, and never should have placed him in a general population cell where sex offenders were also present. He also contends that the named defendants negligently failed to remove the cellmate from the cell after he told them to do so. See Plaintiff's Complaint, ¶ 17 ("Plaintiff is suing the Vermont Dep't of Corrections and its listed officers for Negligence for not keeping sex offenders away from me and not listening to my warnings.").

Defendants seek dismissal of the complaint under V.R.C.P. 12(b)(6) under a variety of legal theories. Although Defendants submitted some materials outside of the

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pleadings in support of the motion, the court has not considered or relied upon those materials in its decision. See *Condosta v. Grussing*, 144 Vt. 454, 459 (1984) (explaining that motions to dismiss need not be converted to motions for summary judgment when the court does not consider matters outside the pleadings, even though submitted).

“The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it.” *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241 (quotation omitted). In reviewing the motion, the court accepts as true all of the facts alleged in the complaint and draws all reasonable inferences in favor of the non-moving party, which in this case is Mr. Murphy. “A motion to dismiss for failure to state a claim upon which relief can be granted . . . should not be granted unless it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” *The Lodge at Bolton Valley Condominium Assoc. v. Hamilton*, 2006 VT 41, ¶ 4, 180 Vt. 497 (quotation omitted); *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5.

Although the complaint has not yet been served upon all of the named defendants, the allegations make clear that the claim has been brought against the named defendants in their official (rather than individual) capacities. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (explaining that lawsuits brought against government agents in their official capacity should be treated as suits against the State). For this reason, the court must consider whether Mr. Murphy’s negligence claim is barred by the doctrine of sovereign immunity, which in pertinent part permits tort claims against the State only when the plaintiff’s cause of action is comparable to a cause of action against a private citizen. 12 V.S.A. § 5601(a); *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 486 (1993). The purpose of immunity under these circumstances is to bar “negligence actions against the State in connection with purely ‘governmental functions’ so as to avoid imposing ‘novel and unprecedented liabilities’ on the State.” *Lamothe*, 2007 VT 91, ¶ 6 (quoting *Denis Bail Bonds*, 159 Vt. at 485–86).

“Before determining whether a private analog exists, [courts] must first determine whether the factual allegations satisfy the necessary elements of a recognized cause of action.” *Lamothe*, 2007 VT 91, ¶ 7. Negligence requires proof that the defendant owed the plaintiff a duty of care, that defendant breached that duty, that the breach was the proximate cause of plaintiff’s harm, and that plaintiff suffered actual damages. *Id.*

The first element is the existence of a legal duty. See *Sorge v. State*, 171 Vt. 171, 174 (2000) (explaining that the existence of a duty is a question of law to be determined by the court). In this case, even if the allegations in the complaint are taken in the light most favorable to Mr. Murphy, they do not establish the existence of a legal duty on the part of the named defendants to prevent Mr. Murphy from assaulting his cellmate. Even if the named defendants knew that Mr. Murphy had a propensity to attack other inmates whom he believed to be sex offenders, this knowledge in no way created a legal duty on the part of the government to prevent Mr. Murphy from assaulting those inmates (and thereby subjecting himself to disciplinary segregation). Generally speaking, the government owes no duty to control the conduct of another person, even when that person is within its custody. *Sorge*, 171 Vt. at 177. Furthermore, even when the

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circumstances are such that a duty to control might arise—such as when a caretaker “takes charge of a third person who he knows or should know to be likely to cause bodily harm to others if not controlled”—the caretaker’s duty to exercise reasonable care is owed to the *victim* of the assault, and not to the assailant himself. Restatement (Second) of Torts § 319. Thus, although a legal duty could have potentially arisen if a negligence action had been brought by a *victim* of one of Mr. Murphy’s assaults, the government owed no duty of care to Mr. Murphy under the circumstances. It is ultimately the duty of Mr. Murphy—and not the government—to take responsibility for his conduct..

Absent a specific duty of care, the court need not reach the question of whether a private analog exists, or whether any other exceptions to the Tort Claims Act apply. *Lamothe*, 2007 VT 91, ¶ 11. The claims against the named defendants in their official capacities are accordingly dismissed. To the extent that the complaint can be construed as seeking relief from the named government agents in their individual capacities, there are no allegations in the complaint that can be reasonably construed as constituting “gross negligence” or “willful misconduct.” 12 V.S.A. § 5602(a)–(b); *Lamothe*, 2007 VT 91, ¶ 12.

The court does not construe the complaint as stating any causes of action other than negligence. Accordingly, for the foregoing reasons, the court concludes that the complaint does not state a claim for negligence upon which relief can be granted, and dismisses the complaint. This disposition makes it unnecessary to address the alternative grounds for dismissal set forth by Defendants’ Motion to Dismiss.

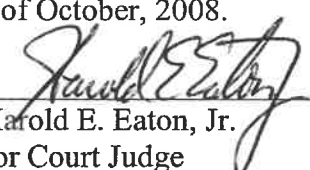
The court has also considered Mr. Murphy’s Motion for Summary Judgment. For the reasons set forth above, the facts set forth in the motion do not show that Mr. Murphy is entitled to judgment as a matter of law even if all of the facts are taken in the light most favorable to him. V.R.C.P. 56(c)(3).

ORDER

(1) Plaintiff’s Motion for Summary Judgment (MPR #4), filed July 2, 2008, is *denied*; and

(2) Defendant’s Motion to Dismiss (MPR #6), filed July 22, 2008, is *granted*;

Dated at Woodstock, Vermont, this 7 day of October, 2008.



Hon. Harold E. Eaton, Jr.
Superior Court Judge

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