UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARRY KLINGER	:	
	:	PRISONER
v.	:	CASE NO. 3:04CV1081(MRK)
	:	
STATE OF CONNECTICUT	:	

RULING AND ORDER

The plaintiff, Garry Klinger, currently is confined at the Osborn Correctional Institution in Somers, Connecticut. In this action, Mr. Klinger sues under 42 U.S.C. § 1983 for damages and a declaration that Connecticut General Statute § 53a-39 – which provides for a reduction of certain sentences and for placement of certain defendants in intensive probation – is unconstitutional. Mr. Klinger originally named the State of Connecticut as the defendant. However, on September 15, 2004, the Court dismissed Mr. Klinger's complaint because the State is not a person within the meaning of § 1983 [doc. #8]. The Court gave Mr. Klinger time to amend his complaint and reopen his case, provided he could identify a proper defendant. Pending before the Court is Mr. Klinger's Motion To Reopen based on his proposed amended complaint, which substitutes Governor M. Jodi Rell for the State of Connecticut as the defendant [doc. #10]. In addition to damages and declaratory relief, Mr. Klinger asks the Court to order Governor Rell to immediately repeal § 53a-39 and to order the Connecticut Superior Court to hold a hearing on modification of his sentence. For the reasons that follow, Mr. Klinger's motion is DENIED.

II.

Under 28 U.S.C. § 1915(e)(2)(B), the district court must dismiss a case "at any time if the

court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915 (e)(2)(B)(i) - (iii); *see Cruz v. Gomez*, 202 F.3d 593, 596 (2d Cir. 2000). Nevertheless, "[w]hen an *in forma pauperis* plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915 (e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (quoting *Benitez v. Wolff*, 907 F.2d 1293, 1295 (2d Cir. 1990)). An action is frivolous when either:

> (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" *Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, *Benitez*, 907 F.2d at1295, or a dispositive defense clearly exists on the face of the complaint. *See Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The Court must exercise caution in dismissing a case under §1915(e) because a claim that a court perceives as likely to be unsuccessful is not necessarily frivolous. *See Neitzke* 490 U.S. at 329.

In reviewing the complaint, the court "accept[s] as true all factual allegations in the complaint" and draws inferences from these allegations in the light most favorable to the plaintiff. *Cruz*, 202 F.3d at 596 (citing *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999)). Furthermore, dismissal under §1915(e)(2)(B)(ii) is appropriate only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief.'" *Id*. at 597 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Finally, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the district court should permit "a *pro se* plaintiff who is proceeding *in forma pauperis*" to file an amended complaint that states a claim upon which relief may be granted. *Gomez v. USAA Federal Savings Bank*, 171 F.3d 794, 796 (2d Cir. 1999).

III.

Mr. Klinger seeks to sue Governor Rell in both her individual and official capacities. As the Court explained in its previous ruling, the Eleventh Amendment bars claims for money damages against Governor Rell in her official capacity. Moreover, in order to maintain a claim for damages against Governor Rell in her individual capacity, Mr. Klinger must demonstrate her direct or personal involvement in the actions which are alleged to have caused the constitutional deprivation. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). "A supervisor may not be held liable under section 1983 merely because his subordinate committed a constitutional tort." *Leonard v. Poe*, 282 F.3d 123, 140 (2d Cir. 2002). Section 1983 imposes liability only on the official causing the violation. Thus, the doctrine of respondeat superior is inapplicable in § 1983 cases. *See Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir. 1999); *see also Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 692-95 (1978).

> [A] supervisor may be found liable for his deliberate indifference to the rights of others by his failure to act on information indicating unconstitutional acts were occurring or for his gross negligence in failing to supervise his subordinates who commit such wrongful acts, provided that the plaintiff can show an affirmative causal link between the supervisor's inaction and [his] injury.

Leonard, 282 F.3d at 140.

Mr. Klinger has alleged no facts demonstrating any link between Governor Rell and his claimed inability to file a motion for modification of sentence. Thus, the Court concludes that Klinger has named Governor Rell for her supervisory role only. However, claims for money damages against Governor Rell are not cognizable in a §1983 action on a theory of respondeat superior. Mr. Klinger's claim for money damages against Governor Rell thus remain barred by the Eleventh Amendment and are, therefore, frivolous.

The Court concludes that Mr. Klinger's claim for injunctive relief against Governor Rell also remains barred by sovereign immunity pursuant under the Eleventh Amendment and is therefore frivolous. The Supreme Court has carved out a limited exception to state sovereign immunity, allowing state officials to be sued in actions seeking injunctive relief , but only if there is a "special relation" between the state official and the statute being challenged. *Ex Parte Young*, 20 U.S. 123, 157 (1908). Otherwise,

> "the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That . . . is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."
>
> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Id. (citation omitted). *See also Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (dismissing governor as defendant where governor lacked specific duty to enforce

the challenged statutes); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."); *but see Mobil Oil Corp. v. Attorney General*, 940 F.2d 73 (4th Cir.1991) (Attorney General was proper party where state statute expressly granted him authority to "investigate and bring an action in the name of the Commonwealth to enjoin any violation" of the statute). Mr. Klinger has alleged no facts suggesting that Governor Rell has any "special relation" to the statute. The statute includes no information regarding enforcement, and the Court cannot discern any relation between the office of the Governor and § 53a-39. Accordingly, Governor Rell is not a proper defendant to Mr. Klinger's claims for injunctive relief.

It would appear that a more appropriate avenue for obtaining the relief that Mr. Klinger seeks would be to file a petition for a writ of habeas corpus in the Superior Court of Connecticut. However, the Court notes that the Connecticut Supreme Court addressed a petition raising a similar issue by a prisoner in *Maniero v. Liburdi*, 214 Conn. 717 (1990) and held that § 53a-39 was constitutional.

III.

In conclusion, because Mr. Klinger's proposed amended complaint fails to identify a proper defendant to pursue this action, the Court hereby **DENIES** Mr. Klinger's Motion to Reopen the Case [doc. # 10]. Because the Court has already given Mr. Klinger an opportunity to cure the defects in his complaint, and he has been unable to do so, the Clerk is directed to close the case.

IT IS SO ORDERED

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut on: November 12, 2004.