IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CHARLES S. CONNER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 03-2010-Ml/V
	)	
THOMAS E. GREEF, et al.,	)	
	)	
Defendant.	)	
	)	

ORDER OF DISMISSAL
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
NOTICE OF APPELLATE FILING FEE

Plaintiff Charles S. Conner filed a pro se complaint on January 9, 2003 that purported to invoke this Court's jurisdiction pursuant to 9 U.S.C. § 10 and 42 U.S.C. §§ 1981, 1983, 1985, and 1986. The complaint also purports to assert claims arising under the laws, statutes, and constitution of the State of Tennessee. On January 29, 2003, this Court issued an order directing the plaintiff to either supplement his in forma pauperis affidavit or pay the civil filing fee. Plaintiff paid the civil filing fee on February 3, 2003. The Clerk shall record the defendants as Thomas E. Greef, C. Richard Barnes, and the Federal Mediation and Conciliation Service ("FMCS"). The FMCS is a federal agency, see

29 U.S.C. § 172, Barnes is Director of the FMCS, and Greef is an "arbitrator-mediator" employed by the FMCS. Compl., ¶¶ 3-5.

Plaintiff purports to bring this action on behalf of "a class of hourly-paid workers in excess of forty-years of age; whose employment is covered by a collective bargaining agreement in a contractual format with specific work rules as forged with management through a recognized segment of organized labor and formal unionization of employees." Id., ¶ 2.[1] Although the

[1] Although plaintiff purports to bring a class action, the substantive allegations of the complaint do not purport to state a claim on behalf of any person other than this plaintiff. Moreover, a party in federal court must proceed either through licensed counsel or on his own behalf. See 28 U.S.C. § 1654; see also Fed. R. Civ. P. 11(a) ("[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party"). No pro se plaintiff may sign pleadings on behalf of another plaintiff. Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) ("While a non-attorney may appear pro se on his own behalf, '[h]e has no authority to appear as an attorney for others than himself.'"); Mikeska v. Collins, 928 F.2d 126 (5th Cir. 1991); Bonacci v. Kindt, 868 F.2d 1442, 1443 (5th Cir. 1989).

The existence of class allegations does not alter that conclusion, because a pro se litigant is not an adequate class representative. Ballard v. Campbell, No. 98-6156, 1999 WL 777435, at *1 (6th Cir. Sept. 21, 1999); Giorgio v. Tennessee Dep't of Human Servs., No. 95-6327, 1996 WL 447656, at *1 (6th Cir. Aug. 7, 1996) ("Because a layman does not ordinarily possess the legal training and expertise necessary to protect the interests of a proposed class, courts are reluctant to certify a class represented by a pro se litigant."); see also Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) (per curiam). The plaintiff is apparently not a licensed attorney, cannot carry insurance, and is not subject to suit by the other class members for any mistakes he may make in handling this case. Other potential class members should not be exposed to the risk that those errors could prejudice their claims and leave them without any remedy.

Even more fundamentally, even if the plaintiff is an attorney, an attorney who is a member of a class cannot also represent the class. See, e.g., Susman v. Lincoln Am. Corp., 561 F.2d 86, 94 (7th Cir. 1977) (holding that conflict of interest precluded attorney from acting as class representative); Sweet v. Birmingham, 65 F.R.D. 551, 552 (S.D.N.Y. 1975) (enunciating test for determining whether class counsel has conflict because of relationship with a class representative); Graybeal v. American Savings & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973) (holding that "dual roles of attorneys for, and representatives of, the proposed class . . . are inherently fraught with potential conflicts of interests"). Accordingly, the Court DISMISSES the class

complaint is less than clear, it appears that the plaintiff is a newspaper reporter who was formerly employed by the Memphis Publishing Co., which publishes The Commercial Appeal, and that he was terminated at some unspecified time, perhaps due to absences from work necessitated by his child care responsibilities. The collective bargaining agreement required that all grievances with management be submitted to arbitration. Id. An arbitration hearing was conducted on October 30, 2001, and the arbitrator issued his decision on or about January 10, 2002. Id., ¶ 6.[2] Although the complaint does not specifically say so, the Court infers that the award was adverse to the plaintiff. The complaint alleges that the arbitrator made numerous factual and legal errors that indicated a bias against the plaintiff. Id., ¶¶ 7-28.

Plaintiff alleges that, on or about April 10, 2002 and again on January 6, 2003, he communicated to the FMCS, through defendant Barnes and others, the numerous errors in the award. Id., ¶¶ 29-30. On January 7, 2003, the general counsel of the FMCS advised the plaintiff that "our Agency has no authority" over the issues raised." Id., ¶ 31. To date, the FMCS has failed "to either recognize or make any effort to rectify, the harmful errors" contained in the award. Id., ¶ 32.

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allegations, and the only plaintiff in this action is Charles S. Conner.

[2] Although the plaintiff alleges that the decision was dated "Jan. 10, 2001," the context of the complaint makes clear that the decision was actually issued in 2002. See, e.g., id., ¶ 29.

The plaintiff seeks to have the award vacated. He also seeks injunctive relief and compensatory and punitive damages.

According to the Sixth Circuit, "a district court may not sua sponte dismiss a complaint where the filing fee has been paid unless the court gives the plaintiff the opportunity to amend the complaint." Apple v. Glenn, 183 F.3d 477, 478 (6th Cir. 1999) (per curiam); see also Benson v. O'Brian, 179 F.3d 1014 (6th Cir. 1999); Tingler v. Marshall, 716 F.2d 1109, 1112 (6th Cir. 1983). There is an exception to this general rule, however, that permits a district court to dismiss a complaint "for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure when the allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion." Apple, 183 F.3d at 478 (citing Hagans v. Lavine, 415 U.S. 528, 536-37 (1974)).

Federal courts are courts of limited jurisdiction. Finley v. United States, 490 U.S. 545, 547-48 (1989); Aldinger v. Howard, 427 U.S. 1, 15 (1976); Stillman v. Combe, 197 U.S. 436 (1905); Turner v. Bank of N. Am., 4 U.S. 8, 10 (1799). Federal courts are obliged to act sua sponte whenever a question concerning jurisdiction arises. See, e.g., St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 287 n.10 (1938); Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177, 1181 (7th Cir. 1989) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)); 13 C.

Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3522 at 70 (1984). "[Fed. R. Civ. P.] 12(h)(3) provides that a court shall dismiss an action '[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter.'" Id.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., provides no basis for subject-matter jurisdiction over plaintiff's claim against defendant Greef.[3] Although § 10 of the FAA, 9 U.S.C. § 10, refers to the filing in federal court of an action to vacate an arbitration award,[4] that provision does not constitute an affirmative grant of subject-matter jurisdiction. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (noting that the FAA "is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise."). Accordingly, the Sixth Circuit has repeatedly held that there is no federal-question jurisdiction over motions to

[3] Although there is some authority, in this circuit as well as elsewhere, for the proposition that "the FAA does not apply to collective bargaining agreements" by virtue of the exclusionary clause contained in § 1 of the FAA, 9 U.S.C. § 1, United Steelworkers of Am. v. Roemer Indus., 68 F. Supp. 2d 843 (N.D. Ohio 1999), the Supreme Court's decision in Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), appears to invalidate that position.

[4] Section 10 provides, in relevant part: "In any of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration."

vacate arbitration awards, even when the petitioner's underlying claim arises under federal law. City of Detroit Pension Fund v. Prudential Sec., Inc., 96 F.3d 26, 29 (6th Cir. 1996) ("Similarly, the federal nature of the claims submitted to arbitration would not appear to be a sufficient basis for jurisdiction under 28 U.S.C. § 1331, since the rights asserted here are actually based on the contract to arbitrate rather than on the underlying substantive claims."); see also Smith Barney, Inc. v. Sarver, 108 F.3d 92, 94 (6th Cir. 1997); Collins v. Blue Cross Blue Shield of Mich., 103 F.3d 35 (6th Cir. 1996).[5]

Although plaintiff could presumably attempt to invoke this Court's diversity jurisdiction with respect to his claims against defendant Greef, that would not confer subject-matter jurisdiction over his claim against Greef even assuming there is complete diversity.[6] The allegations of plaintiff's complaint make clear that defendant Greef is sued solely for his actions as an

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[5] Although, in American Federation of Television & Radio Artists, AFL-CIO v. KJBK-TV (New World Communications of Detroit, Inc.), 164 F.3d 1004, 1008 (6th Cir. 1999), the Sixth Circuit found federal-question jurisdiction over an action seeking to enforce a nonparty subpoena issued by an arbitrator where "the agreement to arbitrate . . . is part of a collective bargaining agreement governed by § 301 of the [Labor Management Relations Act] and, therefore, the agreement to arbitrate *itself* arises under federal law" (emphasis in original), that decision is of no assistance to plaintiff. There can be no question that this action is not brought pursuant to § 301 of the LMRA, 29 U.S.C. § 185, because none of the defendants to this action are signatories to the collective-bargaining agreement. See American Federation of Television & Radio Artists, 164 F.3d at 1008 & n.5; Garrish v. United Auto., Aerospace, & Agric. Implement Workers of Am., 133 F. Supp.2d 959, 966-67 (E.D. Mich. 2001).

[6] Typically, in an action seeking to confirm or vacate an arbitration award, the respondent to the arbitration is named as a party. See 9 U.S.C. § 9. However, plaintiff has failed to name as parties to this action The Commercial Appeal and the Memphis Newspaper Guild, the respondents to that arbitration.

arbitrator. The law is clear that Greef is absolutely immune from civil liability for any action taken in his official capacity as an arbitrator. International Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Greyhound Lines, Inc., 701 F.2d 1181, 1185-86 (6th Cir. 1983); Corey v. New York Stock Exch., 691 F.2d 1205 (6th Cir. 1982); see also Margiotta v. Kosik, No. 91-1218, 1991 WL 177975, at *2 (6th Cir. Sept. 12, 1991). Accordingly, plaintiff's claim against defendant Greef is "totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion," Apple v. Glenn, 183 F.3d at 478, and it is, therefore, DISMISSED.

This Court also does not have subject-matter jurisdiction over plaintiff's claims against defendants Barnes and the FMCS, which are purportedly brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986. The Court will examine each of these claims in turn.

Plaintiff cannot maintain an action against Barnes and the FMCS pursuant to 42 U.S.C. § 1981, which prohibits racial discrimination in the making, performance, modification, and termination of employment contracts. Apart from the fact that the plaintiff has not alleged that Barnes and the FMCS purposefully discriminated against him on the basis of his race, Jackson v. RKO Bottlers, Inc., 743 F.2d 370, 378 (6th Cir. 1984), subsection (c) of § 1981 provides that "[t]he rights protected by this section are

protected against impairment by nongovernmental discrimination and impairment under color of State law." By its terms, then, § 1981 is inapplicable to actions taken under color of federal law. Omeli v. National Council of Senior Citizens, No. 00-1772, 12 Fed. Appx. 304, 307 (6th Cir. June 11, 2001), cert. denied, 534 U.S. 1026 (2001); see also Davis-Warren Auctioneers, J.V. v. Federal Deposit Ins. Corp., 215 F.3d 1159 (10th Cir. 2000); Davis v. United States Dep't of Justice, 204 F.3d 723, 725-26 (7th Cir. 2000) (per curiam); Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998).

Plaintiff also cannot maintain a § 1983 action against Barnes and the FMCS. To state a claim under 42 U.S.C. § 1983, the plaintiff must allege that the defendants (1) deprived plaintiff of some right or privilege secured by the Constitution or laws of the United States and (2) acted under color of state law. Lugar v. Edmonson Oil Co. Inc., 457 U.S. 922, 924 (1982); Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 155 (1978); Wagner v. Metro. Nashville Airport Auth., 772 F.2d 227, 229 (6th Cir. 1985). The FMCS is a federal agency and, therefore, it acts under color of federal law. Likewise, plaintiff's claim against defendant Barnes arises out of his actions as the director of the FMCS and, therefore, he acts under color of federal law. Franklin v. Henderson, No. 00-4611, 2000 WL 861697, at *1 (6th Cir. June 20, 2001) ("The federal government and its officials are not subject to suit under 42 U.S.C. § 1983."); Habtemariam v. Adrian, No. 98-3112, 1999 WL

455326, at *2 (6th Cir. June 23, 1999); Johnson v. Ionia United States Postal Serv., Nos. 90-1078, 90-1313, 1990 WL 115930, at *1 (6th Cir. Aug. 10, 1990); Walber v. United States Dep't of Housing & Urban Dev., No. 88-1984, 1990 WL 19665, at *2 (6th Cir. Mar. 5, 1990).

Moreover, the complaint contains no allegation that Barnes and the FMCS deprived plaintiff of any right secured by the Constitution or laws of the United States. Instead, the complaint alleges only that Barnes and the FMCS failed to take action with respect to plaintiff's complaints about his arbitration award, without indicating that the FMCS possesses any legal authority to alter an arbitration award.

The complaint also does not state a claim pursuant to 42 U.S.C. § 1985.

> [I]n order to state a cause of action under § 1985, the plaintiff must allege that the defendants (1) conspired together, (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, (3) and committed an act in furtherance of the conspiracy, (4) which caused injury to person or property, or a deprivation of any right or privilege of a citizen of the United States, and (5) and that the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus.

Bass v. Robinson, 167 F.3d 1041, 1050 (6th Cir. 1999). The complaint contains no allegations whatsoever that suggest either that the plaintiff was deprived of the equal protection of the laws or that any of the defendants were "motivated by racial, or other

class-based, invidiously discriminatory animus." Id.; see also Smith v. Thornburg, 136 F.3d 1070, 1078 (6th Cir. 1998).

Moreover, "in order to demonstrate the necessary conspiracy, a plaintiff must allege specific acts or means by which the defendants were alleged to have conspired." Bryant-Bruce v. Vanderbilt Univ., Inc., 974 F. Supp. 1127 (M.D. Tenn. 1997); see also Brooks v. American Broadcasting Cos., 932 F.2d 495 (6th Cir. 1991) (affirming denial of motion to amend to add § 1985 claim because "the allegations are too vague and conclusory to withstand a motion to dismiss"); Jaco v. Bloechle, 739 F.2d 239, 245 (6th Cir. 1984); Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636, 645 (W.D. Tenn. 1999); cf. Gutierrez v. Lynch, 826 F.2d 1524, 1538 (6th Cir. 1987) ("It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state . . . a claim."; dismissing § 1983 conspiracy claim).

In this case, however, the complaint fails to mention a conspiracy, let alone identify any of its members. Moreover, even if the plaintiff did allege that each of the defendants conspired to commit the acts described in the complaint, plaintiff's allegations would still be insufficient to state a claim. According to the intracorporate conspiracy doctrine, which has been adopted by the Sixth Circuit, "[a] corporation cannot conspire with itself any more than a private individual can, and it is the

general rule that the acts of the agent are the acts of the corporation." Doherty v. American Motors Corp., 728 F.2d 334, 339 (6th Cir. 1984) (internal quotations omitted); see also Lindsey, 34 F. Supp. 2d at 644-45. Finally, there are no allegations in the complaint that, however broadly construed, even remotely suggest the existence of a conspiracy between defendants Barnes and the FMCS, on the one hand, and The Commercial Appeal or the Memphis Newspaper Guild, on the other.

Because plaintiff has no claim under § 1985, his claim pursuant to 42 U.S.C. § 1986 must also be dismissed. Bass, 167 F.3d at 1051 n.5.

For all the foregoing reasons, plaintiff's claims against defendants Barnes and FMCS are "totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion," Apple v. Glenn, 183 F.3d at 478, and they are, therefore, DISMISSED.[7] Because each of the plaintiff's federal

[7] Although the Court could construe the complaint as arising under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), such a construction would not save plaintiff's claims. As previously indicated, see supra p. 7, defendant Greef is absolutely immune from suit for his actions as an arbitrator. Likewise, plaintiff's claim against the FMCS, a federal agency, is barred by sovereign immunity. Capobianco v. Brink's Inc., No. 79 C 3168, 1980 WL 2089, at *1 (E.D.N.Y. June 25, 1980) (holding FMCS to be immune from suit); see also Franklin v. Henderson, No. 00-4611, 2000 WL 861697, at *1 (6th Cir. June 20, 2001); Fagan v. Luttrell, No. 97-6333, 2000 WL 876775, at *3 (6th Cir. June 22, 2000) ("Bivens claims against the United States are barred by sovereign immunity. . . . The United States has not waived its immunity to suit in a Bivens action."); Miller v. Federal Bureau of Investigation, No. 96-6580, 1998 WL 385895, at *1 (6th Cir. July 1, 1998) ("the doctrine of sovereign immunity precludes a Bivens action against a federal agency for damages"). Finally, the complaint is devoid of allegations that defendant Barnes, in his individual capacity, violated any right conferred on plaintiff by the Constitution or federal law.

claims are subject to dismissal prior to service on the defendants, the Court declines to exercise jurisdiction over the remaining state-law claims.

The final issue to be addressed is whether the plaintiff should be allowed to appeal this decision in forma pauperis. Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). It would be inconsistent for a district court to determine that a complaint is subject to dismissal prior to service on the defendants, yet has sufficient merit to support an appeal in forma pauperis. See Williams v. Kullman, 722 F.2d 1048, 1050 n.1 (2nd Cir. 1983). The same considerations that lead the Court to dismiss this case also compel the conclusion that an appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff is not taken in good faith, and plaintiff may not proceed on appeal in forma pauperis.

The Sixth Circuit Court of Appeals decisions in McGore v. Wrigglesworth, 114 F.3d 601 (6th Cir. 1997), and Floyd v. United States Postal Serv., 105 F.3d 274 (6th Cir. 1997), apply to any appeal filed by the plaintiff in this case.

If plaintiff files a notice of appeal, he must pay the entire $105 filing fee required by 28 U.S.C. §§ 1913 and 1917. The entire filing fee must be paid within thirty days of the filing of the notice of appeal.

By filing a notice of appeal the plaintiff becomes liable for the full amount of the filing fee, regardless of the subsequent progress of the appeal. If the plaintiff fails to comply with the above assessment of the appellate filing fee within thirty days of the filing of the notice of appeal or the entry of this order, whichever occurred later, the district court will notify the Sixth Circuit, which will dismiss the appeal. If the appeal is dismissed, it will not be reinstated once the fee is paid. McGore, 114 F.3d at 610.

IT IS SO ORDERED this _____ day of February, 2003.

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JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE