IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:14-cv-00369-BO

FELICITY M. TODD VEASEY and SECOND AMENDMENT FOUNDATION, INC., Plaintiffs, v. BRINDELL B. WILKINS, JR., in his official capacity as Sheriff of Granville County, North Carolina Defendant.	**REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

Pursuant to Local Civil Rule 7.1, Defendant Brindell B. Wilkins, Jr. ("Sheriff Wilkins") submits the following Reply in support of his Motion to Dismiss the Complaint of Plaintiffs Felicity M. Todd Veasey ("Veasey") and the Second Amendment Foundation, Inc. ("SAF").

ARGUMENT

I. PLAINTIFFS' RESPONSE ONLY UNDERSCORES WHY THEY CANNOT CHALLENGE THE CONSTITUTIONALITY OF A STATE STATUTE BY SUING ONE OF THE 100 LOCAL SHERIFFS WHO ARE REQUIRED TO FOLLOW IT.

In his opening brief, Sheriff Wilkins outlined how well-settled Section 1983 jurisprudence prohibits a plaintiff from suing a local official for merely following state law. Plaintiffs have responded with arguments that only prove Sheriff Wilkins' points with even greater force.

First, Plaintiffs contend that they do not need to identify a "policy or custom" under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), because this requirement is "limited to cases involving vicarious liability" (i.e., suits against the local government entity) and does not apply to official-capacity suits such as this. [DE 23 at 5]. Plaintiffs are wrong. It is black-letter law

that *Monell*'s local "policy or custom" requirement applies to official capacity suits. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *see also, e.g.*, *Robertson v. Elliott*, 315 Fed. Appx. 473, 476 (4th Cir. 2009) (citing *Graham* at 166); *O'Connell v. City of Greenville*, 2014 U.S. Dist. LEXIS 127264, at *4 (E.D.N.C. Sept. 10, 2014) (Boyle, J.) (quoting *Graham*, 473 U.S. at 166) ("[I]n an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law.").

Next, Plaintiffs argue that *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1993), is distinguishable because "the 'local' board that enjoyed Eleventh Amendment immunity in *Bockes* was subject to complete control by the state," and "[t]herefore, when the *Bockes* Court spoke of the local board being constrained by state law and therefore not liable under 1983, it was applying that principle to a state-controlled entity." [DE 23 at 6]. But Sheriff Wilkins is not arguing that he is entitled to the same relief as the state-controlled local board in Bockes. He is arguing that he is entitled to the same relief as the county in *Bockes*. Plaintiffs are apparently confused about who the defendants were in *Bockes* and how the Fourth Circuit ruled as to each of those defendants.

There were three defendants in *Bockes*: the Grayson County Board of Social Services (the "Board"), the Grayson County Department of Social Services (the "Department"), and Grayson County. "The Board and the Department maintained that they were immune from suit in federal court because they were state entities under the Eleventh Amendment." *Id.* at 789-90. By contrast, Grayson County argued what Sheriff Wilkins argues here: that under *Monell's* local "policy or custom" requirement, a Section 1983 plaintiff cannot sue a local government or its officials for merely enforcing State law. *Id.*

The Fourth Circuit agreed with the Board and the Department's arguments that they were "state agencies" and therefore entitled to dismissal under the Eleventh Amendment. *Id.* at 790-91. The Circuit then turned to a consideration of the third defendant, Grayson County. As explained in detail in Sheriff Wilkins' opening brief, the Fourth Circuit held that Section 1983 could not impose liability on Grayson County for following state law because this could not – as a matter of law – constitute a local "policy or custom" under *Monell*. Thus, Plaintiffs' comments about the state-controlled Board in *Bockes* are puzzling because they have nothing to do with the Court's decision or rationale with respect to Grayson County. *Bockes* is directly on point, and Plaintiffs' attempt to distinguish it fails.[1]

Next, Plaintiffs attempt to distance themselves from the allegations of their Complaint by suggesting that they are not really suing over a "State policy" and are instead suing over a "local Granville County policy." As an initial matter, this argument is impossible to accept in light of the Complaint's allegations, which make clear that Plaintiffs are challenging North Carolina's statewide mandatory regulatory scheme for concealed carry permits. The Complaint alleges that Plaintiffs are seeking an injunction to enjoin "the State of North Carolina's prohibition . . . pursuant to N.C. Gen. Stat. § 14-415.12(a)(1)" [DE 1 at ¶ 1], challenging "the State's ban on non-citizens obtaining a concealed carry license" [*Id.* at ¶ 4], challenging laws that "were enacted in the State capital in this District" [*Id.* at ¶ 7], and challenging "the laws of North Carolina." [*Id.* at ¶ 3]. More recently, Plaintiffs' Memorandum in Support of their Motion for Preliminary

[1] Plaintiffs also argue that an outdated New Jersey district court decision, *Davis v. Camden*, 657 F. Supp. 396 (D. N.J. 1987), is "more instructive" than the Fourth Circuit's decision in *Bockes*. [DE 23, 4-5, 7]. *Davis* reached its aberrational result nearly thirty years ago when there was "little authority on the issue." *Id.* at 402. In the nearly thirty years since, however, there is ample authority on the issue. Every federal circuit to consider the issue – including the Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits – has reached the opposite result. [DE 23, 4-5, 7].

Injunction doubles down on this theory. Plaintiffs contend that it is North Carolina's "Code [sic] sections" that "prohibit Veasey and *all other legal aliens residing in North Carolina* from obtaining a concealed carry permit," that "[i]t is unclear what *North Carolina's claimed purpose was for enacting this prohibition*," and that "there is no purpose *North Carolina* can offer that passes constitutional muster." [DE 21 at 3] (emphasis added). Plaintiffs also go into a lengthy discussion of *the State's* interest – as opposed to Granville County's interest – in the statute. [*Id.* at 20]. Plaintiffs also contend that "[i]n Wilkins's official capacity, he is responsible for enforcing certain of *North Carolina's . . . customs . . . and policies*, specifically including N.C.G.S. § 14-415.12(a)(1)." [*Id.* at 4] (emphasis added). Sheriff Wilkins could not have said it any better: the "policy or custom" at issue is a North Carolina "policy or custom," not a local "policy or custom" unique to Granville County.

Nevertheless, in a futile effort to identify the requisite "local policy or custom," Plaintiffs point to the lone fact that the Granville County government website posts a list of requirements for concealed carry permit applicants. [DE 23-1, Exhibit A]. But this posting is a ***verbatim list of the North Carolina statutory requirements***. *Compare id.* (stating that an applicant "must be a citizen of the United States"), *with* N.C. Gen. Stat. § 14-415.12(a)(1) (stating that an applicant must be "a citizen of the United States"). Thus, Plaintiffs' reference to the County's website as "a formal local policy" that "was promulgated by the Sheriff's department, separately and independently of any action by the State of North Carolina" cannot be taken seriously. [DE 23 at 3, 6].

Moreover, Plaintiffs cite no authority for the notion that a local government's verbatim posting of State statutory requirements on its website somehow transforms that "State policy or custom" into a local "policy or custom" under *Monell*. This is because no such authority exists.

On its face, that innocuous act alone could never satisfy the "stringent substantive standards" for recovery based upon the existence of a "local policy or custom." *Spell v. McDaniel*, 824 F.2d 1380, 1391, 1399 (4th Cir. 1987) (noting that "the substantive requirements for establishing . . . liability [under *Monell*] are stringent indeed").

Next, Plaintiffs suggest that they are entitled to "delve into whether the Sheriff had a 'meaningful choice' regarding enforcement" of State law. [DE 23 at 6]. This attempt to stave off dismissal is wrong for two reasons. First, it is well-settled that Section 1983 claims must be dismissed at the Rule 12 stage when, as here, the plaintiffs fail to adequately plead or identify a local "policy or custom" under *Monell*. *Walker v. Prince George's County*, 575 F.3d 426, 431 (4th Cir. 2009) (O'Connor, J., sitting by designation) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and affirming district court's Rule 12 dismissal for failure to adequately plead a local "policy or custom" under *Monell*); *see also, e.g.*, *Fordham v. Doe*, 2011 U.S. Dist. LEXIS 121389, at *1 (E.D.N.C. 2011); *Evans v. Griess*, 2013 U.S. Dist. LEXIS 152322, at *9 (E.D.N.C. 2013); *Harris v. Knuckles*, 2011 U.S. Dist. LEXIS 80540, at *5 (E.D.N.C. 2011); *McMillian v. Leconey*, 2010 U.S. Dist. LEXIS 61119, at *3-4 (E.D.N.C. 2010). Second, the Complaint does not and could not allege that Sheriff Wilkins had a "meaningful choice" because North Carolina's General Statutes clearly state that he does <u>not</u> as a matter of law. If an applicant is not a U.S. citizen, State law provides that Sheriff Wilkins "*shall*" deny them a permit. *See* N.C. Gen. Stat. § 14-415.15(a) (listing "citizenship" as the first of various "criteria"); N.C. Gen. Stat. § 14-415.15(c) (requiring that the "application for a permit *shall* be denied [by the sheriff] only if the applicant fails to qualify under the criteria listed in this Article") (emphasis added). This is not a question of fact; it is a pure legal issue that is definitively answered by North Carolina's General Statutes.

Finally, Plaintiffs cite the New Jersey district court's decision in *Davis* and a Missouri district court decision, *Snider v. Peters*, 928 F. Supp. 2d 1113 (E.D. Mo. 2013), as examples of a federal court rejecting a local official's defense that he was merely following state law. As Plaintiffs' admit, however, both of these decisions rejected this defense with respect to a *personal capacity suit*, as opposed to an official capacity suit. Plaintiffs here have not brought a personal capacity suit against Sheriff Wilkins; they have only brought an official capacity suit against him. This is a critical distinction because personal capacity suits – unlike official capacity suits – do <u>not</u> require a plaintiff to identify a local "policy or custom" under *Monell*. *See, e.g.*, *Hafer* at 25 (explaining that "the plaintiff in a personal-capacity suit need not establish a connection to [a local] governmental 'policy or custom'"). That is why in both *Davis* and *Snider*, the absence of a local "policy or custom" did not preclude the plaintiffs' personal capacity claims; that requirement was simply inapplicable. Indeed, when the district court in *Snider* considered the plaintiffs' official capacity claims, it *dismissed* them for a reason similar to the reason that Plaintiffs' claims fail here: there was no local "policy or custom" because it was the State of Missouri, and not the local government, that was responsible for the challenged training program curriculum. *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1160 (8th Cir. 2014) (affirming district court's decision on these grounds). Thus, Plaintiffs' reliance on these decisions only highlights the flaw in its claims.

For all of the foregoing reasons, Plaintiffs' Response underscores why the Complaint should be dismissed.

II. PLAINTIFFS OFFER NO REASON FOR WHY THIS ACTION COULD PROCEED IN THE STATE'S ABSENCE WITHOUT THE POTENTIAL FOR IMPAIRING THE STATE'S INTERESTS.

Plaintiffs contend in conclusory fashion that joinder of the State is unnecessary because "no actor of the State is involved," but that dodges the question of whether the State has "an interest relating to the subject of the action and is so situated that disposing of the action in the [State's] absence may . . . as a practical matter impair or impede the [State's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B). It is axiomatic that the State has an interest in attempting to preserve the constitutionality of a comprehensive state regulatory scheme enacted by its General Assembly. Furthermore, if Plaintiffs were allowed to proceed and ultimately one of the State's one-hundred counties were enjoined from enforcing North Carolina's regulatory scheme for concealed carry permits, it would directly impair North Carolina's interest in "statewide uniformity." N.C. Gen. Stat. § 14-415.23 ("It is the intent of the General Assembly to prescribe a uniform system for the regulation of legally carrying a concealed handgun.").

While the State is an indispensable party under Rule 19(a), however, joining the State is not feasible in federal court due to Eleventh Amendment immunity. Thus, the operative question is whether the action can nevertheless proceed under Rule 19(b) in the State's absence.

On this score, Plaintiffs do not engage Sheriff Wilkins on any of the Rule 19(b) criteria. Instead, Plaintiffs simply observe that there are no Rule 19(b) decisions dismissing a case on the grounds that a local government was merely following state law. Of course there are not. The *Monell* issue is irrelevant to the Rule 19(b) factors, which look to: (1) whether the absent person existing parties will be prejudiced by a judgment; (2) whether relief can be limited or shaped to avoid or reduce prejudice; (3) whether a judgment without the absent person will be adequate;

and (4) whether the plaintiff is left with an adequate alternative remedy if the case is dismissed. Fed. R. Civ. P. 19(b).

Under those factors, dismissal is the only appropriate course where, as here, a governmental entity is an indispensable party, the government's joinder is not feasible because of an immunity doctrine, and there is the potential for injury to the government's interests. *See Philippines v. Pimentel*, 553 U.S. 851, 866-67 (2008) (citing *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 373-75 (1945), and *Minnesota* v. *United States*, 305 U.S. 382, 386-88 (1939), and declaring it "clear" that "[a] case may not proceed when a required-entity sovereign is not amenable to suit" because "dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign"); *see also, e.g.*, *Seneca Nation of Indians v. New York*, 383 F.3d 45, 49 (2d Cir. 2004) (affirming dismissal of action under Rule 19(b) when the State of New York was an indispensable party that could not be joined because of Eleventh Amendment immunity and there was potential for injury to the government's interests).

Lastly, without explaining why, Plaintiffs posit that they may not be able to name an appropriate State official under *Ex Parte* Young [DE 23 at 9], which would leave them with the only option of bringing an action against the State in state court. Even assuming that there is no appropriate State official for Plaintiffs to sue under *Ex Parte Young*, the fact that Plaintiffs may be relegated to a state court forum is of no consequence. Indeed, even when there is *no available forum at all*, dismissal under Rule 19(b) is still the only appropriate course of action when the alternative is to proceed without an immune government entity whose interests could be impaired by the federal court action. *See, e.g.*, *Pimental* at 872 (dismissing action under such circumstances and noting that "[d]ismissal under Rule 19(b) will mean, in some instances, that

plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of [governmental] immunity").

For these reasons, Plaintiffs' Response only proves up the flaw in its decision to sue Sheriff Wilkins instead of the State or its appropriate official. To the extent the Court reaches this issue, the case should be dismissed for failure to join the State as a necessary party.

III. PLAINTIFFS APPARENTLY CONCEDE THAT THEIR SECOND AMENDMENT CLAIM SHOULD BE DISMISSED.

Sheriff Wilkins in his opening brief noted that the Second Amendment does not confer the right to carry concealed firearms. Plaintiffs have apparently conceded this issue by failing to respond in their Response. To the extent the Court reaches this issue, Plaintiffs' Second Amendment challenge (Count 2) should be dismissed.

IV. NOW THAT PLAINTIFFS HAVE COMPLIED WITH THE APPLICABLE FEDERAL STATUTORY NOTICE REQUIREMENTS, SHERIFF WILKINS WITHDRAWS HIS RELATED OBJECTION.

Four-and-a-half months after filing the Complaint, Plaintiffs have now complied with Rule 5.1 of the Federal Rules of Civil Procedure by filing the requisite Notice of Constitutional Question on November 10, 2014. Accordingly, Sheriff Wilkins withdraws his objection to Plaintiffs' initial failure to comply with Rule 5.1.

CONCLUSION

For the foregoing reasons, Sheriff Wilkins respectfully requests that the Court dismiss the Complaint.

Respectfully submitted the 14th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record as follows:

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s/Andrew H. Erteschik
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PATRICK O'CONNELL, Plaintiff, v. CITY OF GREENVILLE, NORTH CAROLINA, CHIEF OF POLICE HASSAN ADEN, et al., Defendants.

NO. 4:14-CV-64-BO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION

2014 U.S. Dist. LEXIS 127264

September 10, 2014, Decided
September 11, 2014, Filed

COUNSEL: [*1] For Patrick O'Connell, Plaintiff: Philip J. Clarke , 3rd, Philip J. Clarke, Attorney at Law, Morehead City, NC.

For City of Greenville, North Carolina, Defendant: Gary S. Parsons, Gavin B. Parsons, LEAD ATTORNEY, Troutman Sanders, LLP, Raleigh, NC; Jason R. Benton, LEAD ATTORNEY, Parker, Poe, Adams & Bernstein, LLP, Charlotte, NC; William J. Little , III, LEAD ATTORNEY, Office of the City Attorney, Greenville, NC.

For Hassan Aden, Does 1-5, individually and in their official capacity, Defendants: Gary S. Parsons, Gavin B. Parsons, LEAD ATTORNEY, Troutman Sanders, LLP, Raleigh, NC; William J. Little , III, LEAD ATTORNEY, Office of the City Attorney, Greenville, NC.

JUDGES: TERRANCE W. BOYLE, UNITED STATES DISTRICT JUDGE.

OPINION BY: TERRANCE W. BOYLE

OPINION

ORDER

This cause comes before the Court on defendant Hassan Aden's motion to dismiss the claims against him in both his official and individual capacities. [DE 15]. Plaintiff has responded to the motion [DE 19], defendant has replied [DE 20], and the matter is ripe for ruling. For the reasons discussed below, defendant's motion is DENIED.

BACKGROUND

Plaintiff Patrick O'Connell filed this action seeking injunctive and declaratory relief against the City of Greenville, [*2] North Carolina (City) the Chief of Police, Hassan Aden, (Aden) and five police officers employed by the City (Does One through Five), for alleged civil rights violations under *42 U.S.C. § 1983*. [DE 1]. Specifically, O'Connell claims that defendants violated his rights under the *First* and *Fourteenth Amendments to the United States Constitution* by depriving him of his right to engage in both free speech and free exercise of religion in the city of Greenville, North Carolina. Plaintiff brought suit against Greenville in its official capacity, and Aden and Does One through Five in both their official and individual capacities. [*Id*.]. Aden now moves to dismiss all claims against him pursuant to *Federal Rule of Criminal Procedure 12(b)(6)*. [DE 15].

DISCUSSION

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of a complaint. *Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009)*. When ruling on the motion, the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Specificity is not required; the complaint need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly, 550 U.S at 555* (quotation omitted). To survive a *Rule 12(b)(6)* motion, a complain must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on [*3] its face." *Id. at 555, 570*; *see also Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

Defendant Aden raises three grounds in support of his motion for dismissal. The Court addresses these claims in turn.

l. OFFICIAL CAPACITY CLAIM

Adem argues that plaintiff's official capacity claim should be dismissed, as he also brought suit against the City. Official capacity suits "generally represent only another way of pleading an action against an entity of which the officer is an agent." *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)* (quotation omitted). The Fourth Circuit has held that official capacity claims are essentially the same as a claim against the entity and should be dismissed when the entity is also a named defendant. *Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004)*. State officials acting in their official capacities, however, can be sued for prospective injunctive relief, "to prevent ongoing violations of federal law, on the rationale that such a suit is not a suit against the state for purposes of the *Eleventh Amendment*." *McBurney v. Cuccinelli, 616 F.3d 393, 399 (4th Cir. 2010)* (citing *Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*; *see also Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)* (noting that a "state official in his or her official capacity, when sued for injunctive relief, would be a person under *§ 1983* ").

Here, plaintiff alleges Aden participated in a custom of repeated failures to adequately train and supervise his staff in avoiding Constitutional violations. These allegations are sufficient [*4] to state an official capacity claim for injunctive relief. *Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)* ("[I]n an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law."). Thus, defendant Aden's motion to dismiss this claim is denied.

II. INDIVIDUAL CAPACITY CLAIMS

Defendant Aden next argues that plaintiffs individual capacity claim is subject to dismissal because *§ 1983* claims may not be premised on a *respondeat superior* theory and the complaint fails to allege sufficient facts to support a claim of supervisory liability.

A. Vicarious Liability

Defendant Aden is correct in citing Supreme Court jurisprudence for the premise that "[g]ovemment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior." Ashcroft v. Iqbal, 556 U.S. at 676 (2009)*. The Supreme Court went on to say, however that "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id. at 677*. Therefore, a plaintiff is not precluded from establishing fault through a method of vicarious liability other than *respondeat superior*. Here, plaintiff alleges that Aden is liable under the doctrines of both vicarious liability and *respondeat superior*. While [*5] the latter is not applicable to this matter, other types of vicarious liability may apply. As such, the Court finds that dismissal of plaintiffs entire individual capacity claim on this basis is unwarranted at this time.

Supervisory Liability

To succeed on a *§ 1983* claim for supervisory liability, a plaintiff must show:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a 'pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff;
>
> (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive

practices; and

(3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff."

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994). Defendant Aden argues that plaintiff's supervisory liability claim fails because the complaint does not allege any facts regarding Aden's individual actions or omissions.

The complaint, however, asserts that Aden, the police chief, failed to adequately supervise Does One through Five. Specifically, plaintiff alleges that Aden failed [*6] to implement and enforce policies to adequately supervise and train his officials to prevent constitutional violations. These allegations are sufficient to nudge plaintiff's supervisory liability claim across the line from conceivable to plausible. *Twombly, 550 U.S. at 570*. Thus, defendant Aden's motion to dismiss the individual capacity claim on this ground is denied.

CONCLUSION

For the foregoing reasons, Defendant Aden's motion to dismiss [DE 15] is DENIED. The action is not dismissed at this time and may proceed in its entirety.

SO ORDERED.

This the 10th day of September, 2014.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE

UNITED STATES DISTRICT JUDGE

ANGELO FORDHAM, JR., Plaintiff, v. GREENVILLE POLICE OFFICER JOHN DOE, and THE CITY OF GREENVILLE, Defendants.

No. 4:11-CV-32-D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION

2011 U.S. Dist. LEXIS 121389

October 20, 2011, Decided
October 20, 2011, Filed

COUNSEL: [*1] For Angelo Fordham, Jr., Plaintiff: David Campbell Sutton, Sutton Law Office, P.A., Greenville, NC.

For Greenville Police Officer John Doe, The City of Greenville, NC, Defendants: William J. Little, III, LEAD ATTORNEY, Office of the City Attorney, Greenville, NC.

JUDGES: JAMES C. DEVER III, Chief United States District Judge.

OPINION BY: JAMES C. DEVER III

OPINION

ORDER

On February 25, 2011, Angelo Fordham, Jr. ("Fordham" or "plaintiff") filed this action pursuant to *42 U.S.C. sections 1983* and *1988*, the *Fourth* and *Fourteenth Amendments*, and North Carolina law. Compl. ¶ 1 [D.E. 1]. Fordham names the city of Greenville, North Carolina (hereinafter "Greenville" or "city") and Greenville police officer John Doe (hereinafter "Doe" or defendant") [1] as defendants. Id. ¶¶ 1--2. On March 23, 2011, defendants filed a motion to dismiss pursuant to *Rules 12(b)(2)* & *(4)--(6) of the Federal Rules of Civil Procedure*. Defs.' Mot. Dism. [D.E. 6]. On April 22, 2011, Fordham responded in opposition to defendants' motion. Pl.'s Mem. Opp'n Mot. Dism. [D.E. 12]. On April 27, 2011, defendants replied. Defs.' Reply [D.E. 13]. As explained below, Fordham has failed to state a claim upon which relief can be granted; therefore, defendants' motion [*2] to dismiss pursuant to *Rule 12(b)(6)* is granted.

1 Fordham alleges that an African-American male Greenville police officer used excessive force against him via a taser gun ("taser"), and that because he was "face down and had soiled himself" immediately after being tased, he does not know the name of the officer. Pl.'s Mem. Opp'n. Mot. Dism. 3. Therefore, he has brought this action against the unnamed officer, with the expectation that he will learn the identity of the defendant during discovery. Id. Upon learning this information, he intends to amend his complaint pursuant to *Rule 15(c) of the Federal Rules of Civil Procedure* to change the name of the officer-defendant. Id.

I.

On February 26, 2009, Fordham and his friend, Monte Corey, were in Fordham's residence in Greenville, North Carolina when members of the Greenville Police

Department and Pitt County Sheriff's Office Joint Drug Task Force (hereinafter "Task Force") knocked on his door. Compl. ¶¶ 6--9. Doe, an officer with the Greenville Police Department, was a Task Force member. Id. ¶¶ 4--7. The Task Force was there to execute a search warrant. Id.

When Fordham heard the knock, Fordham told Corey to open the door. Id. ¶ 9. Corey complied, [*3] but upon seeing that there were numerous law enforcement officers seeking to enter, Corey immediately shut the door. Id. Corey then leaned on the door to prevent the officers' entrance. Id. The Task Force officers used force to open the door. Id.

When the Task Force officers entered the home, Fordham was "approximately 10 to 15 feet from the door." Id. ¶ 10. He states that the officers entered his home shouting conflicting instructions. Some officers ordered him to "put his hands up" and others directed him to "get on the ground." Id. Fordham claims that he raised his hands and continued to stand near the door as the Task Force officers entered. Id. Fordham then alleges that Doe used his taser on Fordham. Id. The taser burned a hole in Fordham's shirt, and caused him to lose control of his bodily functions, soil himself, and fall to the floor. Id. ¶ 11. Fordham alleges that Doe later told him that he had used the taser because Fordham had not put his hands up. Id. ¶ 12. Fordham states that during the altercation, he was not intoxicated, disorderly, or "a threat to himself or others." Id. ¶ 18.

Fordham alleges that Doe used excessive force in violation of his *Fourth Amendment* right to [*4] be free from unreasonable seizure and committed an assault and battery. Id. ¶¶ 21--26; see also Pl.'s Mem. Opp'n Mot. Dism. 4--8. As for the city, Fordham seeks to recover from the city under *section 1983* and contends that the city, "by and through its police department, developed and maintained policies or customs exhibiting deliberate indifference to the constitutional rights of persons in Greenville . . . ." Compl. ¶¶ 27--33. Fordham refers to the city's policies of failing to properly investigate citizen complaints of excessive force, failing to take corrective actions after internal investigations of excessive force allegations, and failing to adequately train officers on properly using tasers. Id. ¶¶ 15--17, 29--30, 33; see also Pl.'s Mem. Opp'n Mot. Dism. 5--6.

The city and Doe seek dismissal. See Defs.' Mem. Supp. Mot. Dism [D.E. 7]. First, they contend that the complaint against the city must be dismissed pursuant to *Rules 12(b)(4)* & *(5)* because Fordham failed to properly serve the city. Id. 2--4. Next, defendants argue that the court does not have personal jurisdiction over defendant Doe because Doe was not served, and therefore seek dismissal pursuant to *Rules 12(b)(2)* & *(5)*. Id. 4--5. [*5] Finally, defendants seek to dismiss all claims against the city and Doe under *Rule 12(b)(6)* and argue that Fordham has not alleged facts to support the city's municipal liability under *section 1983* or Doe's personal liability under federal or state law. Id. 5--12.

II.

A.

Rule 4 of the Federal Rules of Civil Procedure describe the requirement of effective service and process. See *Fed. R. Civ. P. 4(a)--(c)*. Within 120 days of filing a complaint, a plaintiff must serve all defendants with process, unless service is waived or plaintiff demonstrates good cause for the delay. *Fed. R. Civ. P. 4(d)* & *(m)*. Process consists of a summons and a copy of the complaint. See *Fed. R. Civ. P. 4(c)*.

Rule 4(j)(2) sets forth the specific requirements for service of all "state-created governmental organization[s]," including cities. See *Fed. R. Civ. P. 4(j)(2)*. It provides that a state governmental entity may be served by either "delivering a copy of the summons and of the complaint to its chief executive officer; or . . . serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant." Id. Therefore, the court looks to North Carolina law to determine [*6] if Fordham properly served the city. See, e.g., *Patterson v. Whitlock, 392 F. App'x 185, 188 n.7 (4th Cir. 2010)* (per curiam) (unpublished).

Under North Carolina law, a plaintiff may serve a "city, town, or village . . . by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk . . . ." N.C. Gen. Stat. Ann. § 1A-1, Rule 4(j)(5)(a). North Carolina strictly enforces this rule "to insure that a defendant receives actual notice of a claim against him," and does not provide for any exceptions to personal service, other than the specific procedure set forth in the statute. See, e.g., *Crabtree v. City of Durham, 136 N.C. App. 816, 817, 526 S.E.2d 503, 505 (2000)*; *Johnson v. City of Raleigh, 98 N.C. App. 147, 149, 389*

S.E.2d 849, 851 (1990).

Here, Fordham mailed a copy of the complaint and summons to the office of Greenville's city manager, return receipt requested. See Pl.'s Mem. Opp'n Mot. Dism. 2--3. The process arrived at the city manager's post office box on March 4, 2011, seven days after Fordham filed the complaint. See Aff. Serv. Proc. on City [D.E. 10] 2. On April 21, 2011, Fordham filed his affidavit [*7] of service pursuant to *Rule 4(1) of the Federal Rules of Civil Procedure*, and it shows that the process was addressed to "City Manager Wayne Bowers," but that Gordon Clark actually accepted delivery. Id. 1--2. Clark is a city buildings and grounds employee. See Defs.' Mem. Supp. Mot. Dism., Att. 3 ("Clark Aff.") ¶ 3.

The city seeks dismissal on two grounds. First, it seeks to dismiss the case pursuant to *Rule 12(b)(4)*, alleging that "no summons has been issued." See Defs.' Mem. Supp. Mot. Dism. 2. However, the city presents no evidence to support this claim, and Fordham has demonstrated that a summons was issued against the city on February 28, 2011. See Summons [D.E. 5]; Aff. Serv. Proc. on City. Therefore, the court denies the *Rule 12(b)(4)* motion.

As for the city's *Rule 12(b)(5)* motion, the city alleges that Fordham's method of service failed to comply with *Rule 4(j)(2) of the Federal Rules of Civil Procedure* and applicable North Carolina law. See Defs.' Mem. Supp. Mot. Dism. 3--4. In support, defendants contend that Fordham's service was deficient because the city manager did not physically receive it. See id. 3--4.

When a defendant seeks dismissal under *Rule 12(b)(5)*, plaintiff bears [*8] the burden of establishing that process complies with *Rule 4*. See, e.g., *Tate v. Mail Contractors of Am., Inc., No. 3:10-CV-528, 2011 U.S. Dist. LEXIS 41843, 2011 WL 1380016, at *2 (W.D.N.C. Apr. 12, 2011)* (unpublished); *Harty v. Commercial Net Lease LP Ltd., No. 5:09-CV-495-D, 2011 U.S. Dist. LEXIS 20565, 2011 WL 807522, at *2 (E.D.N.C. Mar. 1, 2011)* (unpublished). Fordham has met that burden. See Aff. Serv. Proc. on City. As for the city's argument that the city manager had to physically receive the mail, the argument lacks merit under North Carolina law. See, e.g., *Steffey v. Mazza Constr. Grp., Inc., 113 N.C. App. 538, 539--41, 439 S.E.2d 241, 242--43 (1994)*; *In re Annexation Ordinance, 62 N.C. App. 588, 592, 303 S.E.2d 380, 382 (1983)*. Thus, the court denies the city's motion to dismiss under *Rule 12(b)(5)*.

B.

As for Doe, he seeks to dismiss the claims pursuant to *Rule 12(b)(2)* for want of personal jurisdiction and pursuant to *Rule 12(b)(5)* for deficient service. See Defs.' Mem. Supp. Mot. Dism. 4. When a court's personal jurisdiction over a defendant is challenged under *Rule 12(b)(2)*, "the plaintiff bears the burden [of] making a prima facie showing of a sufficient jurisdictional basis to survive the jurisdictional challenge." *Consulting Eng'rs Corp. v. Geometric Ltd., 561 F.3d 273, 276 (4th Cir. 2009)*. [*9] Failure to properly serve a defendant prevents a court from obtaining personal jurisdiction over the defendant and entitles the defendant to dismissal under *Rule 12(b)(2)*. See, e.g., *Koehler v. Dodwell, 152 F.3d 304, 306 (4th Cir. 1998)*; see also *Thomas v. Green Point Mortg. Funding, No. 5:10-CV-365-D, 2011 U.S. Dist. LEXIS 65887, 2011 WL 2457835, at *1 (E.D.N.C. June 16, 2011)* (unpublished). Additionally, as stated, plaintiff must establish that service was adequate when a defendant seeks dismissal pursuant to *Rule 12(b)(5)*. See, e.g., *Harty, No. 5:09-CV-495-D, 2011 U.S. Dist. LEXIS 20565, 2011 WL 807522, at *2*. Therefore, dismissal is appropriate under both *Rules 12(b)(2)* and *12(b)(5)* if the court determines that plaintiff failed to properly serve Doe. See, e.g., *Mayberry v. United States, No. 5:11-CV-165, 2011 U.S. Dist. LEXIS 80979, 2011 WL 3104666, at *2 (E.D.N.C. July 23, 2011)* (unpublished); Taylor-Perkins v. Tyler, No. 2:10-CV-59-BO, 2011 WL 1705558, at *1 (E.D.N.C. May 4, 2011) (unpublished).

Defendants claim that the summons failed to actually name the police officer who attacked Fordham and that Fordham improperly served Doe by sending him process through certified mail addressed to the Greenville Police Department Chief of Police. See Defs.' Mem. Supp. Mot. [*10] Dism. 4. However, plaintiff's naming John Doe as defendant does not make service per se improper. John Doe suits are permissible "against real, but unidentified defendants." *Chidi Njoku v. Unknown Special Unit Staff, No. 99-7644, 2000 U.S. App. LEXIS 15695, 2000 WL 903896, at *1 (4th Cir. July 7, 2000)* (per curiam) (unpublished table decision) (quoting *Schiff v. Kennedy, 691 F.2d 196, 197 (4th Cir. 1982))*. A court should dismiss a John Doe suit without prejudice when it does not appear that the plaintiff will be able to identify the true identity of the defendant "'through discovery or through intervention by the court.'" Id. (quoting *Schiff, 691 F.2d at 198*). Moreover, even when there is a reasonable likelihood of uncovering the defendant's

identity, when filing the complaint, a plaintiff must still "provide an adequate description of some kind which is sufficient to identify the person involved so that process can be served." *Dean v. Barber, 951 F.2d 1210, 1216 (11th Cir. 1992)* (quotation omitted); *Williams v. Burgess, No. 3:09-CV-115, 2010 U.S. Dist. LEXIS 47370, 2010 WL 1957105, at *2 (E.D. Va. May 13, 2010)* (unpublished), aff'd, *443 Fed. Appx. 856, 2011 U.S. App. LEXIS 17493, 2011 WL 3664279 (4th Cir. Aug. 22, 2011)* (per curiam) (unpublished). Furthermore, the complaint must provide [*11] each Doe defendant with fair notice of the specific facts upon which individual liability rests. See *Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158, 1163 (10th Cir. 2007)*; *Williams, 2010 U.S. Dist. LEXIS 47370, 2010 WL 1957105, at *3*.

Assuming the facts alleged in the complaint to be true, Doe is a "real, but unidentified" Greenville police officer who used a taser against Fordham on February 26, 2009. Fordham further narrowed Doe's possible identity to an African-American male officer on the Task Force who helped execute a search warrant at Fordham's residence on February 26, 2009. Although defendants argue that Fordham's failure to identify Doe in the two years between the alleged conduct and when Fordham filed the complaint supports dismissal, defendants have presented no authority to suggest that such pre-filing failure supports dismissal. Cf. *HMK Corp. v. Walsey, 637 F. Supp. 710, 714 n.4 (E.D. Va. 1986)* (failure to identify a Doe defendant after discovery warrants dismissal). However, it appears that the proper means of serving an unidentified defendant under North Carolina law is by publication. See *N.C. Gen. Stat. Ann. § 1-166*; N.C. Gen. Stat. Ann. § 1A-1, Rule 4(j1); cf. *Wayne Cnty. ex rel. Williams v. Whitley, 72 N.C. App. 155, 160, 323 S.E.2d 458, 462--63 (1984)*. [*12] Nonetheless, because Fordham has failed to state a claim against Doe upon which relief can be granted, the court need not and does not determine whether Fordham's service of Doe comports with North Carolina law.

III.

In analyzing a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a court must determine whether the complaint is legally and factually sufficient. See *Fed. R. Civ. P. 12(b)(6)*; *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555--56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Coleman v. Md. Ct. of Appeals, 626 F.3d 187, 190 (4th Cir. 2010)*, cert. granted, *131 S. Ct. 3059, 180 L. Ed. 2d 884 (2011)*; *Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008)*; *Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007)* (en banc); accord *Erickson v. Pardus, 551 U.S. 89, 93--94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam). Although a court "assume[s] the facts alleged in the complaint are true and draw[s] all reasonable factual inferences in [plaintiff's] favor," *Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 406 (4th Cir. 2002)*, a court need not accept a complaint's legal conclusions drawn from the facts. *Iqbal, 129 S. Ct. at 1949--50*. Similarly, a court "need not accept as true unwarranted [*13] inferences, unreasonable conclusions, or arguments." *Giarratano, 521 F.3d at 302* (quotation omitted); see *Iqbal, 129 S. Ct. at 1949--50*.

A.

First, defendants move to dismiss plaintiff's *section 1983* claim against the city. See Defs.' Mem. Supp. Mot. Dism. 6--9. Assuming without deciding that Fordham did suffer a deprivation of his constitutional rights, the city is only liable for injuries stemming from that deprivation under *section 1983* "if it causes such a deprivation through an official policy or custom." *Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999)* (citing *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690--91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978))*. Cities are not liable under *section 1983* based on a respondeat superior theory. *Iqbal, 129 S. Ct. at 1948--49*; *Monell, 436 U.S. at 691*. In Carter, the Fourth Circuit identified four possible sources of "official policy or custom" giving rise to municipal liability: (1) "written ordinances and regulations;" (2) "affirmative decisions of individual policymaking officials;" (3) omissions by policymaking officials "that manifest deliberate indifference to the rights of the citizens;" or (4) a practice "so persistent and widespread and so permanent and well settled as [*14] to constitute a custom or usage with the force of law." *Carter, 164 F.3d at 218* (quotations and citations omitted). Fordham focuses on the third and fourth grounds.

When municipal liability is premised on omissions in training law enforcement officers, a plaintiff must show that the municipal officials were at least deliberately indifferent to the constitutional rights of the citizenry in their failure to train. Id.; *Spell v. McDaniel, 824 F.2d 1380, 1390 (4th Cir. 1987)*. Allegations of mere

negligence are insufficient to state a claim. *Spell, 824 F.2d at 1390*; *Smith v. Atkins, 777 F. Supp. 2d 955, 967 (E.D.N.C. 2011)*.

When municipal liability is premised on a practice constituting a custom or usage with the force of law, (1) the custom or usage must be causally connected to the specific violation alleged; (2) the custom or usage must have been constructively or actually known of by the municipal policymakers before the alleged violation; and (3) "there must [have been] a failure by those policymakers, as a matter of specific intent or deliberate indifference, to correct or terminate the improper custom and usage." *Randall v. Prince George's Cnty., Md., 302 F.3d 188, 210 (4th Cir. 2002)* [*15] (quotations omitted); see *Buffington v. Baltimore County, Md., 913 F.2d 113, 122 (4th Cir, 1990)*; *Spell, 824 F.2d at 1390*. Mere negligence is not enough. *Buffington, 913 F.2d at 122*. Moreover, constructive knowledge "may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duties of responsible policymakers to be informed, or combinations of these." *Randall, 302 F.3d at 210* (quotations omitted). The causal connection must be close, with the "specific deficiency . . . such as to make the specific violation almost bound to happen, sooner or later . . . ." *Spell, 824 F.2d at 1390* (quotations omitted); see *Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407--09, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)* (holding that plaintiff must establish that municipal action was taken with deliberate indifference to its known or obvious consequences); *City of Canton v. Harris, 489 U.S. 378, 390--91, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*; *Buffington, 913 F.2d at 122*; *Smith, 777 F. Supp. 2d at 967*.

Here, Fordham asserts municipal liability on the third ground, alleging a failure to train officers regarding proper taser use amounting to deliberate indifference. See Compl. ¶¶ 27--33; Pl.'s Mem. Opp'n [*16] Mot. Dism. 5--6. However, Fordham has not presented any facts to support his claim that the city failed to properly train its officers regarding the use of tasers. Rather, his assertion is merely a "threadbare recital[] of [the] cause of action's elements, supported by mere conclusory statements." *Iqbal, 129 S. Ct. at 1949*. Moreover, Fordham has presented no facts indicating that the alleged failure to train resulted from city policymakers' deliberate indifference to citizens' constitutional rights. See, e.g., *Brown, 520 U.S. at 407--09*; *Harris, 489 U.S. at 391*; *Doe v. Broderick, 225 F.3d 440, 456 (4th Cir. 2000)*; *Semple v. City of Moundsville, 195 F.3d 708, 713--14 (4th Cir. 1993)*; *Spell, 824 F.2d at 1390*. Therefore, Fordham fails to state a claim.

Fordham also claims that Greenville police officers' practice of improperly using tasers is so persistent and widespread, and so permanent, as to amount to a custom or usage with the force of law. In support, Fordham alleges that the city "inadequately and improperly investigate[d] citizen complaints of police misconduct . . . ." Compl. ¶ 29. Fordham also alleges that in the past year, Greenville police officers used tasers on 31 documented [*17] occasions, and that the city had "sustained [21] complaints [of excessive taser use] against Greenville [p]olice [o]fficers." Id.; Pl.'s Mem. Opp'n Mot. Dism. 5. [2] Fordham then states that the city rarely takes corrective action against officers found to use excessive force against citizens and fails to inform aggrieved citizens of such corrective actions when they are taken. Compl. ¶ 30. Finally, Fordham claims that this frequency of excessive force, coupled with the infrequency of corrective responses from the city demonstrates that city policymakers were deliberately indifferent to the constitutional rights of the citizenry, that this indifference caused officers to believe that excessive force would go unpunished, and that this belief among officers, including Doe, caused his injuries. Id. ¶¶ 31--32.

2 Defendants note that Fordham does not allege in the complaint that the 21 sustained complaints were related to taser use. See Defs.' Mem. Supp. Mot. Dism. 8; Compl. ¶ 29. However, in its brief opposing defendants' motion to dismiss, Fordham explains that at a January 13, 2011 meeting of the Greenville City Council, the police chief "confirmed that twenty-one . . . complaints of taser [*18] use had been 'sustained.'" Pls.' Mem. Opp'n Mot. Dism. 2. This elaboration comports with the facts alleged in the complaint, and the court accepts it as true for purposes of defendants' motion to dismiss. See, e.g., *Help at Home, Inc. v. Med. Capital, LLC, 260 F.3d 748, 752--53 (7th Cir. 2001)*; see also *Hayes v. Whitman, 264 F.3d 1017, 1025 (10th Cir. 2001)*.

Taking all of Fordham's allegations as true, they fail to amount to "a practice . . . so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law. *Carter, 164 F.3d*

at 218 (quotations omitted). Assuming without deciding that the 21 sustained complaints imparted constructive notice on city policymakers of improper taser use, Fordham has failed to show that knowledge of these 21 sustained complaints gives rise to a "specific intent or deliberate indifference . . . to correct or terminate" the officers' improper behavior. See, e.g., *Randall, 302 F.3d at 210* (quotations omitted). Although Fordham claims that the city did not respond to these complaints, he provides no factual basis for this assertion. Compl. ¶ 30. Rather, he merely asserts that the city, as a matter of policy, [*19] fails to inform complaining citizens of corrective action taken against officers found to have used their tasers improperly. However, the failure to inform citizens of corrective action does not necessarily suggest that such corrective action was not taken or suggest that any improper taser use equates to an excessive use of force. In short, Fordham has failed to plausibly allege that the city policymakers failed to respond to complaints of excessive force arising from improper taser use, much less that any failure met the scienter standard required by Randall and Carter. Without providing plausible allegations that support deliberate indifference on the part of the city policymakers, Fordham cannot show that any indifference caused his injuries. See, e.g., *Randall, 302 F.3d at 210*; *Carter, 164 F.3d at 218*; cf. *Iqbal, 129 S. Ct. at 1950*; *Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)*. Therefore, Fordham fails to state a claim for municipal liability, and the court dismisses his *section 1983* claim against the city.

B.

As for Fordham's claims against Doe, defendants assert that Doe is entitled to qualified immunity from Fordham's *section 1983* claim. See Defs.' Mem. Supp. Mot. [*20] Dism. 11. The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*; see *Brandon v. Holt, 469 U.S. 464, 472--73, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985)*. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)*; see *Pearson v. Callahan, 555 U.S. 223, 231--32, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*. Qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.' *Waterman v. Batton, 393 F.3d 471, 476 (4th Cir. 2005)* (quoting *Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992))*. "A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information could have believed that his conduct was lawful." *Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991)* (emphasis removed); see *Pearson, 555 U.S. at 231*.

The court must ask two questions [*21] to determine whether qualified immunity applies. See, e.g., *Pearson, 555 U.S. at 232*; *Brockington v. Boykins, 637 F.3d 503, 506 (4th Cir. 2011)*; *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 169 (4th Cir.)*, cert. denied, *131 S. Ct. 392, 178 L. Ed. 2d 137 (2010)*; *Bostic v. Rodriguez, 667 F. Supp. 2d 591, 605--06 (E.D.N.C. 2009)*. First, "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson, 555 U.S. at 232*. Second, "whether the right at issue was clearly established at the time of defendant's alleged misconduct." Id. (quotations omitted). Courts have discretion to decide which of the two prongs should be addressed first. *Id. at 236*. Thus, defendants are entitled to qualified immunity if the answer to either question is "no." See, e.g., *Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011)*; *Brockington, 637 F.3d at 506*.

As for the "clearly established right" prong,

> the right the official is alleged to have violated . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would [*22] be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (quotations and citations omitted), overruled on other grounds by *Pearson, 555 U.S. at 227*; see, e.g., *Cloaninger ex rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324, 331 (4th Cir. 2009)*. In *Wilson v.*

Layne, 141 F.3d 111 (4th Cir. 1998) (en banc), aff'd, *526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)*, the Fourth Circuit held that for a plaintiff to prevail over the defense of qualified immunity, the right at issue must have been "authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *141 F.3d at 114* (quotation omitted). When the Supreme Court affirmed the Fourth Circuit's decision in Layne, it observed that plaintiffs had not brought to the Court's attention any cases "of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *526 U.S. at 617*. In Al-Kidd, the Supreme [*23] Court stated:

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every "reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.

131 S. Ct. at 2083 (citations and quotations omitted).

Fordham alleges that Doe used excessive force in violation of the *Fourth Amendment*. The *Fourth Amendment* protects citizens from a state actor's excessive force. See, e.g., *Graham v. Connor, 490 U.S. 386, 394--95, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*; *Valladares v. Cordero, 552 F.3d 384, 388 (4th Cir. 2009)*; *Young v. Prince George's Cnty., Md., 355 F.3d 751, 758 (4th Cir. 2004)*; *Bostic, 667 F. Supp. 2d at 613*. To determine whether an officer used excessive force, the court employs a "reasonableness" test. See, e.g., *Graham, 490 U.S. at 396*; *Valladares, 552 F.3d at 388*. The court looks to the objective reasonableness of the officer's actions, not the officer's subjective motivations. See, e.g., *Graham, 490 U.S. at 397*; *Young, 355 F.3d at 758--59*.

The reasonableness [*24] test under the *Fourth Amendment* is not "capable of precise definition." *Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*. Rather, the court must balance "the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake." *Young, 355 F.3d at 757* (quotations omitted). In particular, the court must give "careful attention to the facts and circumstances of each particular case . . . ." *Graham, 490 U.S. at 396*; see also *Muehler v. Mena, 544 U.S. 93, 98--99, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005)* ("An officer's authority to detain incident to a search is categorical . . . ."); *Michigan v. Summers, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)*; *Noel v. Artson, 641 F.3d 580, 589 (4th Cir. 2011)*. Furthermore, the court may consider the extent of the plaintiff's injury. See *Jones v. Buchanan, 325 F.3d 520, 527 (4th Cir. 2003)*. In evaluating the facts and circumstances "the court must not engage in Monday-morning quarterbacking, but instead should consider that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain and rapidly evolving--about the amount of force that is necessary in a particular situation.'" *Bostic, 667 F. Supp. 2d at 613* [*25] (quoting *Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001))*; see also *Graham, 490 U.S. at 396--97*.

Here, Doe's actions in executing the search warrant were reasonable. Fordham claims that Doe used the taser on him "while he was peaceably standing in his residence, committing no crime, and was threatening harm to no person." Pl.'s Mem. Opp'n Mot. Dism. 7. However, Fordham's complaint shows that the situation was not so tranquil. Doe and the Task Force were entering an unfamiliar residence to execute a search warrant concerning narcotics. The officers encountered active resistance from Corey when Corey discovered that law enforcement officers were seeking entrance. Upon entering the residence, the officers found two adult males close to the door. Thus, Doe reasonably believed that he was entering a hostile environment when he entered the residence and was reasonably prepared to address any threat that the occupants of the home might pose to officer safety. Moreover, Fordham concedes that, in Doe's presence, at least one of the officers instructed him to get on the ground and that he failed to comply. See Compl. ¶ 10. Doe then used his taser one time on Fordham after Fordham refused to [*26] comply with the other officer's instructions. Under the totality of the circumstances, Doe's taser use was reasonable. See, e.g., *Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004)* ("Although being struck by a taser gun is an unpleasant experience . . . a single use of the taser gun causing a one-time shocking[] was reasonably proportionate to the need for force and did not inflict any

serious injury."); *Hinton v. City of Elwood, 997 F.2d 774, 781 (10th Cir. 1993)*.

Alternatively, a reasonable officer could have believed on February 26, 2009, that using the taser one time in these circumstances was permissible under the *Fourth Amendment*. See, e.g., *Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008)*; see also *Al-Kidd, 131 S. Ct. at 2083*; *Saucier, 533 U.S. at 202*; *Graham, 490 U.S. at 397*; *Mattos v. Agarano, No. 08-15567, 661 F.3d 433, 2011 U.S. App. LEXIS 20957, 2011 WL 4908374, at *12, 16 (9th Cir. Oct. 17, 2011)* (en banc); *Maciariello, 973 F.2d at 298* ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines."). Stated differently, existing Supreme Court and Fourth Circuit precedent on February 26, 2009, did not place the "constitutional question beyond debate." *Al-Kidd, 131 S. Ct. at 2083*. [*27] Thus, qualified immunity applies.

In sum, Fordham has failed to show that Doe violated the *Fourth Amendment*, or, in the alternative, that Doe violated a *Fourth Amendment* right that was clearly established. Accordingly, the court dismisses Fordham's *section 1983* claim against Doe.

C.

Having disposed of Fordham's federal claims, the court must decide whether to address his remaining state law claims. See, e.g., *McLenagan v. Karnes, 27 F.3d 1002, 1008--09 (4th Cir. 1994)*. When the remaining state law claims "have been briefed by both parties and are patently without merit, the balance between judicial efficiency and comity is struck in favor of the federal court's disposition of the state claims." Id. (quotations omitted).

Fordham claims that Doe is liable for the state law torts of assault and battery. Compl. ¶¶ 24--26. In response, Doe asserts immunity under North Carolina law, and this court looks to North Carolina law to determine whether such immunity applies. See, e.g., *Gray-Hopkins v. Prince George's Cnty., Md., 309 F.3d 224, 231 (4th Cir. 2002)* ("We must look to substantive state law . . . in determining the nature and scope of a claimed immunity.").

Under North Carolina law, "a public [*28] official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held liable unless it is alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Showalter v. North Carolina Dep't of Crime Control & Pub. Safety, 183 N.C. App. 132, 136, 643 S.E.2d 649, 652 (2007)*. A public official sued individually generally is not liable for "mere negligence." *Hare v. Butler, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236 (1990), 327 N.C. 634, 399 S.E.2d 121 (1990)* (quotations omitted); see also *Epps v. Duke Univ., Inc., 122 N.C. App. 198, 206, 468 S.E.2d 846, 852 (1996)* (holding that the "mere negligence" standard of Hare was intended "only as a truncated, or 'shorthand' version of the official immunity doctrine"). "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984)*. Wanton conduct is that which "is done of wicked purpose, or . . . needlessly, manifesting a [*29] reckless indifference to the rights of others." *Id., 321 S.E.2d at 890* (quotations omitted). In the context of a law enforcement officer sued for allegedly using excessive force, the officer "has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties . . . ." *Williams v. City of Jacksonville Police Dep't, 165 N.C. App. 587, 596--97, 599 S.E.2d 422, 430 (2004)* (quotations omitted).

In his complaint, Fordham does not plausibly allege that Doe acted maliciously, corruptly, or outside the scope of his duty. Moreover, the complaint shows that Doe reasonably believed that tasing Fordham was necessary in discharging his duties. Therefore, North Carolina's public official immunity bars Fordham's assault and battery claims against defendant Doe and those claims are dismissed.

IV.

Plaintiff has failed to state a claim upon which relief can be granted against the city or Doe. Thus, the court GRANTS defendants' motion to dismiss [D.E. 6].

SO ORDERED. This 20 day of October 2011.

/s/ James Dever

JAMES C. DEVER III

Chief United States District Judge

GEORGE REYNOLD EVANS, Plaintiff, v. OFFICER JASON GRIESS, ET AL., Defendants.

No. 7:13-CV-128-BO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION

2013 U.S. Dist. LEXIS 152322

September 16, 2013, Decided
September 17, 2013, Filed

SUBSEQUENT HISTORY: Adopted by, Dismissed by, in part *Evans v. Griess, 2013 U.S. Dist. LEXIS 152317 (E.D.N.C., Oct. 22, 2013)*

COUNSEL: [*1] George Reynold Evans, Plaintiff, Pro se, Jacksonville, NC.

JUDGES: Robert B. Jones, Jr., United States Magistrate Judge.

OPINION BY: Robert B. Jones, Jr.

OPINION

ORDER AND MEMORANDUM AND RECOMMENDATION

This matter is before the court for review of the application to proceed *in forma pauperis* and complaint of Plaintiff George R. Evans ("Plaintiff") pursuant to *28 U.S.C. § 1915(a), (e)(2)(B)*. [DE-1]. A litigant may commence an action in federal court *in forma pauperis* if he files an affidavit, in good faith, stating that he is unable to pay the costs of the lawsuit. *See 28 U.S.C. § 1915(a)*. Nothing in the record suggests that Plaintiff's affidavit is inaccurate or submitted in bad faith. [1] Accordingly, it appears that Plaintiff satisfies the financial requirements for *in forma pauperis* status and the motion is allowed. However, for the reasons set forth below, this court recommends that the complaint be dismissed in part for failure to state a claim.

1 It appears that Plaintiff was not incarcerated at the time of his filing. Therefore, the appropriate *in forma pauperis* application would be Form AO 239. Plaintiff has filed Form AO 240, the short form. Nonetheless, the court considers Plaintiff's *in forma pauperis* application.

I. [*2] **STATEMENT OF FACTS**

Plaintiff, a resident of North Carolina, has filed a complaint seeking compensatory and punitive damages under *42 U.S.C. § 1983* and *§ 1985*, based upon his alleged wrongful arrest and two wrongful searches of his vehicle by two Jacksonville police officers. [DE-1-1].

According to the complaint, on March 9, 2013, Officer Griess stopped Plaintiff while driving his vehicle and subsequently arrested Plaintiff for felony possession of crack cocaine and drug paraphernalia. *See* Compl. at 3. The complaint describes the details preceding the arrest as follows: Plaintiff was traveling on North Marine Boulevard in Jacksonville by vehicle. *Id.* Officer Griess stopped Plaintiff's vehicle in a parking lot for "[impeding] traffic." *Id.* Officer Griess asked Plaintiff to produce his driver's license and car registration, but Plaintiff was only

able to produce his driver's license. *Id.* While speaking with Plaintiff, Officer Griess indicated that he smelled alcohol to which Plaintiff responded that he had not consumed any alcohol. *Id.* Plaintiff states that several other officers were with Officer Griess when he confronted Plaintiff about ownership of the vehicle. *Id.* at 4. Officer Griess [*3] asked permission from Plaintiff to search his vehicle to which Plaintiff denied consent. *Id.* at 3. Officer Griess stepped away from Plaintiff at this time. *Id.* Shortly thereafter, Officer Griess returned to Plaintiff's vehicle with a crack pipe in his hand that he recovered from the parking lot area where Plaintiff's vehicle was stopped. *Id.* Plaintiff informed Officer Griess that the crack pipe did not belong to him. *Id.* Next, Officer Griess proceeded to search Plaintiff's vehicle from which he recovered a pellet gun and ski mask. *Id.* Plaintiff states that Officer Griess also searched Plaintiff's cell phone for a telephone number. *Id.* at 4. Officer Griess informed Plaintiff that he had run a check on Plaintiff and discovered Plaintiff had a prior armed robbery charge and pending charges for the sale and delivery of illegal drugs. *Id.* at 3. Plaintiff responded that all pending charges were false charges. *Id.* at 4. Officer Griess placed Plaintiff under arrest for possession of crack cocaine and drug paraphernalia. *Id.* at 3. Plaintiff alleges that Officer Griess and other officers with him that day engaged in racial profiling and tried to intimidate Plaintiff, and that Officer Griess [*4] provided false statements to a magistrate regarding Plaintiff's arrest. *Id.* at 4.

Two days later, on March 11, 2013, Plaintiff was again pulled over while driving his vehicle, this time by Officer Ehrler. *Id.* Officer Ehrler informed Plaintiff he was pulled over because Plaintiff matched the description provided to officers related to a filling-station drive-off incident in the Jacksonville area. *Id.* Officer Ehrler requested Plaintiff's driver's license which Plaintiff provided. *Id.* Officer Ehrler first conducted a dog search and then performed a full search of Plaintiff's vehicle based on the dog's drug detection. *Id.* No drugs or illegal contraband were recovered in the search of Plaintiff's vehicle. *Id.* Plaintiff filed two complaints with the police department regarding each alleged incident claiming racial profiling by the officers. *Id.* Plaintiff maintains that neither complaint was fully investigated. *Id.*

Plaintiff subsequently brought this action under *§ 1983* and *§ 1985* against various police officers with the Jacksonville Police Department, in their individual and official capacities, and the City of Jacksonville, the Jacksonville City Manager, and the Jacksonville Mayor, alleging [*5] that the two searches of his vehicle and the March 9, 2013 arrest violated his *Fourth Amendment* rights against unlawful search and seizure and *Fourteenth Amendment* equal protection guarantees. *See* Compl. at 2-5. Plaintiff seeks compensatory damages of $5 million and punitive damages in the amount of $500 million. *Id.* at 5.

II. STANDARD OF REVIEW

A court must dismiss a case brought *in forma pauperis* if the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant immune from such recovery. *28 U.S.C. § 1915(e)(2)(B)(i-iii)*; *see Cochran v. Morris, 73 F.3d 1310, 1315 (4th Cir. 1996)* (discussing *sua sponte* dismissal under predecessor statute *28 U.S.C. § 1915(d)*).

With respect to the first ground for dismissal, a complaint is frivolous if it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)*. Although the complaints of *pro se* plaintiffs are entitled to more liberal treatment than those drafted by attorneys, *White v. White, 886 F.2d 721, 724 (4th Cir. 1989)*, the court is not required to accept a *pro se* plaintiff's contentions as true. *Denton v. Hernandez, 504 U.S. 25, 32, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992)* [*6] (explaining under predecessor statute *28 U.S.C. § 1915(d)* that "a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations"). Rather, the court is permitted "to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless," *Neitzke, 490 U.S. at 327*, which include those with factual allegations that are "fanciful," "fantastic" or "delusional." *Id. at 325, 328*. Absent such allegations, "the initial assessment of the *in forma pauperis* plaintiff's factual allegations must be weighted in [his] favor." *Denton, 504 U.S. at 32*.

The standard for dismissal under *28 U.S.C. § 1915(e)(2)(B)(ii)* is the same standard set forth in *Fed. R. Civ. P. 12(b)(6)* and this Court will look to cases decided under that rule for the appropriate review standard. Accordingly, a complaint should be dismissed for failing to state a claim only if "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro,*

178 F.3d 231, 244 (4th Cir. 1999) (applying *Fed. R. Civ. P. 12(b)(6)*). [*7] A court must accept as true all well-pleaded allegations and view those allegations in the light most favorable to the plaintiff, construing all reasonable factual inferences in the plaintiff's favor. *Id.* Moreover, civil rights complaints, particularly those filed by *pro se* plaintiffs, are entitled to even greater latitude. *See Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002)* ("[W]e must be especially solicitous of the wrongs alleged [in a civil rights complaint] and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.") (citation and internal quotation marks omitted). Nonetheless, a civil rights plaintiff may not simply present conclusions, but must "allege with specificity some minimum level of factual support" for his claim in order to avoid dismissal. *White, 886 F.2d at 724*.

Finally, the remaining ground for dismissal under *§ 1915*, immunity of a defendant, relates to the protection the law affords certain governmental entities and officials against particular types of lawsuits. *28 U.S.C. § 1915(e)(2)(B)(iii)*. The aspects of governmental immunity [*8] as applicable to this case are discussed below.

III. ANALYSIS

Plaintiff asserts claims under *42 U.S.C. § 1983* for various violations of his *Fourth Amendment* rights and *Fourteenth Amendment* equal protection guarantees. Compl. at 3-5. Plaintiff also appears to assert claims under *42 U.S.C. § 1985* for civil conspiracy. *Id.*

A. Plaintiff Fails to State A Claim Against Lieutenant Dorn, Richard Woodruff, and Sammy Phillips

Rule 8 of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8*. The statement must give a defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Plaintiff's complaint here falls short of meeting the requisite standard as to any claims Plaintiff seeks to allege against Lieutenant Dorn, Richard Woodruff, and Sammy Phillips. The caption on Plaintiff's complaint names Lieutenant Dorn and Richard Woodruff, the Jacksonville City Manager, as defendants in this action. However, Plaintiff provides no factual information regarding any alleged causes of action against these individuals. Additionally, Plaintiff [*9] lists Mayor Sammy Phillips in his complaint, though omitting him as a named defendant in the caption, and similarly sets forth no factual allegations relating to this individual. What involvement, if any, these three individuals had in the events underlying this cause of action is unexplained. The complaint thereby fails to provide these defendants notice of the allegations against them and to adequately state a claim upon which relief may be granted. Accordingly, the court recommends that Plaintiff's complaint be dismissed to the extent it alleges claims against Lieutenant Dorn, Richard Woodruff, and Sammy Phillips.

B. *§ 1983* Official Capacity Claims Against Officer Griess, Officer Funcke, Officer Ehrler, and Police Chief Yaniero

In a *§ 1983* action, an official-capacity claim is a claim against the governmental entity of which the official is an agent. *Wyche v. City of Franklinton, 837 F. Supp. 137, 144 (E.D.N.C. 1993)* ("A suit against a city official in his official capacity is a suit against the city itself.") (citing *Hughes v. Blankenship, 672 F.2d 403, 406 (4th Cir. 1982))*. Because Plaintiff has named the City of Jacksonville as a defendant, Plaintiff's official capacity *§ 1983* [*10] claims against Officers Griess, Funcke, and Ehrler, and Police Chief Yaniero are duplicative and should therefore be dismissed. *See Wyche, 837 F. Supp. at 144* (stating *§ 1983* claims against city police officer were subsumed by the claims against the city). Accordingly, for all claims against both individual Defendants in their official capacity and Defendant City of Jacksonville, this court recommends that claims against individual Defendants in their official capacity be dismissed.

C. *§ 1983* Individual Capacity Claims Against Officer Griess, Officer Funcke, Officer Ehrler, and Police Chief Yaniero

Plaintiff's complaint appears to assert several claims pursuant to *§ 1983*. Although *§ 1983* is not a source of substantive rights, it provides a method for vindicating federal rights elsewhere conferred by the United States Constitution and federal statutes that it describes. *Lambert v. Williams, 223 F.3d 257, 260 (4th Cir. 2000)*; *see also Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)*. Accordingly, to state a cause of action under *section 1983*, a plaintiff must allege that (1) the defendant was acting under color of state law

in the actions complained of; and (2) the defendant deprived plaintiff [*11] of a right, privilege or immunity secured by the Constitution or laws of the United States. *Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988)*; *see also West v. Atkins, 487 U.S. 42, 49-50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*.

"In conducting a frivolity review, a court may consider the defense of qualified immunity." *Hinton v. Holding, No. 5:07-CT-3057-D, 2008 U.S. Dist. LEXIS 46153, 2008 WL 2414042, at *3 (E.D.N.C. June 12, 2008)* (citing *Jones v. Bock, 549 U.S. 199, 214, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*; *Leveto v. Lapina, 258 F.3d 156, 161 (3d Cir. 2001)* ("[A] complaint may be subject to dismissal under *Rule 12(b)(6)* when an affirmative defense . . . appears on its face.")). Police officers sued in their individual capacities are entitled to immunity from *§ 1983* liability for money damages as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*.

Police officers performing a discretionary function are entitled to immunity from civil damages "unless (1) the officers' conduct violates a federal statutory or constitutional right, and (2) the right was clearly established at the time of the conduct, such that (3) an objectively reasonable officer [*12] would have understood that the conduct violated that right." *Milstead v. Kibler, 243 F.3d 157, 161 (4th Cir. 2001)*. Accordingly, at this stage of the proceedings, this court must determine whether the facts, viewed in the light most favorable to Plaintiff, establish that Officers Griess, Ehrler, and Funcke and Police Chief Yaniero violated Plaintiff's constitutional rights. *See Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)* (describing this inquiry as the "threshold question" in ruling upon the issue of qualified immunity).

Additionally, there is no vicarious liability in *§ 1983* actions; rather, to avail himself to relief "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. If a supervisory law officer is deliberately indifferent to that responsibility, he then bears some culpability for illegal conduct by his subordinates, and he may be held vicariously liable for their illegal acts." *Randall v. Prince George's Cnty., 302 F.3d 188, 203 (4th Cir. 2002)* (citation omitted). The three elements that establish supervisory liability under *§ 1983* are: "(1) that [*13] the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." *Cilman v. Reeves, 452 F. App'x 263, 269-70 (4th Cir. 2011)* (quotations omitted). Because supervisory claims are derivative, a plaintiff must adequately plead a separate basis for holding the supervisors liable for the constitutional violation caused to the plaintiff by one of its employees. *Evans v. Chalmers, 703 F.3d 636, 654 (4th Cir. 2012)* (stating that supervisors cannot be liable under *§ 1983* without some predicate constitutional injury at the hands of the individual state officer, at least in suits for damages).

At the outset, the court notes that Plaintiff's complaint alleges all individual Defendants are employees of the City of Jacksonville with the police department. [*14] Compl. at 2. Accordingly, Plaintiff has satisfied the requirement that the individuals were acting under color of state law. *See West, 487 U.S. at 50* (noting that a public employee acts under the color of state law while acting in his or her official capacity or while exercising his or her responsibilities pursuant to state law). The court now considers the specific violations alleged by Plaintiff.

1.Fourth Amendment Search Claims

The *Fourth Amendment* prohibits law enforcement officers from conducting a search without a warrant. *Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*; *see also Carroll v. United States, 267 U.S. 132, 153, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925)*. However, the Supreme Court has recognized certain exceptions to the warrant requirement. *Katz, 389 U.S. at 357*. Officers may perform a search on a car without a warrant under the so-called "automobile exception" if they have probable cause to believe the car contains contraband or evidence of a crime. *See Carroll, 267 U.S. at 153* (establishing the automobile exception to the warrant requirement); *United States v. Lawing, 703*

F.3d 229, 239 (4th Cir. 2012); *United States v. White, 549 F.3d 946, 949 (4th Cir. 2008)*. Probable cause is determined by the totality [*15] of the circumstances which requires courts to examine all of the facts known to the officer to see whether an objectively reasonable police officer would believe there was contraband or evidence to be found. *See Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)*; *Lawing, 703 F.3d at 239*. As to whether this asserted *Fourth Amendment* right was clearly established, the Supreme Court has long held that the *Fourth Amendment* prohibits a search without a warrant. *Carroll, 267 U.S. at 153*. Additionally, the Supreme Court has long addressed the circumstances permitting a warrantless search of a car and those circumstances still necessitate that the officer have probable cause to search. *Id. at 151-53*.

Viewing the facts in the light most favorable to Plaintiff, the court finds that Plaintiff has set forth sufficient factual allegations to establish violations of his *Fourth Amendment* right to be free from unreasonable searches. *See Green v. Maroules, 211 F. App'x 159, 161 (4th Cir. 2006)* (finding plaintiff stated a cause of action under *§ 1983* where plaintiff alleged officer acted under state law and without cause). Construing Plaintiff's pro se complaint liberally, Plaintiff has alleged that [*16] Officers Griess and Ehrler did not have probable cause to search his car both on March 9, 2013 and March 11, 2013. Compl. at 3-4. As to the search performed by Officer Griess on March 9, 2013, Plaintiff contends that Officer Griess' discovery of a crack pipe in the parking lot where Plaintiff's car was pulled over does not constitute probable cause because Plaintiff denied possession and ownership of the crack pipe and the complaint does not allege any other connection between Plaintiff and the crack pipe. *Id.* at 3. Additionally, Plaintiff's pro se complaint generally alleges the same as to the search performed by Officer Ehrler on March 11, 2013 -- that Officer Ehrler conducted the search without probable cause. *Id.* at 4. The right to be free from unreasonable searches is clearly established. Therefore, Plaintiff has sufficiently alleged unlawful search violations on the part of Officers Griess and Ehrler.

However, the court finds that Plaintiff has not alleged sufficient facts establishing that Officer Funcke or Police Chief Yaniero similarly conducted a search or decided to conduct a search of Plaintiff's car, nor has Plaintiff sufficiently alleged that either is a supervisor of Griess [*17] and Ehrler, nor otherwise plead elements necessary to hold Funcke and Yaniero derivatively liable as supervisors. *See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 n.58, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)* (noting that supervisory liability "must be based on more than the right to control employees" and awareness of the conduct does not lead to supervisory liability). Accordingly, the court recommends that Plaintiff's *§ 1983* unlawful search claims alleged against Officer Funcke and Police Chief Yaniero be dismissed.

2.<u>Fourth Amendment False Arrest Claim</u>

A claim of false arrest under *§ 1983* is a *Fourth Amendment* claim for unreasonable seizure. *See Brown v. Gilmore, 278 F.3d 362, 367 (4th Cir. 2002)* (analyzing false arrest claim under *Fourth Amendment* prohibition of unreasonable seizures). "To establish an unreasonable seizure under the *Fourth Amendment*, [the plaintiff] needs to show that the officers decided to arrest [him] . . . without probable cause." *Id.* (citation omitted). "For probable cause to exist, there need only be enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed; evidence sufficient to convict is not required." *Id.* (citation omitted). "It [*18] is clearly established that citizens have a *Fourth Amendment* right to be free from unreasonable seizures accomplished by excessive force." *Valladares v. Cordero, 552 F.3d 384, 388 (4th Cir. 2009)*.

Here, construing the allegations in Plaintiff's favor, Plaintiff has minimally, but sufficiently alleged that Officer Griess did not have probable cause to believe that Plaintiff had committed a crime when Officer Griess arrested him. Further, the right to be free of unreasonable seizures is clearly established. Therefore, Plaintiff has sufficiently alleged an unlawful seizure violation on the part of Officer Griess. However, the court finds that Plaintiff has failed to allege sufficient facts to support a claim that Officers Ehrler or Funcke or Police Chief Yaniero arrested or decided to arrest Plaintiff. Plaintiff also has not sufficiently alleged that these individuals may be held derivatively liable as supervisors. *See Cilman, 452 F. App'x at 269-70*. Accordingly, the court recommends that Plaintiff's *§ 1983* unlawful seizure claim, to the extent alleged against Officers Ehrler and Funcke and Police Chief Yaniero, be dismissed.

3.<u>Fourteenth Amendment Equal Protection Claim</u>

"The purpose of [*19] the *equal protection clause* . .

. is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . . ." *Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)* (internal quotation marks and alteration omitted). In acknowledging this guarantee, "the Supreme Court has recognized the validity of 'class of one' Equal Protection claims, 'where the plaintiff alleges that []he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Willis v. Town of Marshall, 426 F.3d 251, 263 (4th Cir. 2005)* (quoting *Vill. of Willowbrook, 528 U.S. at 564*). To state an equal protection claim, a plaintiff's factual allegations must show that he or she has been treated differently from other similarly situated persons and that they were treated differently because of purposeful discrimination. *See Green, 211 F. App'x at 162*.

Plaintiff, an African-American, has alleged that the searches and arrest he underwent represent differential treatment based on the racial profiling of the police officers involved. Compl. at 3-5. However, Plaintiff's allegations as to this cause of action [*20] fail because they are comprised almost entirely of conclusory allegations unsupported by concrete facts. Importantly, Plaintiff has alleged no facts articulating how his treatment was different from others. Accordingly, the court recommends that Plaintiff's equal protection claim based on racial profiling be dismissed.

D. Claims Against the City of Jacksonville[2]

2 It appears that Plaintiff is equating the City Council with the City of Jacksonville. However, to the extent Plaintiff is naming the City Council as a separate defendant, Plaintiff has not alleged any facts against the City Council and has therefore failed to state a claim. Accordingly, this court recommends that any claims against the City Council be dismissed.

A municipality "cannot be held liable solely because it employs a tortfeasor . . . in other words, a municipality cannot be held liable under *§ 1983* on a respondeat superior theory." *Rowell v. City of Hickory, 341 F. App'x 912, 915 (4th Cir. 2009)* (quoting *Monell, 436 U.S. at 691*). Rather, it is "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [*21] injury that the government as an entity is responsible under *§ 1983*." *Id.* (quoting *Monell, 436 U.S. at 694*). That is, a plaintiff may prevail on such a claim only if an individual defendant violated a specific constitutional right of that plaintiff, and that specific violation was caused by an unconstitutional policy or custom of the county. *Vathekan v. Prince George's Cnty., 154 F.3d 173, 180-81 (4th Cir. 1998)*. A policy or custom for which a municipality may be held liable can arise in four ways: "(1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that manifests deliberate indifference to the rights of citizens; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law." *Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003)* (quotations omitted).

Here, Plaintiff's complaint does not provide factual allegations sufficient to state a claim against the City of Jacksonville under *section 1983*. Plaintiff's complaint focuses almost exclusively on the conduct of the police [*22] officers who searched and arrested Plaintiff. Not once does Plaintiff reference a policy, a custom, an exercise of decision-making authority, or a practice on the part of the City of Jacksonville that colorably could have been the cause of his alleged constitutional injuries. Plaintiff also fails to allege an act or omission on the part of the City of Jacksonville that manifests deliberate indifference to the rights of citizens or a widespread practice constituting a municipal custom. Plaintiff has failed, even viewing Plaintiff's pro se complaint liberally, to sufficiently plead a cause of action against the City of Jacksonville under *section 1983*. Accordingly, this court recommends that Plaintiff's claims against the City of Jacksonville be dismissed.

E. *§ 1985* Civil Conspiracy Claims

Plaintiff appears to assert *§ 1985* civil conspiracy claims against Officers Griess, Ehrler, and Funcke. Compl. at 4. To maintain a cause of action for conspiracy to deny equal protection of the laws under *§ 1985*, "a plaintiff must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal [*23] enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy."

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citations omitted). With regard to the second element, a plaintiff cannot simply identify himself or herself as an African American and describe a defendant's conduct as "race hate abuse" to state a claim under *§ 1985(3)*. *Green, 211 F. App'x at 162* n.*. Additionally, to prove a *§ 1985* conspiracy, "a claimant must show an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights." *Simmons, 47 F.3d at 1377* (citations omitted). "[A]n express agreement is not necessary," although it "must be shown that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences." *Id. at 1378* (quotation omitted). This is a "relatively stringent standard" that requires sufficient evidence that the alleged conspirators participated in a joint plan. *Id. at 1377* ("[W]e have specifically rejected *section 1985* claims whenever the purported [*24] conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts.").

Plaintiff's allegations that these officers conspired to deprive Plaintiff of his civil rights fail because they are comprised almost entirely of conclusory allegations unsupported by concrete facts. For example, Plaintiff's complaint alleges conspiracy "thru the use of threats, harassment and intimidation and false charges," but provides no allegations regarding a "meeting of the minds." Compl. at 4. There are no facts indicating an agreement or single plan between the officers and the allegations regarding the conduct of Officers Griess and Ehrler on the dates in question provide no support. Further, Plaintiff identifies himself as black and the police officers as white, but this fact is insufficient to establish the requisite discriminatory animus on the part of the police officers and there are no other allegations that otherwise relate to discriminatory animus. *See Gooden v. Howard Cnty., 954 F.2d 960, 969-70 (4th Cir. 1992)* (holding the mere statement that the plaintiff was black and the officers in question were white is insufficient to state a claim under *§ 1985(3)*). Accordingly, [*25] the court recommends that Plaintiff's *§ 1985* conspiracy claim be dismissed.

IV. CONCLUSION

For the reasons stated above, Plaintiff's application to proceed *in forma pauperis* is ALLOWED, and it is RECOMMENDED that the underlying complaint be DISMISSED in part for failure to state a claim.

The Clerk shall send copies of this Memorandum and Recommendation to counsel for the respective parties, who have fourteen (14) days from the date of receipt to file written objections. Failure to file timely written objections shall bar an aggrieved party from receiving a de novo review by the District Court on an issue covered in the Memorandum and, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions not objected to, and accepted by, the District Court.

This the 16th day of September 2013.

/s/ Robert B. Jones, Jr.

Robert B. Jones, Jr.

United States Magistrate Judge

ANTHONY RAY HARRIS, Plaintiff, v. T. A. KNUCKLES, et al., Defendants.

No. 5:10-CT-3206-D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION

2011 U.S. Dist. LEXIS 80540

July 22, 2011, Decided
July 22, 2011, Filed

SUBSEQUENT HISTORY: Affirmed by, Motion denied by *Harris v. Knuckles, 2011 U.S. App. LEXIS 23140 (4th Cir. N.C., Nov. 18, 2011)*
Reconsideration denied by, Request denied by *Harris v. Knuckles, 2012 U.S. Dist. LEXIS 6625 (E.D.N.C., Jan. 20, 2012)*

COUNSEL: [*1] Anthony Ray Harris, Plaintiff, Pro se, Raleigh, NC.

JUDGES: JAMES C. DEVER, III, United States District Judge.

OPINION BY: JAMES C. DEVER, III

OPINION

ORDER

Anthony Ray Harris ("Harris" or "plaintiff"), a pretrial detainee proceeding pro se, filed this action pursuant to *42 U.S.C. § 1983* [D.E. 1]. Harris seeks leave to proceed in forma pauperis under *28 U.S.C. § 1915* [D.E. 2]. On February 3, 2011, Harris filed a motion to amend his complaint [D.E. 7]. On July 1, 2011, Harris filed motions for discovery and "for prompt settlement and resolution of the case" [D.E. 9-10].

Courts must review complaints in civil actions in which prisoners seek relief from a governmental entity or officer, and dismiss a complaint if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted." *28 U.S.C. § 1915A(a)-(b)(1)*. A case is frivolous if it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)*. Claims that are legally frivolous are "based on an indisputably meritless legal theory and include claims of infringement of a legal interest which clearly does not exist." *Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994)* (quotations omitted). Claims that are factually frivolous [*2] lack an "arguable basis" in fact. *Neitzke, 490 U.S. at 325*. The standard used to evaluate the sufficiency of the pleading is flexible, and a pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam) (quotation omitted). Erickson, however, does not undermine the "requirement that a pleading contain 'more than labels and conclusions.'" *Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*; see *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949-52, 173 L. Ed. 2d 868 (2009)*; *Coleman v. Md. Ct. of Appeals, 626 F.3d 187, 190 (4th Cir. 2010)*, cert. granted, *131 S. Ct. 3059, 180 L. Ed. 2d 884, 2011 WL 500227 (U.S. 2011)*; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255-56 (4th*

Cir. 2009); *Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)*.

A party may amend his pleading once as a matter of course within 21 days after service, or, if it is a pleading requiring a response, within 21 days after service of the response or service of a motion under *Rule 12(b), (e)*, or *(f). Fed. R. Civ. P. 15(a)(1)*. Otherwise, a party [*3] may amend his pleading only with the written consent of opposing counsel or by leave of court. *Fed. R. Civ. P. 15(a)(2)*. Because plaintiff's complaint is subject to review under *§ 1915A*, no defendant has been served. Accordingly, Harris's motion for leave to amend his complaint is granted. The court reviews the complaints together to determine whether Harris has stated any claim upon which relief may be granted.

Harris alleges that on July 27, 2010, he was arrested on a "charge of a weapon of mass destruction" by defendant Knuckles, a Raleigh police officer, pursuant to a warrant issued by defendant McCauley, a Wake County magistrate. Compl. 3. Harris states that the incident forming the basis of the charge occurred on October 6, 2009 at the Greyhound bus station. Id. at 3-4. Although Harris acknowledges that he was at the bus station on the day of the incident, Harris questions the sufficiency of the evidence which formed the basis for the warrant against him, noting that there was no witness who could identify him, and that the bus station manager had asked him to leave the station. Id. at 4. Harris "would like to be [released] and properly [compensated] for time being locked in this [*4] jail . . . . [in] the amount of $250,000." Id.

In his amended complaint, Harris states that he sues defendant Knuckles in his individual capacity, rather than the Raleigh Police Department. Mot. *Amend 1*. However, Harris seeks to add a claim against the City of Raleigh because it "is . . . [responsible] for Mr. Knuckle's means of using race[] discrimination and wrongfully locking [Harris] in jail" based on the insufficient evidence against Harris. Id. at 1-2.

Turning first to defendant McCauley, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray, 386 U.S. 547, 553-54, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)*; see *Pressly v. Gregory, 831 F.2d 514, 517 (4th Cir. 1987)* ("As judicial officers, magistrates are entitled to absolute immunity for acts performed in their judicial capacity."). Thus, the court dismisses Harris's claim against McCauley as frivolous.

As for defendant City of Raleigh, Harris has failed to state a claim on which relief may be granted. Alleging that a municipal employee committed a constitutional violation is necessary in order to state a claim against a municipality, [*5] but is not sufficient. A municipality may be found liable under *42 U.S.C. § 1983* only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*; see *Iqbal, 129 S. Ct. at 1949*. Therefore, a county may not be found liable under *section 1983* based on a theory of respondeat superior or simply for employing a tortfeasor. See, e.g., *Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 403-04, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)*. Plaintiff has failed to allege any policy or custom of the City of Raleigh which is responsible for the acts of which he complains. Thus, Harris's claim against the City of Raleigh is dismissed as frivolous.

As for Harris's challenge to the criminal charges against him, it appears that his state criminal proceedings remain pending. To recover money damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a plaintiff must show that the underlying conviction has been reversed on direct appeal, expunged by executive [*6] order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. See, e.g., *Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)*. "A district court must undertake a case specific analysis to determine whether success on the claims would necessarily imply the invalidity of a conviction or sentence." *Thigpen v. McDonnell, 273 F. App'x 271, 272 (4th Cir. 2008)* (per curiam) (unpublished). Harris contends that the pending charges against him are invalid; therefore, Harris must challenge the legitimacy of the charges against him as part of his state criminal action. See, e.g., *Ballenger v. Owens, 352 F.3d 842, 845-46 (4th Cir. 2003)*; *Antonelli v. Foster, 104 F.3d 899, 901 (7th Cir. 1997)*; *Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996)* (per curiam). Moreover, Harris specifically alleges that his defense attorney has presented these contentions in a motion in the criminal proceeding

against him. Compl. 4. Thus, the claim is dismissed without prejudice.

Finally, to the extent that Harris asserts that the charge against him is the result of racial discrimination by defendant Knuckles, the *equal protection clause* provides that "[n]o [*7] State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 1*. "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001)*. Harris has not stated that he was treated differently from any person with whom he is similarly situated. Although pro se litigants are held to less stringent pleading standards than attorneys, the court is not required to accept as true legal conclusions or unwarranted factual inferences. See, e.g., *Iqbal, 129 S. Ct. at 1949-52*; *Twombly, 550 U.S. at 555*; *Coleman, 626 F.3d at 190*. Harris has not made plausible allegations to support his equal protection claim. See, e.g., *Coleman, 626 F.3d at 190-91*. Thus, Harris has failed to state a claim upon which relief may be granted, and this claim is dismissed.

For the reasons stated, the court GRANTS plaintiff's motion to amend [D.E. 7], and DISMISSES plaintiff's action as frivolous under *28 U.S.C. § 1915A*. The court [*8] DENIES AS MOOT Harris's motions for discovery [D.E. 9] and settlement [D.E. 10]. The Clerk of Court is directed to close the case.

SO ORDERED. This 22 day of July 2011.

/s/ James C. Dever III

JAMES C. DEVER III

United States District Judge

ERIC M. McMILLIAN, Plaintiff v. L. G. LeCONEY, Defendant.

NO: 5:09-CV-175-BR

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION

2010 U.S. Dist. LEXIS 61119

June 21, 2010, Decided
June 21, 2010, Filed

SUBSEQUENT HISTORY: Motions ruled upon by *McMillian v. LeConey, 2010 U.S. Dist. LEXIS 122455 (E.D.N.C., Nov. 17, 2010)*

COUNSEL: [*1] Eric M. McMillian, Plaintiff, Pro se, Raleigh, NC.

For Officer L.G. LeConey (Raleigh Police Dept.), Defendant: Hunt K. Choi, LEAD ATTORNEY, City Attorney's Office, Raleigh, NC.

JUDGES: W. Earl Britt, Senior United States District Judge.

OPINION BY: W. Earl Britt

OPINION

ORDER

This matter is before the court on Defendant's motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*. Plaintiff was notified by letter from the Clerk of Court dated 16 April 2010, that he had until 10 May 2010, to file any material in opposition to the motion. Plaintiff filed no material with the court, and this matter is now ripe for disposition.

Plaintiff appears to allege that, in the course of his arrest on 31 March 2008, Defendant searched his person without probable cause and used excessive and unreasonable force, all in violation of *42 U.S.C. § 1983*. (Compl. 4-5). In evaluating a motion to dismiss under *Rule 12(b)(6)*, the court must take all the factual allegations in the complaint as true, but legal conclusions and conclusory allegations need not be accepted as true if not supported by sufficient factual allegations. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A [*2] court must determine whether a complaint contains sufficient well-pleaded factual allegations to "plausibly give rise to an entitlement to relief" and, thus, enable the complaint to survive a motion to dismiss. *Id.*

Defendant argues that Plaintiff asserts a claim against Defendant only in his official capacity. Defendant correctly notes that the complaint does not expressly state in what capacity Plaintiff is suing Defendant. When capacity is unclear from a complaint, "the court must examine the nature of the plaintiff's claims, the relief sought, and the course of the proceedings to determine whether a state official is being sued in a personal capacity." *Parks v. Lowe, No. 1:09cv00070, 2010 U.S. Dist. LEXIS 12592, *21 (W.D. Va. Feb. 12, 2010)* (quoting *Biggs v. Meadows, 66 F.3d 56, 61 (4th Cir. 1995))* (internal quotation marks omitted). Defendant argues that because Plaintiff's complaint refers to Defendant's breach of duty, Plaintiff clearly intends to sue Defendant in his official capacity. (Mem. Supp.

Def.'s Mot. Dis. 4-5). However, an allegation involving breach of official duties tends to denote that the accused went outside or beyond the scope of his official duties, hence the breach.

Defendant [*3] also argues that because Plaintiff did not seek punitive damages, the suit was intended to be against Defendant in his official capacity. (*Id.* at 5). However, Plaintiff clearly seeks money damages, (Compl. 6), and any claim for money damages -- whether compensatory or punitive -- tends to imply that Plaintiff intended to sue Defendant in his individual capacity, *see Parks, 2010 U.S. Dist. LEXIS 12592 at *21*. In light of the foregoing, the court cannot assume that Plaintiff intended to sue Defendant solely in Defendant's official capacity. And, if Plaintiff is suing Defendant in his individual capacity, then the factual allegations contained in the complaint, taken as true, support a plausible enough claim to survive a motion to dismiss.

On the other hand, to the extent Plaintiff sues Defendant in his official capacity, that claim does not survive a motion to dismiss. As Defendant correctly points out, a *§ 1983* claim against a governmental agent acting in his official capacity must allege in the complaint a policy or custom of the governmental unit -- in this case the City of Raleigh -- that violates the rights of those against whom the policy or custom is practiced. *See Walker v. Prince George's County, Md., 575 F.3d 426, 431 (4th Cir. 2009)* [*4] (citations omitted). Plaintiff's complaint alleges no such policy or custom.

Accordingly, Defendant's motion to dismiss is ALLOWED IN PART. To the extent Plaintiff brings a *§ 1983* claim against Defendant in his official capacity, the claim is DISMISSED. Plaintiff's *§ 1983* claim against Defendant in his individual capacity remains.

This 21 June 2010.

/s/ W. Earl Britt

W. Earl Britt

Senior U.S. District Judge