IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

AARON TOBEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:11cv154-HEH**
	)	
JANET NAPOLITANO, *et al*.	)	
	)	
Defendants.	)	

MEMORADUM IN SUPPORT OF THE COMMISSION DEFENDANTS' MOTION TO PARTIALLY DISMISS COMPLAINT UNDER FED. R. CIV. P. 12(b)(6)

Defendants Capital Region Airport Commission (the "Commission"), Victor Williams ("Williams"), and Calvin Vann ("Vann") (the Commission, Williams and Vann, collectively, the "Commission Defendants"), by counsel, submit this memorandum in support of their motion to dismiss, in part, the Complaint of Aaron Tobey ("Tobey"), pursuant to Fed. R. Civ. P. 12(b)(6). As shown below, Tobey fails to state a Section 1983 claim against the Commission, or against Williams and Vann in their official capacities. Moreover, the vitality of the doctrine of sovereign immunity requires dismissal of Tobey's Count Four for false imprisonment and Count Five for malicious prosecution to the extent asserted against the Commission and Williams.

ALLEGATIONS

The Commission is a political subdivision of the Commonwealth of Virginia created by the Virginia General Assembly and authorized to operate, manage, and regulate the Richmond International Airport ("RIC"). Compl. ¶ 5. The Commission's

operation of "modern and efficient air transportation and related facilities are proper and essential governmental functions and public purposes . . . ." *See* 1980 Acts of Assembly Chapter 380, § 2, attached hereto as Exhibit A.[1] As a part of its operation of RIC, the Commission "maintains an airport police force and employs police officers to enforce its rules and regulations and the general laws. . . ." Compl. ¶ 7. *See also* Ex. A, §§ 8(17); 10. The Commission's rules and regulations "authorize the exercise of First Amendment expression, including political expression" and the Commission "permitted a variety of speech activities at RIC, including, without limitation, airport and non-airport related speech, individual symbolic speech, individual speech, including speech on clothing, and commercial speech . . . ." Compl. ¶¶ 68, 70.

Defendant Williams is the Commission's Director of Public Safety and Operations. Compl. ¶ 5. Williams is responsible for the management, direction, training and supervision of the RIC police, as well as the RIC police officers' interaction with the Transportation Security Administration ("TSA") officers. Compl. ¶ 8. He is alleged to have acted in his official capacity. *Id.* Vann and the two John Doe Defendants are Commission police officers, Compl. ¶¶ 10-11, and are alleged to have acted in both their official and individual capacities.

Plaintiff, Tobey, is a student at the University of Cincinnati and maintains a permanent residence with his parents in Charlottesville, Virginia. Compl. ¶ 12. On December 30, 2010, Tobey was present at RIC as a ticketed passenger on a flight to

[1] This court may take judicial notice of any legislative act of the Commonwealth of Virginia. *United States v. Gavegnano,* 305 Fed. Appx. 954, 956-57 (2009). The Complaint also refers to the Commission as a "governmental authority created in 1975 by an Act of the General Assembly of the Commonwealth of Virginia." Compl. ¶ 7. As noted in the 1980 Acts of Assembly Chapter 380, the original 1975 Acts of Assembly Chapter 537, was reenacted and continued by the 1980 Acts of Assembly Chapter 380 and subsequent Amendments (the "Enabling Act").

Wisconsin. Compl. ¶¶ 25, 28. Tobey entered the security screening area, submitted his identification and boarding pass to the pre-screening agent, and proceeded to the conveyer belt area. Compl. ¶¶ 28-29. At the conveyer belt area, Tobey initially removed his belt, shoes, wallet, phone, computer, carry-on bag, and sweatshirt. Compl. ¶ 29. He then removed his T-shirt and sweatpants, revealing the text of the Fourth Amendment written on his bare chest. Compl. ¶¶ 31, 26. Tobey was unclothed with the exception of "shorts." Compl. ¶ 10. The security line was shut down after Tobey removed his clothing at the conveyer belt area. Compl. ¶ 33.

After receiving a radio call for assistance, Defendants Vann and John Doe 1 arrived at the security line and escorted Tobey through the security area. Compl. ¶¶ 33-34. Tobey was handcuffed and his belongings were collected. Compl. ¶¶ 35-36. Tobey was then escorted to the police station within RIC. ¶ 39. Tobey was charged with disorderly conduct, issued a summons and, after speaking with a federal Air Marshal, was allowed to return to the terminal in time to catch his flight. Compl. ¶¶ 56, 60, 64.

On or about March 10, 2011, Tobey filed a Complaint for Compensatory Damages, Injunctive and Declaratory Relief arising out of the events of December 30, 2010, against the Commission Defendants, the Secretary of Homeland Security, Janet Napolitano, the Administrator of the TSA, John Pistole, an unknown TSA employee, "John Smith," and two unknown Commission officers, "John Does" #1 and #2. Tobey contends that Defendants violated his First, Fourth, Fifth and Fourteenth Amendment rights, as well as falsely imprisoned and maliciously prosecuted him. *See* Compl.

STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a Complaint to determine whether a plaintiff has stated a claim. *Republican Party of North Carolina v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992). "Although a complaint 'does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Newhard v. Borders,* 649 F. Supp. 2d 440, 445 (W.D. Va. 2009)(quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). A court need not accept as true legal conclusions, unwarranted inferences, unreasonable conclusions or arguments. *Id.* (citing *Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir. 2000)). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009).

ARGUMENT

I. Plaintiff Fails to State a Section 1983 Claim Against the Commission or Against Williams and Vann Acting in Their Official Capacities.

The sole vehicle available to Tobey to successfully assert a section 1983 claim against the Commission and those of its employees acting in their official capacities, is a proper allegation that the Commission deprived him of his constitutional rights through an official policy or custom. *Carter v. Morris,* 164 F.3d 215, 218 (4th Cir. 1999); *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690-91 (1978)). In fact, even under the more lenient pleading standards in place before *Twombly* and *Iqbal*, the Fourth Circuit, in *Revene v. Charles County Commissioners,* 882 F.2d 870, 874-75 (4th Cir. 1989), held that a plaintiff's claim of municipal liability under section 1983 failed because the critical

allegations of a municipal policy were asserted entirely as legal conclusions. Tobey's Complaint fares no better and his assertion of gratuitous legal conclusions without factual allegations of other instances of the Commission's constitutional abuses amounts to nothing more than "naked assertions devoid of further factual enhancement," and therefore, fails to state a claim against the Commission. *Rutledge v. Town of Chatham,* 2010 U.S. Dist. LEXIS 103465 at *9 (W.D. Va. 2010) (quoting *Iqbal,* 129 S.Ct. at 1949).

A. Plaintiff Fails to Allege Sufficient Supporting Facts of The Commission's Policy or Custom of Deprivation of Constitutional Rights.

Municipal official policies are written in ordinances and regulations, established by certain affirmative decisions of individual policymaking officials, or in certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens. *Carter v. Morris,* 164 F.3d at 218 (citing *Monell v. Dep't of Soc. Servs.,* 436 U.S. at 690-91). "Policy in this context implies most obviously and narrowly a 'course of action consciously chosen . . . as opposed to episodic exercises of discretion in the operation details of government.'" *Newhard,* 649 F. Supp. 2d at 446 (citing *Spell v. McDaniel,* 824 F.2d 1380, 1385-86 (4th Cir. 1987)).

Alternatively, in order for a municipal act to rise to a municipal custom, a municipal practice must become 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 (citing *Monell,* 436 U.S. at 691). "A custom may be attributed to a municipality when the duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the municipal governing body that the practices have become

customary among its employees." *Newhard,* 649 F. Supp. 2d at 446 (quoting *Spell*, 824 F.2d at 1387).

Importantly, under no circumstances can a municipality "be held liable under § 1983 on a *respondeat superior* theory." *Carter,* 164 F.3d at 218; *see also Keathley v. Vitale,* 866 F. Supp. 272, 274 (1994) ("A municipality is not liable solely because it employs a tortfeasor."). "A plaintiff's theory is most likely to slip into that forbidden realm when she alleges municipal omission -- either *a policy of deliberate indifference* or the *condonation* of an unconstitutional custom." *Carter,* 164 F.3d at 218 (citing *Board of County Comm'rs v. Brown,* 520 U.S. 397, 405 (1997))(emphasis added). In fact, when a plaintiff argues that a policy or custom should be inferred from municipal inaction, alleged "isolated constitutional deprivations by municipal employees" will not give rise to section 1983 liability. *Newhard,* 649 F. Supp. 2d at 446. It is not enough to simply allege deliberate indifference generally. *Id.* (dismissing plaintiff's section 1983 claim against the Town of Culpeper notwithstanding plaintiff's allegation that the Town "implemented and promulgated a departmental policy . . . demonstrating deliberate indifference"). Instead, in order for a policy or custom to be inferred from inaction, a plaintiff must allege conduct that "*shows* a 'deliberate indifference' to the rights of the [municipality's] inhabitants." *Id.* (emphasis added). Municipal policy or custom may be inferred from "continued inaction in the face of a known history of widespread constitutional deprivations" or from the "manifest propensity of a general, known course of employee conduct to cause constitutional deprivations to an identifiable group of persons having a special relationship to the state." *Id.* (citing *Milligan v. Newport News,* 743 F.2d 227, 230 (4th Cir. 1984)).

In *Carter*, the Fourth Circuit directly confronted the question of what a plaintiff needed to allege to proceed against a municipality under Section 1983. Notably, the Court began its analysis with the assumption that plaintiff Carter had suffered a deprivation of her federal rights. *Carter,* 164 F.3d at 218.[2] The plaintiff in *Carter* alleged that the City of Danville was liable under Section 1983 due to its deliberate indifference to the "long and widespread history of violations of the federal rights of citizens." *Id.* at 219. The Court held that these allegations were insufficient to proceed against the City of Danville because plaintiff failed to establish an "affirmative link" between the majority of prior incidents and the violations of which she complained. *Id.* While the Court determined that two prior incidents were similar to the events described by plaintiff, it ultimately held that "this meager history of isolated incidents" failed to "approach the 'widespread and permanent' practice necessary to establish municipal custom." *Id.* at 220.

Tobey's Complaint pales in comparison to the allegations made, and determined insufficient by the Fourth Circuit, in *Carter*. Tobey altogether fails to properly allege an official Commission policy or custom which resulted in the alleged violation of his First, Fourth, Fifth and/or Fourteenth Amendment rights. In fact, Tobey's allegations concerning the Commission's specific rules and regulations plead just the opposite, namely, that the Commission's policies and procedures were designed to protect, not violate citizens' civil rights. *See* Compl. ¶ 67-70. According to Tobey, his "silent,

[2] Of course no assumption of deprivation exists under the facts alleged by Tobey. In dismissing Carter's Section 1983 counts against the municipality, the Court considered only Carter's version of events which included the police using a sledge hammer to break into her front door and entering her bedroom without warning. One officer placed a gun to her ear, while the other placed a gun at her mouth. She was then handcuffed and arrested at which time she urinated on herself and the officers refused her request to change clothes. Once at the police station, the officers refused her request to use the restroom and Carter urinated on herself again. *Carter,* 164 F.3d at 217.

nonviolent protest . . . was not contrary to rules and regulations promulgated by Defendant Commission;" the Commission's rules and regulations "authorize the exercise of First Amendment expression, including political expression" and the Commission "permitted a variety of speech activities at RIC, including without limitation, airport and non-airport related speech, individual symbolic speech, individual speech, including speech on clothing, and commercial speech . . . ." Compl. ¶¶ 68, 70.

Notwithstanding Tobey's allegations concerning specific Commission policies and customs, which Tobey concedes permit First Amendment expression, Tobey attempts in paragraphs 84-88 of his Complaint to allege some type of joint policy of indifference to training that allowed officers to make incorrect enforcement choices. In doing so, Tobey offers no factual support for the alleged inaction of the Commission, relying instead on bare and inadequate legal conclusions that simply do not carry the day.

At most, Tobey has pled that the Commission is vicariously liable for the actions of its officers under a *respondeat superior* theory that is insufficient as a matter of established federal law. *See* Compl. ¶¶ 84-88. *Compare Rutledge,* at * 9 (dismissing section 1983 claim against Town of Chatham when plaintiff failed to allege additional specific instances of police abuses); *Newhard,* 649 F. Supp. 2d at 446-47 (dismissing section 1983 claim against the Town of Culpeper when plaintiff alleged only that the Town implemented a policy, practice and custom of not enforcing federal rights without any allegations that Town officials were actually or constructively aware of persistent constitutional deprivations). Therefore, Counts One, Two, and Three must be dismissed as to the Commission.

B. Plaintiff's Failure to Sufficiently Plead a Section 1983 Claim Against the Commission Necessitates the Dismissal of Plaintiff's Section 1983 Claims Against Williams and Vann In Their Official Capacity.

There is no question in this Circuit that suits against officers acting in their official capacities are nothing more than suits against the entity of which the officers are agents. *Hughes v. Blankenship,* 672 F.2d 403, 405-06 (4th Cir. 1982); *Laboke v. City of Fairmont,* 2000 U.S. App. LEXIS 3708 (4th Cir. 2000). Damages may only be awarded against officers acting in their official capacities if those damages would be recoverable from the governmental entity. *Hughes*, 672 F.2d at 405-06. For the reasons set forth above, Tobey's section 1983 claims against the Commission must be dismissed, as Tobey has failed to allege facts supporting a Commission policy or custom that led to a deprivation of his constitutional rights. Therefore, Counts One, Two, and Three also must be dismissed as to Williams, sued in his official capacity only, and as to Vann to the extent of the allegations against him in his official capacity.[3]

II. The Doctrine of Sovereign Immunity Bars Plaintiff's State Law Claims with respect to the Commission and to Williams.

A. The Commission's Governmental Immunity Bars Tobey's State Law Claims.

Tobey specifically alleges that defendants Vann and two "John Does" engaged in acts constituting false imprisonment (Count Four) and malicious prosecution (Count Five). The Commission and Williams are not mentioned in those counts except by the convention of incorporation by reference of all previous paragraphs and by vague references to "defendants" generically. To the extent that it is Tobey's intention to use

[3] While the "John Doe" defendants have not been served and, therefore, no appearance on their behalf is being made at this time, they, too, were sued in their official and individual capacities and the same argument for dismissal of the Constitutional claims that apply to Vann also apply to the John Does to the extent of their actions in their official capacities.

such incorporation to allege that the Commission and Williams are liable for those torts, the claims are barred by the doctrine of sovereign immunity. This doctrine cloaks governmental entities and their supervisory personnel operating within the scope of their employment with a defense that is non-waivable except by the Virginia General Assembly, depriving courts of jurisdiction to adjudicate the merits of a tort claim. *See Afzall v. Commonwealth of Virginia*, 273 Va. 226, 230, 639 S.E.2d 279, 281 (2007); *Ligon v. County of Goochland,* 279 Va. 312, 315-16, 689 S.E.2d 666, 668 (2010). As the Virginia Supreme Court has recognized, the doctrine of immunity serves a multitude of purposes including but not limited to:

> protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of government affairs through the threat or use of vexatious litigation.

Azfall, 271 Va. at 231, 639 S.E.2d at 282. Governmental immunity creates an absolute bar to Tobey's claims for False Imprisonment (Count Four) and Malicious Prosecution (Count Five). *See Niese v. City of Alexandria*, 264 Va. 230, 239-40, 564 S.E.2d 127, 133 (2002) (sovereign immunity shielded municipality for alleged intentional torts by police officers); *see also Carter*, 164 F.3d 215 (sovereign immunity applied to state tort claims for excessive force by local police).

With respect to municipal corporations and those local governments with the attributes of municipal corporations, sovereign immunity protects such entities from suit for the failure to exercise, or for the negligent or improper exercise of, governmental, legislative, or discretionary powers. *City of Lynchburg v. Peters,* 156 Va. 40, 48, 157 S.E. 769, 771 (1931) (holding that the City of Lynchburg was authorized by law and its

charter to establish a park and such establishment was a governmental function). Moreover, as the Supreme Court of Virginia has recognized, the public "has a vital interest in the orderly administration of government, and, as a general rule, the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to act." *Hinchey v. Ogden*, 226 Va. 234, 239-40, 307 S.E.2d 891, 894 (1983); *see also City of Va. Beach v. Carmichael Dev. Co.*, 259 Va. 493, 527 S.E.2d 778 (2000) (holding that "the doctrine of sovereign immunity provides for 'smooth operation of government' and prevents 'citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.'").

To be cloaked with sovereign immunity, the Commission must possess the attributes of a municipal corporation and the actions complained of must be in the performance of a governmental function. *Carter v. Chesterfield County Health Comm'n,* 259 Va. 588, 590, 527 S.E.2d 783, 785 (2000). When a public body meets that two-prong test, dismissal of the case at the initial pleading stage is appropriate. *See Woods v. W&L Constr. & Paving,* 22 Va. Cir. 314, 315 (1990)(treating special plea of sovereign immunity as a demurrer). Here, the Commission satisfies the test for a municipal corporation in the exercise of its governmental functions, and the state law claims against it should be dismissed. Further, and as discussed below, Williams, as a supervisory employee sued in his official capacity for his role as a policymaker, is protected by the same immunity. *Messina v. Burden,* 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984); *James v. Jane,* 221 Va. 43, 267 S.E.2d 108 (1980).

1. The Commission Has the Attributes of a Municipal Corporation.

Municipal corporations and other local political subdivisions with similar powers are immune from tort liability in the performance of governmental functions. *Carter,* 259 Va. at 590, 527 S.E.2d at 785; *Ligon,* 279 Va. at 315-16, 689 S.E.2d at 668. The Commission is a political subdivision of the Commonwealth created by the Virginia General Assembly. As the Virginia General Assembly determined, "the ownership and operation by the Commission of modern and efficient air transportation and related facilities are proper and essential governmental functions and public purposes . . . ." *See* Ex. A, § 2; *see also Gaskin v. Capital Region Airport Comm'n*, 45 Va. Cir. 212 (Richmond 1998) (citing the Enabling Act and noting that the Commission is a political subdivision of the Commonwealth).

Applying Virginia law, there are six attributes of a municipal corporation:

> (1) Creation as a body corporate and politic and as a political subdivision of the Commonwealth; (2) Creation to serve a public purpose; (3) Power to have a common seal, to sue and be sued, to enter into contracts, to acquire, hold and dispose of its revenue, personal and real property; (4) Possession of the power of eminent domain; (5) Power to borrow money and issue bonds which are tax exempt; (6) Management of the corporation vested in a board of directors or a commission.

County of York v. Peninsula Airport Com., 235 Va. 477, 480-82, 369 S.E.2d 665, 666-67 (1988) (applying these factors to conclude that the Peninsula Airport Commission, which, like the Commission, was created by a special act of the General Assembly and is composed of member governmental jurisdictions, was a municipal corporation).

The Commission indisputably possesses each of these attributes, as it:

(1) is a political subdivision created by the General Assembly. *See* Ex. A; *see also Gaskin*, 45 Va. Cir. at 212.

(2) was created to serve a public purpose, (*See* Ex. A, 1 § 2);

(3) has the power to sue and be sued; to adopt a corporate seal; to make and enter into all contracts; and to acquire, hold and dispose of its revenue, personal and real property, (s*ee* Ex. A, 1 § 8 (1)(3)(8)(13)(15)(16)(18)(20));

(4) has the power of eminent domain, (*See* Ex. A, 1 § 11);

(5) is authorized to issue bonds, (S*ee* Ex. A, 1 § 15); and

(6) is managed by a group of appointed commissioners, (*See* Ex. A, 1 § 6).

The Commission possesses all six necessary attributes and is therefore considered a municipal corporation for purposes of a sovereign immunity analysis. *See Airport Props. Ltd. P'ship v. Capital Region Airport Comm'n*, 1991 U.S. App. LEXIS 5350, at *11-13 (4th Cir. 1991) (unpublished) (affirming dismissal of claims against the Commission and treating it as a municipal corporation for immunity purposes).

2. The Commission's Operation of a Police Force is a Governmental Function.

It is well established in Virginia that "a municipal corporation acts in its governmental capacity in maintaining a police force." *Niese*, 264 Va. at 239, 564 S.E.2d at 132. As is clear from its Enabling Act and as the Plaintiff admits, the Commission is authorized to maintain a police force and to enforce the general laws. Under its Enabling Act, the Commission has the power to enforce it rules and "all other rules, regulations, ordinances, and statues relating to its facilities . . . ." Ex. A, § 8(17). It is further authorized to have a police force to enforce its rules as well as "all other applicable statues, ordinances, rules and regulations of the United States of America and agencies

and instrumentalities thereof." Ex. A, § 10. Plaintiff acknowledges in the Complaint that the Commission "maintains an airport police force and employs police officers to enforce the general laws. . . ." Compl. ¶ 7.

"Municipal corporations are immune from tort liability when performing governmental functions …." *Carter*, 259 Va. at 590, 527 S.E.2d at 785 (citation omitted). Governmental functions are duties performed for the public welfare. *City of Chesapeake,* 268 Va. at 633, 604 S.E.2d at 426. Moreover, a municipal corporation is immune from liability for an intentional tort committed by an employee in the performance of a government function. *Id.* Making an arrest is "a classic example of a governmental function." *Jefferson v. Howard*, 1989 Va. Cir. LEXIS 124, at *5 (Richmond 1989) (holding that an officer enjoyed sovereign immunity of the municipality where he used his vehicle to assist in an arrest). Tobey's claims against the Commission for false imprisonment and malicious prosecution are based upon the actions of Vann and the John Doe defendants performed in the course of their police duties. Compl. ¶¶ 118-119, 122-124. The Commission is immune from Tobey's claims because both the maintenance of the police department and the performance of police duties by Vann and John Doe defendants are government functions. *Niese,* 264 Va. at 239-240, 564 S.E.2d at 132-33. Tobey's Counts Four and Five must be dismissed as to the Commission.

B. Williams Shares in the Commission's Immunity and Tobey's State Law Claims Against Williams Must Be Dismissed.

The only specific allegations with respect to defendant Victor Williams are found in paragraph 8 of the Complaint as follows:

> 8. Defendant VICTOR WILLIAMS, who is sued in his official capacity, is the Director of Public Safety and Operations of Defendant COMMISSION, and is

> responsible for the management, direction and supervision of the RIC Police and all police officers in the employ of the COMMISSION, as well as for the development, promulgation, approval and implementation of all programs, policies, practices, procedures, customs and protocols of the RIC Police including, without limitation, the training and supervision of its police officers, and the operations and interactions of the RIC Police with other security personnel and agencies exercising security functions at RIC.

In all other paragraphs in which Williams' name is listed, the Plaintiff lumps Williams together with the Secretary of Homeland Security, the Administrator of the TSA and the Commission, Williams' employer. For instance, paragraph 85 states that "By policy, custom and /or practice, Defendants NAPOLITANO, PISTOLE, COMMISSION, WILLIAMS and/or the other Defendants and/or their subordinates, have each permitted and/or authorized the uniformed officers and agents under their authority to enforce, or permit the enforcement of, or to request collaborative assistance in the enforcement of, the disorderly conduct and other inappropriate laws…." The four defendants whose names are capitalized are alleged to have been indifferent in supervision that would guarantee protection of constitutional rights (Compl. ¶ 86) and by "policy, custom and/or practice… failed to exercise and/or unlawfully delegated their respective affirmative constitutional duties…" (Compl. ¶ 87). *See also* Compl. ¶¶ 100, 106 and 113.

From these allegations, we may glean that as Director of Public Safety and Operations, Mr. Williams acted in his official capacity as an employee of the Commission, collaborated with his employer and the federal government to carry out enforcement policies at issue and failed to exercise proper control over the defendant

officers to prevent violations of law. In sum, Williams is alleged to have been acting in the scope of his employment to carry out the offending policies.

As stated by the Virginia Supreme Court in *Messina v. Burden,* 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984), two recognized purposes served by the doctrine of sovereign immunity are the protection of governmental officials from being fearful and unwilling to carry out their public duties and the removal of the threat to public service due to citizens' reluctance to take public jobs. Were the governmental entity alone in its enjoyment of immunity, it would do "nothing to insure that officials will act without fear." *Id.* at 308, 321 S.E.2d at 661. In fact, "if every government employee is subject to suit, the State could become as hamstrung in its operations as if it were subject to direct suit." *Id.*

In recognizing these policy concerns, the Supreme Court of Virginia in *Messina* reiterated that, in certain circumstances, governmental employees are afforded the same immunity granted to the employing entity. "Government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys." *Id.* (quoting *First Va. Bank-Colonial v. Baker,* 225 Va. 72, 79, 301 S.E.2d 8, 12 (1983)). In *Messina,* the Supreme Court of Virginia did not extend immunity to all local governmental employees but rather held that supervisory employees acting within the scope of their employment and exercising discretion to carry out the employer's policies are not to be held liable unless they were grossly negligent or acted intentionally with respect to the offending conduct. *Id.* at 307-08; 301 S.E.2d at 12.

Here, there is no allegation that Williams was involved in the detention of plaintiff or even knew about it until after the fact. It is his alleged indifferent supervision and delegation of authority that is challenged, nothing more. In gauging the nature of the employment activities that are covered by sovereign immunity, the Court, in *Messina*, applied the factors set out in its earlier decision in *James v. Jane,* 221 Va. 43, 267 S.E.2d 108 (1980). Those factors are: (1) the nature and function performed by the employee; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion. *Messina,* 228 Va. at 313, 321 S.E.2d at 664. When applying the *James* test to Tobey's allegations against Williams, it is evident that Williams shares in the immunity of the Commission.

Both federal and state courts applying Virginia's doctrine of sovereign immunity have afforded police chiefs the immunity held by the employing municipality, particularly when the allegations are in essence failure to train, supervise and/or discipline subordinate officers. In 1991, the Circuit Court of Fairfax County applied the *James* test and determined that the Sheriff of Fairfax County was immune from plaintiff's action alleging a failure to train and discipline deputy sheriffs because such activities were matters of judgment and discretion. *See Sickles v. Peed,* 25 Va. Cir. 487, 489 (Fairfax 1991); *compare* Compl. ¶¶ 81, 84-87. *See also Blackburn v. Town of Coeburn,* 2007 U.S. Dist. LEXIS 40059 (W.D. Va. 2007) (holding that the chief of police was entitled to the same sovereign immunity of the municipality for which he was employed because the hiring, training, and retention of police officers involved the exercise of judgment and discretion).

Accordingly, to the extent the Complaint is construed to allege false imprisonment and malicious prosecution against the Commission and Williams, such claims should be dismissed.

CONCLUSION

For the foregoing reasons, the Commission and Williams request that all counts be dismissed with prejudice as against them and Vann requests that Counts One, Two, and Three be dismissed against him acting in his official capacity.

Respectfully Submitted,

CAPITAL REGION AIRPORT COMMISSION,
VICTOR WILLIAMS, and
CALVIN VANN

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2011, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record, including:

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