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.	)	

REPLY 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"), Quentin Trice ("Trice"), Anthony Mason ("Mason"), Jeffrey Kandler ("Kandler"), and Calvin Vann ("Vann"), (the Commission, Williams, Trice, Mason, Kandler and Vann, collectively, the "Commission Defendants")[1], by counsel,

[1] On May 27, 2011, after the Motion to Dismiss was filed, Plaintiff filed his First Amended Complaint replacing John Does #1 and #2 and naming Trice, Mason, and Kandler as Defendants. The Commission Defendants consented to Plaintiff's filing of the Amended Complaint in accordance with the Consent Motion filed with the Court on May 16, 2011, and to the extent that the amendment only identified the John Doe parties and did not otherwise alter the allegations of the original Complaint. *See* Consent Motion (Dkt. 22) at ¶ 9. Rather than simply filling in the blanks with names as agreed, however, Plaintiff further embellishes his allegations by characterizing their roles. Chief Trice, for instance, is described as "the highest uniformed officer of the RIC Police force and responsible for the management, direction and supervision of the RIC Police and all police officers in the employ of the Commission" and shares with Williams, responsibilities "in connection with the training and supervision of [RIC's] police officers, and the operations and interactions of the RIC Police with other security personnel and agencies exercising security functions at RIC." Amended Compl. ¶ 11. Officer Mason is alleged to have urged and directed Vann. *Id.* ¶ 11. Nevertheless, as discussed below, Plaintiff's second attempt to state a Section 1983 claim still fails against the Commission Defendants in their official capacities and should be dismissed.

submit this reply memorandum in further support of their motion to dismiss, in part, the Complaint of Aaron Tobey ("Tobey"), pursuant to Fed. R. Civ. P. 12(b)(6). Having conceded in his opposition that he is not asserting state law claims against the Commission Defendants in their official capacities, the issue before the Court is solely the sufficiency of the constitutional claims against these same defendants in the same capacity. As shown below, the Complaint, even as amended, falls wide of the mark to assert such claims.

ARGUMENT

Plaintiff's additional factual allegations in the Amended Complaint do not save Plaintiff's Section 1983 claims against the Commission or the individuals in their official capacities from dismissal. Assuming for the purposes of this Motion that a violation occurred,[2] there are three ways in which Plaintiff may establish a policy or custom necessary to hold the Commission and its officials liable: (1) the existence of an articulated Commission policy that is unconstitutional; (2) a Commission policymaker directing an act that resulted in a violation of federal rights; or (3) by 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). Working on the assumption that he has a constitutional right to stand in

[2] Plaintiff suggests in his Opposition Brief that the Commission Defendants have not stated that the Officers complied with the Constitution. To be sure, it is the position of the Commission Defendants, as noted in the Answer filed, that Plaintiff suffered no deprivation of his constitutional rights at the hands of the Commission officers. As that issue obviously turns on facts that cannot be resolved at the initial pleading stage, the Commission Defendants' Motion to Dismiss is not the appropriate posture for making this argument. Should the Court grant the Commission Defendants' Partial Motion to Dismiss, this issue will be tested at a later stage of the proceedings with respect to the officers in their individual capacities.

the front of an airport security line, strip down completely to his "shorts" and refuse to go to through the offered screening device,[3] Tobey is sure that an official policy to deny him that right must be at play. Yet, he cannot identify it. Alleging in the disjunctive, he claims that "[b]y policy, custom, and/or practice, Defendants unlawfully drew, or by failing to properly supervise train and instruction [sic], permitted the other Defendants to draw, distinctions among the content and/or viewpoints(s) of various types of speech in the forum in question." Amended Compl. ¶ 84. With a healthy sprinkling throughout the Amended Complaint of "upon information and belief" and with nothing more than the use of "labels and conclusions, and a formulaic recitation of the elements of a cause of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), Plaintiff refuses to identify the policy, affirmative decision or omission in training that led to the police action. Having failed to reveal the source of this claimed official deprivation, Plaintiff's Amended Complaint cannot meet the minimum requirements for a charge against a local government and its decisionmakers and should be dismissed. *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. <u>Plaintiff Does Not Adequately Identify An Official Written Policy Tied to the Alleged Violation.</u>

Plaintiff does not contend in the Complaint or in his Opposition Brief that an unconstitutional written policy of the Commission exists concerning what actions will be taken when there is a disturbance in the security line, or, more particularly, what actions

[3] Tobey was very aware that his actions could cause delay to others in the security line as he concedes in his Amended Complaint that "[t]o avoid the possibility of causing delay for his fellow passengers, Plaintiff waited for the number of people in line to diminish before entering the area at RIC established for TSA security screening." Amended Compl. ¶ 27.

will be taken if the disturbance is the consequence of a passenger purportedly exercising his constitutional rights. As discussed in the Commission Defendants' opening brief, and, wholly ignored by Plaintiff in his Opposition, the only allegations made concerning the Commission's rules and regulations are those that suggest that the Commission has a policy in place to allow for the exercise of constitutional rights. *See* Amended Compl. ¶ 67-70. Instead, when challenged by the Commission Defendants to identify a policy that meets the test under *Monell*, Tobey reaches for the TSA "Playbook." Citing *Spell v. McDaniel*, 824 F. 2d 1380, 1385 (4th Cir. 1987), Tobey recites the proposition that "a local authority can be held liable under Section 1983 for ordinances, regulations, and official acts adopted by its governing body 'which directly command or authorize constitutional violations'....." He then claims he has met this test by alleging that TSA Management Directive 100.4 authorizes checkpoint screenings and that CRAC and TSA have entered into agreements to enforce it. He also points to the allegation that there is a "Playbook" for CRAC and TSA to act cooperatively and for CRAC to execute "upon Plays." Amended Compl. ¶¶ 17-24. From these allegations, the opposing brief leaps far to the conclusion that "[i]f the Defendant Officers followed these policies, customs, or practices, then those 'policies' authorized constitutional violations and directly led to Plaintiff's injuries." Opposition Br. p. 8.

Tobey, however, has pointed to *nothing* in the TSA Management Directive or "Playbook" that even vaguely touches on his exercise of First Amendment rights in a security line, the gravamen of his complaint.[4] He has not suggested that any such policy

[4] If he is suggesting that the Fourth Amendment gave him the right to select his manner of screening once in a security line that issue has been foreclosed. *See Gilmore v. Gonzales*, 435 F.3d 1125, 1139 (9th Cir. 2006)(holding an airline passenger has a choice

was created by CRAC nor has he articulated what policy contained in the Directive or Playbook led to his arrest. Such clear allegations are necessary to avoid holding a municipality and its officers liable simply under a theory of *respondeat superior*. Indeed, as the Fourth Circuit in *Spell* stated clearly,

> "[W]e also accept that the most relevant Supreme Court decisions now require that each of the theories be carefully controlled at critical points to avoid imposing by indirection a form of vicarious municipal liability flatly rejected by *Monell*. Those critical points are (1) identifying the specific "policy" or "custom"; (2) fairly attributing the policy and fault for its creation to the municipality; and (3) finding the necessary "affirmative link" between identified policy or custom and specific violation."

Spell, 824 F.2d at 1389. In short, Tobey cannot meet the test for municipal liability through a claim of an articulated official policy that violates his constitutional rights.

B. <u>There Was No Affirmative Decision By a Policymaker.</u>

Plaintiff makes much of the fact that, in limited circumstances, municipal liability under Section 1983 can be based upon a single incident. This is Plaintiff's primary argument, and it is neither novel nor applicable to these facts. According to *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), the seminal case upon which Plaintiff relies, in order for a municipality to be liable under Section 1983 for a single incident, the act must represent official policy and the decision to act must be made by the government's

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only to submit to a search of his person and immediate possessions as a condition to boarding or to turn around and leave the airport); *see also Corbett v. United States*, 2011 U.S. Dist. LEXIS 38531 at * 11-13 (S.D. Fl. March 2, 2011) ("Balancing the intrusion on plaintiff's privacy against the government's interest in the safety of the passengers and the public at large, the undersigned finds that the subject TSA screening procedures are reasonable and not in violation of the Fourth Amendment. Following the tragic events of September 11, 2001, Congress tasked TSA with protecting the public from violence and piracy aboard aircrafts. See 49 U.S.C. § 44903(b). It is evident that the security conducted by TSA is in furtherance of a legitimate governmental interest to deter and prevent terrorist attacks against this country's airline industry.").

authorized decisionmaker(s), those that establish governmental policy. *Pembaur*, 475 U.S. at 481.

In *Pembaur,* a doctor claimed his constitutional rights were violated when County deputies forced entry into his practice without his consent to serve capiases on his employees. Before the deputies entered the back of the practice, however, they called their supervisor, who directed them to call the assistant prosecutor, who then conferred with the County Prosecutor, who then directed the deputies to "go in and get [the witnesses]." *Id.* at 473. The Supreme Court reversed the Sixth Circuit's dismissal of the plaintiff's claims against the County, holding that the County Prosecutor was a decisionmaker responsible for establishing governmental policy and his decision in this single instance was an "official government 'policy'" sufficient to hold the municipality responsible under Section 1983. *Id.* at 481.

Unlike in *Pembaur,* Plaintiff cannot allege that the decision to remove Plaintiff from the security line was made by anyone at the Commission other than Vann and Mason, the two officers called to the scene. Plaintiff, moreover, cannot and does not allege that either Vann or Mason is in a position to establish governmental policy for the Commission. While Plaintiff does allege that the Director of Safety, Victor Williams, and Police Chief Trice were responsible for management, direction and supervision, Amended Compl. ¶¶ 8, 11, he cannot and does not allege that Williams or Trice directed the actions of Vann and Mason or even knew about them in advance. This is very different from the role of the County Prosecutor in *Pembaur* whose order created a policy out of a single incident. Quite simply, Plaintiff is missing the direction -- the "go in and get [the witnesses]" -- from a policymaker, and without it, the Commission is not liable.

The other two cases cited by Plaintiff to further the undisputed proposition that municipal liability can be predicated on a single instance, *Pachaly v. City of Lynchburg,* 897 F.2d 723 (4th Cir. 1990) and *Corbin v. Woolums,* 2008 U.S. Dist. LEXIS 93509 (May 19, 2008), support the positions taken by the Commission Defendants in their opening brief. While both the Fourth Circuit and this Court recite the *Pembaur* standard, it is the holding in each of these cases that illustrates why dismissal of Plaintiff's Section 1983 claims against the Commission Defendants is appropriate. First, concerning *Pachaly,* the Plaintiff conveniently ignores that, notwithstanding *Pembaur,* the Fourth Circuit *affirmed* the District Court's grant of summary judgment to the City of Lynchburg due to the plaintiff's failure to establish a municipal policy in violation of Section 1983. *Pachaly,* 897 F.2d at 724. The Fourth Circuit held:

> The appellant contends, and we agree, that a single act by a municipality may give rise to civil **liability if it is shown that the officials of the municipality** responsible for establishing the challenged policy **made a calculated choice** to follow the course of action deemed unconstitutional. (citing *Pembaur,* 475 U.S. 469). According to the appellant, the search of WLVA premises is evidence that the City of Lynchburg adhered to a policy condoning illegal searches and seizures. Such a position is untenable. **There is no evidence that the city pursued an impermissible policy of issuing and executing illegal search warrants or routinely conducted searches beyond the authorization of the single warrant herein.**

Pachaly, 897 F.2d at 726 (emphasis added).

Likewise, this Court in *Corbin,* held that the plaintiff's Section 1983 claim could proceed against a municipality when the plaintiff alleged *specific policies* concerning the defendant officer, which led to her alleged constitutional injury. *Corbin,* at * 12.[5] The

[5] Corbin's claims were later dismissed on summary judgment. *Corbin v. Woolums,* 2008 U.S. Dist. LEXIS 95977 (E.D. Va. November 25, 2008).

Town's alleged policies included improper and inadequate investigation into the backgrounds of officers, specifically the defendant officer, improper investigation of the citizen complaints against officers, specifically the defendant officer and inadequate training. *Id.* It was, however, the alleged policies specific to the defendant officer which saved plaintiff's complaint from dismissal, with the Court noting,"[d]ismissing the claims at this stage would be premature because [plaintiff] **sufficiently identifies specific policies and acts that pertain to [the defendant officer], and that allegedly caused her injury**." *Id.* (emphasis added).

Plaintiff's saving grace in *Corbin* is precisely what Plaintiff lacks in this case – any allegation that officers here were recidivists and that the Commission, through any policy, enabled their conduct. What Plaintiff has instead is a single incident whereupon two officers approached one passenger who had effectively stopped the security line, detained and charged him, with the creation of a public disturbance. Amended Compl. ¶¶ 25, 26, 28-36, 39, 56-58. This is hardly an act taken pursuant to any Commission policy or custom to deny constitutional rights.

C. Plaintiff Has Not Adequately Alleged Any Commission Omission That Would Support Plaintiff's Section 1983 Claim.

As the Commission Defendants have established, Plaintiff cannot allege the existence of a Commission policy that is facially unconstitutional. He also cannot allege that a Commission policymaker directed an act that resulted in any violation of his constitutional rights. Consequently, Plaintiff is left with one remaining option to hold the Commission Defendants liable under Section 1983 - to properly allege omissions by the Commission which led to the purported violation of his federal rights. In his Opposition Brief, Plaintiff attempts to do so in two ways: first, by alleging that the Commission

vested "standardless discretion" in the RIC police to determine whether there has been a constitutional violation; and second, by his allegation that the Commission failed to train RIC officers to properly respond to First Amendment protests. Opposition Br. at 9, 13. As a practical matter, Plaintiff's contention that the Commission vested "standardless discretion" in the RIC police is nothing more than a restatement of his inadequate training allegation. *See* Amended Compl. ¶ 87 ("By policy, custom or practice, Defendants . . . failed to execute or improperly delegated their respective affirmative constitutional duties . . . to properly train and supervise the officers acting under their authority . . . by vesting standardless discretion in police officers").[6]

Section 1983 claims against municipalities can, under no circumstances, be based upon a *respondeat superior* theory. When a plaintiff predicates a Section 1983 claim on the inaction or inadequacy of an official's action, "there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself." *Board of County Comm'rs v. Brown,* 520 U.S. 397, 405 (1997). For this exact reason, in order to hold a municipality liable under Section 1983 for inadequate training, the failure to train must amount to **deliberate indifference to the rights of the persons with whom the police come into contact**. *City of Canton v. Harris,* 489 U.S. 378, 388 (1989). Deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown,* 520 U.S. at 411. "Permitting cases against

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[6] Plaintiff's reliance on *Avery v. Burke County,* 660 F.2d 111, 115 (4th Cir. 1981) is misplaced. In *Avery,* the evidence presented established the defendant Board of Health denied it was "required to '**set any policies**' for the Department of Health or to make '**any rules'** to protect the public health." *Id.* Plaintiff concedes that the Commission has rules and regulations concerning the exercise of First Amendment speech. Amended Compl. ¶¶ 66-70.

cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities." *Canton,* 489 U.S. at 392.[7]

The question becomes what must a plaintiff allege to establish "deliberate indifference" in a failure to train case. As set forth in the Commission Defendants' Opening Brief, "deliberate indifference" cannot be alleged generally. *Newhard v. Borders,* 649 F. Supp. 2d 440, 446 (2009)(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"); *Milligan v. City of Newport News,* 743 F.2d 227, 230 (4th Cir. 1984) (affirming dismissal of plaintiff's Section 1983 failure to train claim by the District Court because the plaintiff failed to allege "known, widespread conduct by its employees"). A plaintiff must instead plead the conduct which shows the "deliberate indifference." The Court need look no further than the allegations put forth in *Spell,* 824 F.2d at 1392, and compare those to Plaintiff's Amended Complaint to determine that Plaintiff falls woefully short of what is required to adequately plead any failure to train by the Commission.

The complaint in *Spell* contained the following allegations concerning the defendants:

> knowledge of repeated allegations of abusive and assaultive behavior toward . . . detainees and arrestees by [City]

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[7] Permitting "failure to train" cases to go forward on a lesser standard of fault would also "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism." *Id.*

> police officers . . . repeatedly . . . fail[ed] to enforce established procedures to insure the safety of individual arrestees and detainees; . . . establish[ed] and enforce[d] quota systems for arrests and citations . . .; . . . fail[ed] to discipline . . . police officers . . . who had been found to have committed abusive and assaultive behavior toward . . . detainees and arrestees; fail[ed] and refuse[d] to competently investigate allegations of abuse and assault . . . by . . . police officers . . .; reprimand[ed], intimidate[d], demote[d], and fire[d] police officers and officials who reported acts of abuse of authority by other[s] . . .; cover[ed] up acts of misconduct and abuse of authority by individual police officers and officials; . . . reward[ed] and commend[ed] . . . police officers who displayed aggressive, abusive and assaultive behavior towards . . . detainees and arrestees; repeatedly . . . fail[ed] to adequately train and educate police officers in the use of reasonable force and proper use of authority; repeatedly fail[ed] to adequately supervise the actions of police officers and officials under their control and supervision.

Id. Because, as the Fourth Circuit noted, the evidence (much of it undisputed), substantially tracked these allegations, it allowed the verdict to stand. *Id.*

By contrast, Plaintiff alleges the following legal conclusions to support his trumped up allegations that the Commission failed to train its officers:

- Defendants . . . knowingly, willfully and intentionally, and/or carelessly and negligently failed to prevent, and continue to fail to prevent, the Defendants Officers from prohibiting or interfering with Plaintiff in the exercise of his First Amendment rights. Amended Compl. ¶ 81.
- By policy, custom or practice, Defendants unlawfully drew, or by failing to properly supervise train and instruction, permitted the other Defendants to draw, distinctions among content and/or viewpoint(s) of various types of speech in the forum in question. Amended Compl. ¶ 84.

- By implementation of the aforesaid policies, customs and/or practices, Defendants . . . were deliberately indifferent in the supervision and training of their officers and agents with respect to the proper enforcement of the disorderly conduct statute and other laws . . . . Amended Compl. ¶ 86.

In his Opposition Brief, Plaintiff argues that the Commission should have trained its officers with respect to the appropriate actions to take when a passenger decides to use the security line as the site of a First Amendment protest by taking off his clothes and refusing to move through the enhanced screening device. Opposition Br. p. 13. This, of course, begs the question of what such "training" should have encompassed to avoid First Amendment violations. The Fourth Circuit in *Spell* made clear that

> … a sufficiently close causal link must be shown between potentially inculpating training deficiency or deficiencies and [the] specific violation. This requires first that a specific deficiency rather than general laxness or ineffectiveness in training be shown. It then requires that the deficiency or deficiencies be such, given the manifest exigencies of police work, as to make occurrence of the specific violation a reasonable probability rather than a mere possibility. In common parlance, the specific deficiency or deficiencies must be such as to make the specific violation "almost bound to happen, sooner or later," rather than merely "likely to happen in the long run."

824 F.2d at 1390. In failure to train cases, there is generally a clear constitutional standard against which the training insufficiency can be measured. In *Spell*, for instance, it was excessive force. *Id*. 1383. Here, Tobey does not articulate the parameters of his right to protest in a security line and, hence, cannot delineate the boundary that the officers should be trained not to cross. Should the officers have been "trained" to allow a passenger to stand in front of the security line and refuse to move through the enhanced

device while the line built up behind him simply because the location is "unique" to his protest? *See* Amended Compl. ¶ 82. No specific deficiency is described in the Amended Complaint, which, if proved, would create an inference that a violation was "almost bound to happen." As the Supreme Court made clear in *Twombly*, a plaintiff must state a "plausible, not merely speculative, claim for relief." *Twombly*, 550 U.S. at 555. At this stage, Tobey must allege more than a possibility of liability but facts showing a "plausibility" of liability. *Id.* The alleged deficiency in training falls far, far short.

CONCLUSION

For the foregoing reasons, the Commission Defendants request that Counts One, Two, and Three be dismissed against them acting in their official capacity.

Respectfully Submitted,

CAPITAL REGION AIRPORT COMMISSION, VICTOR WILLIAMS, QUENTIN TRICE, JEFFREY KANDLER, ANTHONY MASON, and CALVIN VANN

By Counsel

/s/ Belinda D. Jones

Paul W. Jacobs, II (VSB #16815)
Henry I. Willett, III (VSB #44655)
Belinda D. Jones (VSB #72169)
CHRISTIAN & BARTON, L.L.P.
900 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
Phone: (804) 697-4100
Fax: (804) 697-4112
pjacobs@cblaw.com
hwillett@cblaw.com
bjones@cblaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 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:

James Jeffrey Knicely
KNICELY & ASSOCIATES
487 McLaws Circle
PO Box GK
Williamsburg, VA 23187
Tel: (757) 253-0026
Email: jjk@knicelylaw.com

Alan C Veronick
Anand Agneshwar
Arnold & Porter LLP (NY-NA)
399 Park Avenue
New York, NY 10022

Counsel for Aaron Tobey

/s/ Belinda D. Jones

CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
Tel: (804) 697-4100
Fax: (804) 697-4112
Email: bjones@cblaw.com

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