UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

ROBERT L. PASCO,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No.: 5:11CV87**
v.	)	
	)	
HANK ZIMMERMAN, *et als.*	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Shenandoah County Library ("Library"), by counsel, states as follows for its Brief in Support of its Motion to Dismiss.

FACTS

The plaintiff filed this action for both compensatory and punitive damages arising from Defendant Library's alleged acts and conduct in violation of the plaintiff's rights under both federal and state laws. The Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

This action arises out of the termination of the plaintiff by Defendant Board of Trustees of the Shenandoah County Library ("Board of Trustees"). The plaintiff served as the Director of Defendant Library from January 1, 2002 until October 12, 2010. Complaint ¶ 6. Defendant Library is a public entity established by the governing body of Shenandoah County pursuant to Virginia Code § 42.1-33, *et seq*. Complaint ¶ 9. Defendant Board of Trustees is also a public entity appointed by the governing body of Shenandoah County pursuant to Virginia Code § 42.1-35. Complaint ¶ 10. Defendant Hank Zimmerman ("Zimmerman") was the Chairman of the Library's Board of Trustees, and is sued in both his individual and official capacities. Complaint ¶ 7.

On the morning of October 1, 2010, Defendant James Dallas Moore ("Defendant Moore") came into the plaintiff's office at the Library. The plaintiff alleges that Defendant

Moore physically pushed him back from his computer and seized two external computer hard drives that were on the plaintiff's desk near his computer, on the opposite side of the desk from the doorway through which Defendant Moore entered the office. Complaint ¶ 17. The plaintiff alleges that one of the hard drives belonged to the Library and one of the hard drives was his personal property. Complaint ¶ 19. When Defendant Moore attempted to leave the plaintiff's office with both of the hard drives, the plaintiff attempted to retrieve the hard drives from Defendant Moore. Complaint ¶¶ 21, 23. When the plaintiff attempted to retrieve the hard drive from Defendant Moore, Defendant Moore allegedly threw both of the drives to the floor and they shattered. Complaint ¶ 24. The plaintiff further alleges that Defendant Moore's conduct destroyed the plaintiff's hard drive, rendering it useless and the files on it irretrievable. Complaint ¶ 27.

The plaintiff avers that when Defendant Zimmerman learned of the incident, he asked the plaintiff not to file a criminal complaint against Defendant Moore, and further told the plaintiff to wait until after the plaintiff had returned from a scheduled conference to make a decision about Defendant Moore's employment. Complaint ¶ 29. Defendant Moore filed a complaint to law enforcement against the plaintiff for assault and battery on October 2, 2010. A Sheriff's Deputy came to the plaintiff's home and advised him of such complaint. Complaint ¶ 30. In response, the plaintiff alleges that he, as Director of the Library responsible for personnel decisions, terminated Defendant Moore and then informed Defendant Zimmerman. Complaint ¶ 31. On or about October 12, 2010, Defendant Board of Trustees met and voted to terminate the plaintiff's employment. Complaint ¶ 36. Further, Defendant Board of Trustees reinstated Defendant Moore to his job. Complaint ¶ 37.

The Complaint contains six separate counts against Defendant Library, including both federal and state claims. Count One alleges claims under 42 U.S.C. §§ 1983 and 1988, alleging that the defendants' conduct violated clearly established statutory and constitutional rights of which a reasonable person would have known, including the right to be free from unlawful searches and seizures, and the right to protection from unlawful takings without due process under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Complaint ¶ 42. The plaintiff alleges he had both a statutory and a constitutional right to possession of the computer hard drives. Complaint ¶ 41. Further, the plaintiff alleges a deprivation of his rights, privileges, or immunities secured for him by the Constitution and other

laws, and that his actions to protect his rights resulted in the unlawful termination of his job. Complaint ¶ 43.

Count Two alleges a state claim of conversion, alleging that the defendants had no right to seize his property. Complaint ¶ 47. Count Three alleges a state violation of Virginia Computer Crimes Act. Complaint ¶ 51. Count Four alleges a state claim of assault and battery, stating that Defendant Moore's touching was in an unlawful manner without authority or permission, and that Defendant Library "ratified, adopted, and acquiesced in Defendant Moore's conduct." Complaint ¶ 55. Count Five alleges a violation of Virginia Constitution Article 1, § 11, stating that no person shall be deprived of his life, liberty, or property without due process of law. Complaint ¶ 62. Count Six alleges a wrongful discharge in violation of Virginia public policy arising out of Virginia Code §§ 18.2-152.1 through 18.2-152.15 and §§ 19.2-11.01 through 19.2-11.4, as well as the Virginia Constitution, Article 1, § 11. Complaint ¶ 74.

ARGUMENT

I. Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the factual allegations made in a complaint. *E.I. DuPont De Nemours & Co. v. Kolon Ind.*, 688 F. Supp. 2d 443, 449 (E.D. Va. 2009); and *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted by the court as true, to 'state a claim to relief that is plausible on its face.'" *E.I. DuPont De Nemours*, 688 F. Supp. 2d at 449 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). To be plausible on its face, the facts alleged must be more than a "sheer possibility that a defendant has acted unlawfully." *Id.* While the Court must accept as true all factual allegations contained in the complaint, it is not bound to accept as true the complaint's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Kloth v. Microsoft Corp.*, 444 F.3d 312, 319 (4th Cir. 2006). A motion to dismiss will be granted if it appears that the plaintiff would be entitled to no relief under any state of facts which could be proved to support his claim. *Wolford v. Budd Co.*, 149 F.R.D. 127, 129 (W.D. Va. 1993).

II. 42 U.S.C. § 1983 Claim Fails to State an Unconstitutional Policy or Custom

In Count One of the Complaint, the plaintiff purports to allege a violation of 42 U.S.C. § 1983 against Defendant Library, stating: "Because Defendant Moore and the other Defendants had no right to seize Plaintiff's computer hard-drive, because the seizure of Plaintiff's property was unreasonable and because Plaintiff objected to the seizure, Plaintiff had both a statutory right and a constitutional right to possession of the computer hard-drive." Complaint ¶ 41. In essence, the Plaintiff alleges an unlawful search and seizure and the right to protection from unlawful taking without due process of law under the Fourth, Fifth, and Fourteenth Amendments. Complaint ¶ 42. However, the plaintiff fails to state an actionable claim against Defendant Library.

The seminal case of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) established municipal liability in an action under § 1983 for unconstitutional actions by a municipal employee below the policy-making level. Under *Monell*, counties, like other local government entities, can be sued for violations of constitutional rights under 42 U.S.C. § 1983; however, a plaintiff must show that the violation of his constitutional rights resulted from a municipal policy or custom. *Monell*, 436. U.S. at 690. Moreover, the *Monell* Court specifically concluded that a municipality cannot be held liable solely because it employs a tortfeasor. *Id.* at 691. The Supreme Court made it clear that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.*[1] Rather, a local government as an entity is only responsible under § 1983 when the local government's policy or custom, "whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy," causes the injury. *Id.* at 694; *see also Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (municipalities cannot be held liable under a theory of *respondeat superior* for the constitutional violations of their employees acting within the scope of their employment).

Accordingly, a plaintiff alleging a § 1983 action must therefore adequately plead and ultimately prove three distinct elements. First, the plaintiff must prove the existence of an official policy or custom. Second, the plaintiff must show that such official policy or custom is fairly attributable to the municipality. Third, the plaintiff must show that the official policy or

[1] Further, the Fourth Circuit has set a high standard to guard against back door *respondeat suprerior* claims, stating that "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and caustion must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Carter v. City of Danville*, 164 F.3d 215, 218 (4th Cir. 1999) (citations omitted)).

custom proximately caused the underlying constitutional violation. *Jordan ex. rel. Jordan v. Jackson,* 15 F.3d 333, 338 (4th Cir. 1994). These requirements apply not only in actions against local governments, but also in actions against individually named municipal agents sued in their official capacities. *Monell*, 436 U.S. at 690 n. 55. In this case, the plaintiff has failed to sufficiently allege any of the three required elements. The Complaint is devoid of any mention of or reference to an official policy or custom. The plaintiff's § 1983 claim rests solely on Defendant Moore's alleged unlawful seizure of the plaintiff's hard drive. The plaintiff fails to make any allegations in his Complaint in regards to the existence of Defendant Library's policy, custom, or practice; therefore, he fails to plead a viable claim under *Monell. See also Semple v. City of Moundsville,* 195 F.3d 708, 712 (4th Cir. 1999). Defendant Moore's alleged actions in grabbing and breaking the plaintiff's property is not fairly attributable to Defendant Library. Moreover, no official policy or custom of Defendant Library proximately caused the underlying alleged constitutional violations under the Fourth and/or Fifth Amendments.

Municipal or local government policy is typically found in ordinances and regulations, though it can also be found in formal or informal *ad hoc* policies, choices, or decisions of government officials authorized to make and implement government policy. *Spell,* 824 F.2d at 1385. The Fourth Circuit went on to say that "'[p]olicy' in this context implies most obviously and narrowly a 'course of action consciously chosen from among various alternatives' respecting basic governmental function, as opposed to episodic exercises of discretion in the operational details of government." *Id.* at 1386 (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); and citing *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 1299 & n. 9 (1986)). Thus, in finding liability under § 1983, official policy is used in the relatively narrow sense of discrete, consciously chosen courses of action by policymakers. *Id.* In this case, the plaintiff cites no official policy or facts comprising consciously chosen courses of action by the policymaking Defendant Board of Trustees. Custom or usage may also serve as a basis for the imposition of local government liability. *Monell*, 436 U.S. at 690-91. "'Custom or usage' may be found in 'persistent and widespread . . . practices of [municipal] officials [which] [a]lthough not authorized by written law, [are] so permanent and wellsettled as to [have] the force of law.'" *Spell*, 824 F.2d at 1386 (quoting *Monell*, 436 U.S. 658 at 691 (internal citation and quotation omitted)).

Here, the facts and allegations cannot support attribution of a policy of Defendant Library. To be fairly attributed to a local government, a policy must be made directly by its governing body, or by a municipal agency, or an official having final authority to establish and implement the relevant policy. *Id.* at 1387 (citing *Monell,* 436 U.S. at 694 (policy of City Board of Education and Department of Social Services); and *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 1300-01 (1986) (policy decision by County Prosecutor). Defendant Moore's actions allegedly give rise to the § 1983 action. Defendant Moore is neither a lawmaker nor an official having final authority to establish and implement the relevant policy. Likewise, Defendant Moore's actions cannot give rise to attribution of custom or use. Custom or use requires "'persistent and widespread . . . practices'" by local government agents and employees that may be attributed to the local government "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." *Spell*, 824 F.2d at 1387 (citing *Bennett v. Slidell*, 728 F.2d 762, 768 (5th Cir. 1984)). The independent and one time actions of Defendant Moore are not so permanent and well-settled to have the force of law. There is no allegation in the Complaint that the actions of Defendant Moore have become customary among the Library employees. Moreover, an isolated incident or a meager history of isolated incidents is insufficient to prove the existence of an official policy or custom. *Doe v. County of Fairfax*, 225 F. 3d 440, 456 (4th Cir. 2000) (citing *Carter v. Morris*, 164 F. 3d 215, 220 (4th Cir. 1999) (no liability under § 1983 on plaintiff's assertion that the City of Danville remained deliberately indifferent to or has actively condoned a long and widespread history of violations of the federal rights of its citizens on the part of the police department)). Even liberally interpreting the Complaint to infer allegations of custom or use, without supporting facts, it is legally insufficient. *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993) ("The mere assertion, however, that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference.").

Further, Defendant Library cannot be subject to liability under 42 U.S.C. § 1983 even if the plaintiff is able to identify conduct attributable to it. Rather, "'[t]he plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Riddick v. School Bd. of City of Portsmouth*, 238 F.3d 518, 524 (4th Cir. 2000) (quoting *Board of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404

(1997)). The alleged unconstitutional acts were committed by Defendant Moore. Moreover, these acts were committed before any actions alleged by Defendant Board of Trustees. There is no allegation that Defendant Board of Trustees was deliberately indifferent to any actions of Defendant Moore that led to or caused Defendant Moore's alleged actions on October 1, 2010. Nor is there any allegation that Defendant Board of Trustees was deliberately indifferent to any complaints or concerns of the plaintiff that was the moving force behind the plaintiff's injury. *See Jones v. Wellham*, 104 F.3d 620, 627 (4th Cir. 1997) (plaintiff's allegations that County's failure to terminate officer in 1979 constituted deliberate indifference to her civil rights and led to rape by officer in 1990 were rejected by Fourth Circuit, holding that "only decisions taken with deliberate indifference to the potential consequences of known risks suffices to impose municipal liability on the basis that such decisions constituted official County 'policy.'").

In reviewing the Complaint as a whole, it is clear that the plaintiff has not and cannot state any underlying constitutional violations sufficient to impose liability on Defendant Library. The plaintiff does not cite any policy or custom that could have proximately caused any alleged constitutional violations. Nor does the plaintiff allege, and the facts do not support, that through its deliberate conduct, Defendant Board of Trustees was the moving force behind his alleged injuries. Rather, the plaintiff alleges that Defendant Moore's unconstitutional actions caused his injuries. As such, the plaintiff fails to state an actionable claim under 42 U.S.C. §§ 1983 and 1988 against Defendant Library, and Count One of the Complaint should be dismissed against Defendant Library.

III. State Claims Against Defendant Library Invalid

Counts Two, Three, and Four of the Complaint allege state tort claims for conversion, assault and battery, and violation of Virginia Computer Crimes Act, 18.2-152.12. In Virginia, as a general rule, the sovereign is immune from actions at law for damages. *Hinchey v. Ogden*, 226 Va. 234 (1983); *Ericksen v. Anderson*, 195 Va. 655, 657 (1954) (State is immune from liability for the tortious acts of its servants, agents and employees, in the absence of express constitutional or statutory provisions making it liable.). Further, it is clear that this protection extends to municipalities and local governments in the exercise of their governmental functions. *Hoggard v. City of Richmond*, 172 Va. 145 (1939). Here, the establishment and operation of a County Library is a government function. Moreover, immunity under the Eleventh Amendment has not been waived by the Virginia Tort Claims Act, as that Code section only waives sovereign

immunity provided the lawsuit is filed in state court. *Reynolds v. City of Richmond*, 574 F. Supp. 90, 91 (E.D. Va. 1983) (waiver under Virginia Code § 8.01-195.1 may not be properly construed as waiver of immunity under the Eleventh Amendment to the same or similar suits in federal court) (citations omitted); and *see Carter v. City of Danville*, 164 F.3d 215, 221 (4th Cir. 1999) (plaintiff's state tort claims of assault, battery, and false imprisonment against the City are barred by sovereign immunity). As such, these state tort claims allegedly committed by Defendant Moore should be dismissed as to Defendant Library.

Even absent sovereign immunity, Defendant Library is not liable for the state tort claims allegedly committed by Defendant Moore. First, under Virginia law, "a person is liable for conversion for the wrongful exercise or assumption of authority over another's goods, depriving the owner of their possession, or any act of dominion wrongfully asserted over property in denial of, or inconsistent with, the owner's rights." *E.I. DuPont De Nemours & Co. v. Kolon Ind.*, 688 F. Supp. 2d 443, 454 (E.D. Va. 2009) (quoting *Simmons v. Miller*, 261 Va. 561, 582 (2001)). The plaintiff has failed to state how Defendant Library deprived the plaintiff of possession of his property or asserted any act of dominion over the plaintiff's property in denial or inconsistent with his rights.

The Complaint alleges that only Defendant Moore seized the hard drive. Defendant Moore did not in fact leave the plaintiff's office with the hard drive. Nor did Defendant Moore maintain possession of the hard drive. While Defendant Moore attempted to leave the plaintiff's office with allegedly the intention of seizing the hard drives, Defendant Moore threw both of the drives to the floor and they allegedly shattered. Complaint ¶¶ 20, 21, and 24. Nothing else in the Complaint sets forth any additional facts supporting a claim for conversion against Defendant Library. All of the facts alleged by the plaintiff focus solely on the actions of Defendant Moore. There are no facts or actions alleged by the plaintiff supporting that Defendant Library wrongfully exercised or assumed authority over the plaintiff's goods, or deprived the plaintiff of possession of his property, or any act by Defendant Library wherein it wrongfully asserted dominion over the plaintiff's property in denial of, or inconsistent with, the plaintiff's rights.

Further, Defendant Library is not liable for Defendant Moore's allegedly illegal behavior. The allegations do not give rise to liability by Defendant Library for Defendant Moore's actions based on *respondeat superior*. The allegations do not sufficiently state that Defendant Moore's actions were committed within the scope of his employment, though they were committed during

the course of his employment. First, Defendant Moore's alleged actions in grabbing and throwing the plaintiff's hard drive to the floor was not something fairly and naturally incident to Defendants Library's or Board of Trustees' business. *See United Brotherhood v. Humphreys*, 203 Va. 781, 787 (1962). Second, Defendant Moore's actions were not done with a view to further Defendants Library's or Board of Trustees' interests, but arose wholly from some external, independent, and personal motive on the part of Defendant Moore. *See Id.* More importantly, the plaintiff admits that Defendant Moore's actions and "conduct was initially undertaken for personal reasons, and did not arise out of his employment, although such conduct occurred during the course of his employment." Complaint ¶ 54. The plaintiff merely makes a blanket assertion that the "Defendants had no right to seize Plaintiff's property" (Complaint ¶ 46); however, the facts alleged only show that Defendant Moore, not Defendant Library, allegedly illegally seized the plaintiff's property. Thus, the plaintiff's conversion claim fails against Defendant Library.

Second, the plaintiff incorrectly applies the provisions of the Virginia Computer Crimes Act. The plaintiff simply alleges that the defendants have violated Virginia Code §§ 18.2-152.1 through 18.2-152.15; however, application of the facts alleged in the Complaint to the Act demonstrates that, in fact, the majority of those Code provisions are not triggered. At best, the plaintiff arguably may have alleged sufficient facts to infer a violation of Virginia Code § 18.2-152.4(A)(3) in that computer data may have been allegedly altered, disabled, or erased when Defendant Moore threw the plaintiff's hard drive to the floor. However, none of the allegations show that Defendant Library violated Virginia Code § 18.2-152.4. There is no allegation that Defendant Library altered, disabled, or erased the plaintiff's computer data. The plaintiff's unsupported allegation that "Defendants have, without authorization, unlawfully engaged in computer trespass, permanently disabled Plaintiff's computer data, seized, obtained, used, deprived Plaintiff of, and destroyed, his computer files and data" (Complaint ¶ 51), is legally insufficient to state a claim for violation of the Virginia Computer Crimes Act against Defendant Board of Trustees.

Third, the claim of assault and battery is also based solely on the actions of Defendant Moore. Complaint ¶ 54. Moreover, the plaintiff specifically states that the unlawful touching by Defendant Moore "did not arise out of his employment, although such conduct occurred during the course of his employment." Complaint ¶ 54. As such, the allegations are insufficient to

support a claim against Defendant Library under the doctrine of *respondeat superior*. Generally, an assault and battery by an employee is not within the scope of employment. Thus, based on the plaintiff's allegations, as a matter of law, Defendant Moore was not acting within the scope of his employment, thereby absolving Defendant Library from any liability. *See Kensington Assocs. v. West*, 234 Va. 430 (1987) (employee who accidentally shot third party resulting from horseplay not acting within the scope of his employment as a matter of law); *Abernathy v. Romaczyk*, 202 Va. 328 (1960) (as a matter of law employee not acting within scope of employment when he assaulted third party over who caused traffic accident); and *Cary v. Hotel Rueger, Inc., et al.*, 195 Va. 980 (1984) (assault by employee over money owed to the victim not within scope of employment as a matter of law).[2]

Again, the plaintiff's bare allegations that by reinstating Defendant Moore to his job and by terminating the plaintiff, Defendant Library "adopted, ratified and acquiesced in Defendant Moore's illegal behavior" is legally insufficient to state a claim for relief against Defendant Library for assault and battery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

For all of these reasons, Counts Two, Three, and Four of the Complaint should be dismissed against Defendant Library.

IV. Defendant Library Did Not Violate Virginia Constitution

Count Five of the Complaint states a general averment that the Defendants deprived the plaintiff of his property without due process of law (Complaint ¶ 62), but alleges no facts specific or attributable to Defendant Library. All of the facts and allegations center on the actions of Defendant Moore in seizing and destroying the plaintiff's hard drive. The allegations do not state, nor do they support, a conclusion that Defendant Library violated any article or provision of the Virginia Constitution. As such, Count Five of the Complaint should be dismissed against Defendant Library.

V. Termination Not in Violation of Virginia Public Policy

Count Six of the Complaint alleges that the plaintiff was terminated in violation of Virginia public policy, based on alleged violations of the Crime Victim and Witness Rights Act,

---

[2] Additionally, in Virginia, there is no duty or reasonable care imposed upon employer in the supervision of its employees. *See Chesapeake and Potomac Tel. Co. v. Dowdy,* 235 Va. 55 (1998). Further, the Complaint fails to state facts sufficient to show Defendant Library owed a duty to protect the plaintiff from the alleged assault and battery. *See Wright v. Webb,* 234 Va. 527 (1987).

Virginia Code §§ 19.2-11.01-19.2-11.4, Virginia Computer Crimes Act §§ 18.2-152.1 through 18.2-152.15, and the Virginia Constitution, Article 1, § 11. The plaintiff fails to state a claim against Defendant Library for wrongful termination based on the public policy exception to at-will employment.

In *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985), the Virginia Supreme Court first recognized an exception to the employment at-will doctrine based on an employer's violation of public policy in the termination of an employee. Since *Bowman*, the Supreme Court of Virginia has considered numerous cases claiming a public policy exception to the employment at-will doctrine, and has consistently declined the invitation to broaden this exception. Rather, the Supreme Court of Virginia considers the public policy exception to at-will employment termination to be a narrow exception, holding that while virtually every statute expresses a public policy of some sort, "termination of an employee in violation of the policy underlying any one [statute] does not automatically give rise to a common law cause of action for wrongful discharge." *City of Virginia Beach v. Harris*, 259 Va. 220, 232 (2000). In only three types of cases has the Virginia Supreme Court held that the claims were sufficient to constitute a common law action for wrongful discharge under the public policy exception: 1. an employer violated a policy enabling the exercise of an employee statutorily created right (*Bowman v. State Bank of Keysville*, *supra*); 2. where the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protections enunciated by the public policy (*Lockhart v. Commonwealth Education System Corporation*, 247 Va. 98 (1994) (unlawful discharge based on gender)); and 3. where the discharge was based on the employee's refusal to engage in a criminal act (*Mitchem v. Counts*, 259 Va. 179 (2000)). Here, the common law action is not based on a public policy expressly set out in the statute as it was in *Lockhart*. Nor does the plaintiff claim that he is entitled to maintain a common law action because he was terminated for refusal to engage in criminal acts, as in *Mitchem*. Rather, the plaintiff attempts to bootstrap a public policy exception to employment at-will based on the Virginia Computer Crimes Act, Crime Victim and Witness Rights Act, and/or the Virginia Constitution, in an attempt to make out a *Bowman* exception.

The plaintiff's use of the criminal statutes cited in the Complaint is without merit, as the allegations, at best, show that Defendant Moore allegedly engaged in illegal conduct and do not show that the plaintiff engaged in protected activity for which he was fired. This case is similar

to *Rowan v. Tractor Supply Company*, 256 Va. 209 (2002). In *Rowan*, the plaintiff argued that by virtue of Virginia Code § 18.2-460, the obstruction of justice statute, she was vested with a right to be free from intimidation with a regard to her pressing criminal charges and participating in the legal processes connected to those charges. *Rowan*, 263 Va. at 215. However, the Virginia Supreme Court found that, unlike in *Bowman*, Virginia Code § 18.2-460 does not grant a person involved in a criminal prosecution any specific right; therefore, there exists no corresponding public policy necessary to protect the right. *Id.* As such, the Court held that the defendant's action in discharging the plaintiff "did not violate a right granted to her but rather violated a criminal statute enacted to ensure that the administration of justice is not subverted." *Id.* The same analysis applies here. Even assuming Defendant Library somehow violated the Crime Victim and Witness Rights Act, Virginia Code §§ 19.2-11.01-19.2-11.4, or the Virginia Computer Crimes Act, Virginia Code §§ 18.2-152.1 through 18.2-152.15, none of these provisions grant the plaintiff a specific right; thus, there is no corresponding public policy necessary to protect that right.

Second, the Virginia Constitution does not create a property interest in the plaintiff's employment. *See Jenkins v. Weatherholtz*, 909 F. 2d 105 (4th Cir. 1990) (as an at-will employee, discharged deputy sheriff has no civil rights action for deprivation of due process because he had no property right in continued employment under Virginia law). In *Jenkins*, the Fourth Circuit stated "[a] local government employee serving 'at the will and pleasure' of the government employer has no legitimate expectancy of continued employment and thus has no protectable property interest." *Jenkins,* 909 F. 2d at 107 (citations omitted); *see also City of Virginia Beach v. Harris*, 259 Va. 220, 232 (2000) (finding no wrongful discharge where the plaintiff was terminated for obtaining criminal warrants charging a superior office with obstruction of justice because the plaintiff officer was not a member of the public for whose benefit the statute was enacted). In this case, there are no facts to support a violation of the Virginia Constitution, Article 1, § 11 by Defendant Library. The plaintiff does not allege there was an employment contract for a specific term. Taken as a whole, the Complaint leaves no other conclusion that the plaintiff served at the will of Defendant Library. As such, the plaintiff has no action for wrongful termination based on violation of due process because the plaintiff had no property right in continued employment with Defendant Library under Virginia law.

Accordingly, the Complaint fails to state a valid *Bowman* claim for wrongful discharge in violation of Virginia public policy and should be dismissed.

VI. Punitive Damages

Punitive damages are not recoverable against Defendant Library for the alleged actions of Defendant Moore. Punitive damages cannot be awarded against an employer for the actions of an employee unless the employer participated in, ratified, or authorized the wrongful acts of its employees. *Freeman v. Sproles*, 204 Va. 353, 358 (1963). The plaintiff does not allege that Defendant Library participated in any of the alleged acts. Moreover, the plaintiff fails to allege sufficient facts to support a finding that Defendant Library ratified or authorized the alleged wrongful acts of Defendant Moore. Without facts or elaboration, the plaintiff alleges that by reinstating Defendant Moore to his job and by terminating the plaintiff, Defendant Library "adopted, ratified and acquiesced in Defendant Moore's illegal behavior." The Court should not accept this statement as legally sufficient to state a claim for punitive damages against Defendant Library. *Doe v. Bruton Parish Church, et al.*, 42 Va. Cir. 467, 472 (1997) (demurrer to punitive damages claim sustained as court not bound by plaintiff's legal conclusion that the church ratified the alleged conduct).[3]

CONCLUSION

The Complaint fails to state a claim upon which relief can be granted against Defendant Library and should be dismissed as against this defendant in its entirety. First, the Complaint fails to correctly allege a § 1983 claim against Defendant Library, a local government entity. Nor can the plaintiff fix this defect through amendment of the Complaint based on the facts alleged. The plaintiff cites no written or formal unconstitutional policy that did or would have caused his injury. Nor does the plaintiff assert that Defendant Moore's alleged illegal search and seizure was the result of affirmative decisions of individual policymaking officials. Further, nothing in the Complaint suggests that Defendant Moore's allegedly illegal actions were caused by persistent and widespread practice such that Defendant Library could be liable under § 1983. Moreover, nothing in the Complaint even infers that Defendant Library's deliberate indifference was the moving force behind Defendant Moore's alleged unconstitutional acts. Rather, Defendant Moore's conduct was an isolated, one-time, unprecedented incident arising out of a

[3] Additionally, the Complaint contains no facts, merely unsupported conclusions and allegations, of willful and wanton conduct, conscious and/or reckless disregard for the plaintiff's rights, and malice and ill-will and spite; therefore, such claims are insufficient as a matter of law to support an award for punitive damages.

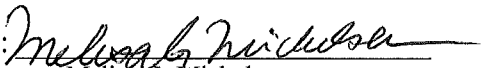
personal dispute between the plaintiff and Defendant Moore. As such, there can be no 42 U.S.C. § 1983 claim against Defendant Library.

Second, there is no liability on the part of Defendant Library for the state tort claims alleged by the plaintiff. Third, the Complaint fails to state any violations of the Virginia Constitution committed by Defendant Library. Fourth, the plaintiff fails to properly assert a *Bowman* public policy exception to the at-will employment doctrine, as the common law action is not based on a public policy expressly set out in the statute, is not a common law action for wrongful termination for refusal to engage in criminal acts, and the Complaint does not show that the plaintiff engaged in protected activity for which he was fired. Finally, as the plaintiff has failed to state a valid 42 U.S.C. § 1983 claim against Defendant Library, there is no compelling reasons or circumstances that justify this Court's retention of the state law claims alleged.

Wherefore, Defendant Library, by counsel, respectfully requests that based on all of the reasons set forth in this Memorandum in Support of the Motion to Dismiss, and for the reasons to be argued at the hearing of this matter, the Court grant Defendant Moore's Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismiss this matter with prejudice in its entirety as against it, and for any further relief deemed necessary and proper.

SHENANDOAH COUNTY LIBRARY
By Counsel

LITTEN & SIPE L.L.P.

By: 
Melisa G. Michelsen
J. Jay Litten

Virginia State Bar Nos. 40001and 24567
410 Neff Avenue
Harrisonburg, Virginia 22801-3434
Telephone (540) 434-5353
Facsimile (540) 434-6069

Counsel for Defendants Hank Zimmerman, Board of Trustees of the Shenandoah County Library, and Shenandoah County Library.

CERTIFICATE

I certify that on the 22nd day of December, 2011, I electronically filed the foregoing Memorandum in Support of Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Timothy E. Cupp, Esq., Cupp & Cupp, P.C., 1951-D Evelyn Byrd Avenue, P.O. Box 589, Harrisonburg, Virginia 22803, Cupplaw@comcast.net, Counsel for Plaintiff; and to Julia B. Judkins, Esq., Bancroft, McGavin, Horvath, & Judkins, P.C., 3920 University Drive, Fairfax, Virginia 22030, Jjudkins@bmhjlaw.com, Counsel for Defendant James Dallas Moore.

Counsel for Defendants Hank Zimmerman, Board of Trustees of the Shenandoah County Library, and Shenandoah County Library.