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

ROBERT L. PASCO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:11cv00087-MFU**
	)	
HANK ZIMMERMAN, *et al.*,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT MOORE'S MOTIONS TO DISMISS UNDER RULE 12(b)(6) and 12(b)(1)

The plaintiff Robert L. Pasco ("Pasco"), by counsel, and pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, submits his Memorandum in Opposition to Defendant Moore's Motion to Dismiss, and shows the Court as follows:

I. Introduction and Facts.

The defendant Moore asserts in his Motion to Dismiss that he did not engage in state action or act under color of state law for purposes of liability under 42 U.S.C. § 1983, and that accordingly, there are no federal claims against him. He then asserts that he is entitled to a dismissal of all of the claims, since, with the dismissal of the federal claims, the court lacks subject matter jurisdiction. Pasco opposes Moore's Motion because he has adequately alleged that Defendant Moore, as well as the other Defendants, engaged in state action or acted under color or pretense of state law, and the Court has subject matter jurisdiction of the federal and the supplemental state claims. The Complaint includes, among others, the following facts.

Pasco served as the Director of the Shenandoah County Library from January 1, 2002 until he was terminated unlawfully from his job on October 12, 2010. Defendant Hank Zimmerman was

the Chairman of the Library's Board of Directors. Zimmerman's actions complained of in the Complaint were taken in the course and scope of his position with the Defendant Board of Trustees, with the Board of Trustees' actual or apparent authority and/or with Board of Trustees' knowledge and acquiescence. Dallas Moore was employed by Defendant Board of Trustees as the technology director of the Shenandoah County Library. Moore's actions complained of in the Complaint were taken in the course and scope of his position with the Defendant Board of Trustees. Complaint, ¶¶ 5-8. The Defendant Shenandoah County Library is a public entity under the authority of Virginia Code Ann. § 42.1-33, *et seq*., as amended. By Virginia statute, funding for the Library is by a special levy and constitutes a separate fund. *Id.* Moreover, the Defendant Board is authorized by Virginia statute to manage and control the operations of the Library, and further is authorized to receive donations and bequests for the establishment and maintenance of the Library. Complaint ¶¶ 9-10. Pasco was the Library Director for almost nine years, substantially increasing services to the public. Pasco held a legitimate expectation that he would not be terminated from his employment absent just cause. Id., ¶¶ 12-13.

Moore was a disciplinary problem at the Library in 2010. He had taken an unnatural interest in another Library employee, Keith Brown, causing Brown to complain of Moore's attention. Moore also had performance deficiencies, including tardiness which had become a habit. *Id*., ¶¶ 14-15. On the morning of October 1, 2010, Moore was late to work and Pasco needed information for a monthly report. Pasco, who was the head personnel officer of the Library (Complaint, ¶ 31), reprimanded Moore and engaged in other discussions with him in the performance of his duties. *Id*., ¶ 15. A personnel dispute with Moore ensued involving Moore attempting to insinuate himself into personnel matters involving Brown. *Id*., ¶ 16.

Moore wanted Pasco fired from Pasco's Director position, which made Pasco Moore's supervisor. Moore assaulted and battered Pasco later on the morning of October 1, 2010 in order to seize two computer hard-drives from Pasco's office. *Id*., ¶¶ 21; 16-20. One of the hard-drives belonged to Pasco, and the other contained confidential data relating to employees. *Id*., ¶ 18. Moore was going to take the computer hard drives to the Shenandoah County Administrator to accomplish his plan of getting Pasco fired. *Id*., ¶ 21. He was going to use information he falsely claimed was on the hard-drives to assist with his plan. Id. A reasonable inference is that Moore purportedly had such information because of his position as technology director. Moore informed Defendant Zimmerman of this plan to go to the County Administrator in order to get Pasco fired using information he claimed was on the hard-drives. *Id*. Pasco let Moore know that he was seizing Pasco's property, and Pasco then attempted to retrieve his property and the Library's property from Moore. *Id*., ¶ 23. Instead of relinquishing the property, Moore threw both hard-drives to the ground, shattering them and destroying Pasco's hard-drive so that the files on it were useless and irretrievable. *Id*., 24-27.

Moore also shared with Zimmerman that Moore was going to file a criminal assault and battery charge against Pasco, but Zimmerman did not share this information with Pasco. Instead, Zimmerman asked Pasco agree to try to mediate the situation between him and Moore. Pasco agreed, until he was confronted the next day by a Sheriff's deputy who advised Pasco of Moore's criminal complaint against him based on assault and battery. *Id*., ¶ 30. Because of Moore's behavior, Pasco's concern that Moore may harm Pasco and others, and Moore's false statements to law enforcement, as well as to Zimmerman, Pasco terminated Moore's employment in accordance with his authority as the Library Director. *Id*., ¶¶ 30-31. Moore filed a grievance with no content other than to seek reinstatement, but he did not appear on October 7, 2010, the date scheduled, to present his position and accordingly Pasco denied the grievance as he was authorized to do. *Id*., ¶¶ 32-33. Another version of Moore's grievance was not shown to Pasco. *Id*., ¶ 32.

Even before Moore's scheduled October 7, 2010 grievance hearing, Zimmerman obtained commitments from other members of the Boart of Trustees to terminate Pasco's employment, with full knowledge that Moore had assaulted and battered Pasco and of the illegal seizure and destruction of Pasco's and the Library's property. *Id*., ¶ 35. Zimmerman's plan reached fruition on October 7, 2010 when the Board met at the home of a member and voted to terminate Pasco from his public employment. *Id*., ¶ 36. Moore was then reinstated to his job. The Defendants Zimmerman, Board of Trustees and Shenandoah County Library adopted, ratified and acquiesced in Defendant Moore's illegal behavior as the acts of all Defendants. *Id*., ¶ 37.

The Complaint sets forth other facts which may be relevant to the Motion to Dismiss.

II. Rule 12(b)(6) Standard

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). That Rule does not require "detailed factual allegations." See, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Moreover, there is no heightened pleading requirement for §1983 claims such as are brought in this Complaint. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993). In *Leatherman* Chief Justice Rehnquist, writing for a unanimous Court, stated that the Fifth Circuit's heightened-pleading requirement in local government failure to train cases was "impossible to square" with the notice pleading standard of Rule 8(a) of the Federal Rules of Civil Procedure.

The role of a 12(b)(6) motion is to test plausibility when determining whether a plaintiff has stated a claim for which relief may be granted. Rule 12(b)(6) simply gives a district judge a tool to screen out implausible cases. To survive a Rule 12(b)(6) motion, a complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Coleman v. Md. Ct. of Apps.*, 626 F.3d 187, 190 (4th Cir. 2010).

The plausibility requirement is met where the facts in support of a pleading allow the Court to reasonably infer that the Defendant is liable for the conduct of which the plaintiff complains. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). That standard is not a probability requirement, but merely asks something more than a mere possibility. See also, *Jacobsen v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 131760, **1-2 (W.D. Va. 2010)(Moon, J.).

Thus, Rule 12(b)(6) simply calls for enough allegations to raise a plausible claim and a reasonable expectation that discovery will reveal evidence supporting the elements of the claim. *Speaker v. United States HHS CDC*, 623 F.3d 1371, 1380 (11th Cir. 2010); see also, *Conrad v. Farmers and Merchants Bank*, 762 F. Supp. 2d 843, 846, n. 5 (W.D. Va. 2011) (the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'").

III. Pasco Adequately Alleged Facts Establishing a Federal Claim Against Defendant Moore Who Was Engaged in State Action or Acting Under Color or Pretense of State Law

Congress "intended to give a broad remedy for violations of federally protected civil rights" when it enacted 42 U.S.C. § 1983. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 685 (1978). "If an individual is possessed with state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Griffin v. Maryland*, 378 U.S. 130, 135 (1964). In fact, a defendant acts under color of law for purposes of 42 U.S.C. § 1983 when he abuses the position given to him by the governmental entity. *United States v. Classic*, 313 U.S. 299 (1941).

"[S]tate employment is generally sufficient to render the defendant a state actor. . ." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935-936 n. 18 (1982). For purposes of Defendant Moore's motion to dismiss, then, the allegation of Defendant Moore's public employment is sufficient to establish that his acts are those of the public entity and under color or pretense of state law.

While it is true, as Defendant Moore notes, that § 1983 excludes merely private conduct (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)), the conduct alleged in the case at bar is not "merely private." Moreover, there is no simple line drawn between the state and private conduct. See *Brentwood Acad. V. Tennessee Secondary Sch. Athletics Assn.*, 531 U.S. 288, 295 (2001). The Fourth Circuit has addressed the issue of private versus state action for purposes of § 1983 liability in *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003), where it reversed the grant of summary judgment by the District Court on the issue of whether the defendants had acted under color of state law. The Court stated:

> *Section 1983* therefore includes within its scope apparently private actions which have a "sufficiently close nexus" with the State to be "fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). "There is no specific formula for defining state action" under this standard. *Hicks v. Southern Maryland Health Sys. Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984) (quoting *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)*)*. Rather, the question of what is fairly attributable to the State "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Academy, 531 U.S. at 295*.

Id. at 523. In *Rossignol*, the Court found acts of sheriff's deputies to be state action when, while off duty, wearing plainclothes and driving their personal vehicles, they bought up all of a publishing company's newspapers in an attempt to suppress criticism of the sheriff and other governmental officials. *Id*. The Court looked to the totality of the circumstances and noted that the defendants' motivation was to retaliate against those who questioned their fitness for public

office and the conduct of their official duties. The following quote from *Rossignol* underscores its applicability to the case at bar.

> Ultimately, defendants were driven by a desire to retaliate against Rossignol's past criticism of their fitness for office and to censor future criticism along the same lines. This link between the seizure's purpose and defendants' official roles helps demonstrate that defendants' actions bore a "sufficiently close nexus" with the States to be "fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. at 351.

Rossignol v. Voorhaar, 316 F.3d at 525. In this case, the link is direct between Defendant Moore's purpose in the unlawful seizure (having Pasco terminated, which was communicated directly by Moore to Zimmerman, and sanctioned by Zimmerman and ultimately the other Defendants), and the Defendants' official roles. In *Rossignol*, the Fourth Circuit also noted other matters that "reinforced" its conviction that defendants acted under color of state law, including the fact that the Sheriff sanctioned the off-duty deputies' conduct in seizing the newspapers. This is exactly what the other defendants, including Zimmerman, the Board of Trustees and the Library, did in the case before this court. Through their actions, they gave "significant encouragement" to Defendant Moore, and adopted and ratified his illegal conduct as their own, knowing that he had assaulted and battered Pasco, and had seized and destroyed Pasco's property and damaged the Library's property. Complaint at ¶ 35. See *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir. 2001). The adoption and ratification of Moore's conduct is clear from his reinstatement and the termination of Pasco's employment.

Defendant Moore's conduct occurred at work and during the regular work-day. The initial dispute related directly to the performance of Defendant Moore's work as the Library's information technology director. His public employment was involved directly. He further was engaged in conduct relating to directly to Pasco's employment. All of the conduct surrounded and related to the public employment of both men and to the operation of the Library. Moreover,

the information Moore purportedly sought and intended on using against Pasco through the seizure of the hard-drives was information Zimmerman and the Board of Trustees reasonably would have expected Moore to have known given his position as technology director. Since Pasco had a legitimate expectation that he would not be terminated from his job absent just cause, but he was terminated without just cause nonetheless, it is reasonable to infer that the Defendants Zimmerman, Board and Library adopted Defendant Moore's conduct as their own, and ratified it.

Additionally, Pasco was authorized to make personnel decisions and to respond to grievances in relation to Moore's employment. He did so. None of the allegations of the Complaint support the Defendant Moore's contention that, as a matter of law, Moore's conduct in seizing Pasco's property in violation of the Fourth, Fifth and Fourteenth Amendments was merely private. In another context, the Fourth Circuit has recognized state action even in a situation in which a law enforcement officer acted after hours, out of uniform and driving his own vehicle in *Revene v. Charles County Com'rs.*, 882 F.2d 870 (4th Cir. 1989).

The Defendant Moore cites *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968) for the proposition that "acts committed by a police officer . . . while on duty and in uniform are not under color of state law unless they are in some way 'related to the performance of police duties.'" First, the conduct of which Pasco complains related directly to the performance of Defendant Moore's duties. Moore simply misused his authority, and as noted above, the Supreme Court has held such misuse of authority does not invalidate the state action. See *Griffin v. Maryland*, 378 U.S. 130 (1964).

Second, *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968) does not support the position taken by Defendant Moore because the conduct involved in that case was clearly

private. The defendant officers offered to fight a group of black individuals, and stated that they would return later that evening. The officers also used racially derogatory statements towards the black individuals. The *Johnson* court understandably held that these acts were not "under 'pretense' of law." The *Johnson* court went on to say, however, that "[i]f the officer was enabled to do what he did because of the authority of his office, even if what he did constituted an abuse of that authority, either by the excessiveness of his conduct or because the act was not actually, although apparently, authorized, the act is under 'color of law.'" *Id*. at 937.

Here, Moore intended to seize the computer hard-drives for the County based on what he contended was contained on them. Compl. at ¶ 21. That was something he would be expected to know in his capacity as technology director. Moore seized the hard-drives based upon his pretense of authority to do so and thereby adversely affected Pasco's employment. His combination with Zimmerman about the situation also indicates that the conduct was under color or pretense of state law. This conduct was adopted and ratified as the conduct of the other Defendants. Plaintiff Pasco ended up being terminated, and Defendant Moore was reinstated to his job because of it.

Finally, Defendant Moore argues that "[t]here is no allegation that Moore was literally or figuratively "clothed in state power" at the time of his act." The cases do not require this. For example, the Supreme Court has stated that its cases have insisted that the conduct causing the deprivation "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), which requires in part that the party charged with the deprivation must fairly be said to be a state actor. "This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id*. Defendant Moore fits all of these requirements. To the extent there is some

additional requirement to be "clothed in state power," the reasonable inferences from the allegations of the complaint are sufficient, due to the other Defendants' responses to their knowledge of Defendant Moore's conduct, and their subsequent adoption and ratification of such conduct as their own through the termination of Pasco and reinstatement of Moore.

Because Pasco sufficiently alleges that Defendant Moore's liability to Pasco under 42 U.S.C. § 1983 through state action or under color or pretense of state law, Defendant Moore's motion also should be denied insofar as it seeks dismissal of the supplemental state law claims on the grounds of lack of subject matter jurisdiction.

CONCLUSION

Based on the foregoing, Plaintiff Robert L. Pasco respectfully requests that the court deny the Defendant Moore's Motion to Dismiss in its entirety.

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CERTIFICATE

I hereby certify that on January 17, 2012, I electronically filed the foregoing Plaintiff's Memorandum in Opposition to Defendant Moore's Motions to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel for Defendants:

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