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 SHENANDOAH COUNTY LIBRARY'S MOTIONS TO DISMISS UNDER RULE 12(b)(6)

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

I. Introduction and Facts.

The defendant Shenandoah County Library (hereinafter the "Library") asserts in its Motion to Dismiss that all of the claims against it should be dismissed. The Motions are identical to those tendered by the Defendant Board of Trustees, and the arguments here mirror Pasco's opposition to the Board's Motion. Pruned to its essence, most of Defendant Library's arguments stem primarily from the contention that the Defendant Moore acted for his own private reasons and the Defendant Library is immune. Pasco opposes the Defendant Library's Motion because the Defendant Library ignores the import of many of the facts alleged in Pasco's Complaint, and because Pasco has stated cognizable claims against the Defendant Library and the other defendants under the plausibility standard of review. Moreover, the Court has subject matter jurisdiction of the federal and the

supplemental state claims and neither sovereign immunity, nor the Eleventh Amendment, bars Pasco's claims.

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 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 for 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).

III. Pasco Alleged Facts Establishing a Cognizable Claim Against Defendant Shenandoah County Library Under Count One for Violation of 42 U.S.C. § 1983

The Supreme Court recognized municipal liability in an action under 42 U.S.C. § 1983 in *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978). Accordingly, the Defendant Library may be sued for violations of the statute. The Library raises no issue over whether the conduct alleged in the Complaint is of a sufficiently public character to support a claim under the statute. Rather, Defendant Library argues that the "plaintiff fails to make any allegations in his Complaint in regards to the existence of the Defendant Library's policy, custom or practice; therefore he fails to plead a viable claim under *Monell*." *Id*. at 5. The Defendant Library's argument is without merit.

Proof of a "policy" or "custom" does not require evidence of numerous similar violations. *Hall v. Marion School Dist. No. 2*, 31 F.3d 183, 195 (4th Cir. 1994). "Municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). See also, *Presley v. City of Charlottesville*, 464 F.3d 480 n. 1 (4th Cir. 2006).

The Supreme Court in *Pembaur* stated:

> *a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.*

Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986) (emphasis added). A decision, then, by the government's authorized policymakers concerning the status of a particular employee is generally considered "policy" under § 1983. *See, e.g., Hall,* 31 F.3d at 195-96. The decision of the Library by its Board, with all of the facts of Defendant Moore's unlawful search, seizure and taking of Pasco's property at hand and known to them, and nonetheless acting to reinstate Moore to his employment and discharge Pasco without just cause (an additional property deprivation attributable to the Defendant Library), constitutes the "policy" or "policies" required to support governmental liability here for purposes of Rule 12(b)(6).

The Defendant Library rigidly adheres to the fact that Defendant Moore's unlawful search, seizure and taking of Pasco's property preceded action by the Library under the facts alleged. But on those facts, the Library's liability is supported by the ratification and adoption of Moore's conduct, and the use of that conduct and Pasco's response to it against Pasco. As Judge William Osteen recognized in his opinion upholding a jury verdict in favor of a former employee

of Halifax County under 42 U.S.C. § 1983 in *Scearce v. Halifx County*, 1995 U.S. Dist. LEXIS 9216 *23 n. 10 (W.D. Va. 1995),

> Where a subordinate's decision is subject to review by the governmental entity's authorized policymakers, and the authorized policymakers approve the decision and the basis for it, their ratification would be chargeable to the governmental entity because their decision is final. (citing *City of St. Louis v. Praprotnick*, 485 U.S. 112, 126 (1988).

Defendant Moore's conduct, including his insertion into the personnel operations at the Library through his unlawful search, seizure and taking of Pasco's property, as well as his reports to Defendant Zimmerman of the reason for the illegal search and seizure, were reviewed and considered directly and almost immediately by the Defendants Zimmerman, Board and the Library. The Defendants approved of Defendant Moore's conduct, knowing of its illegality. Complaint, ¶¶ 35-37. They adopted it as their own through their actions. This constitutes ratification for purposes of governmental liability. Moreover, the Library, through the Board and Zimmerman, directly participated in the denial of Pasco's rights to continued employment based upon Pasco standing up for his rights to protect his property and the Library thereby inserted itself directly in intentional, deliberate and calculated conduct constituting a taking of his property. The Library knew of the deliberate conduct by Defendant Moore, and engaged in its own deliberate conduct in ratification of Moore's conduct and the deliberate termination of Pasco's employment. Accordingly, the Defendant Library's Motion to Dismiss should be denied.

IV. The Defendant Library is not Entitled to Sovereign Immunity or Eleventh Amendment Immunity

The Defendant Library claims that it is immune from liability for Counts Two, Three and Four of the Complaint, which allege intentional state tort claims for conversion, assault and

battery and violation of the Virginia Computer Crimes Act, Va. Code Ann. §18.2-152.12. The Defendant Library's reliance on *Hinchey v. Ogden*, 226 Va. 234 (1983), *Erickson v. Anderson*, 195 Va. 655, 657 (1954), *Hoggard v. City of Richmond*, 172 Va. 145 (1939) and *Carter v. City of Danville*, 164 F.3d 215 (4th Cir. 1999) is misplaced. Sovereign immunity has no application to any of the claims in this case. The Defendant Library cites to *Carter v. City of Danville* to support its contention that tort claims of assault, battery and false imprisonment are barred by sovereign immunity. Def. Memo. at 7-8. However, the *Carter* Court noted in its decision that although the plaintiff there argued that the City was not immune from liability for intentional torts of its employees, the plaintiff had cited no relevant authority for that proposition.

No precedential value can be taken from *Carter v. City of Danville*, 164 F.3d 215 (4th Cir. 1999) because only a year after it was decided, another panel of the Fourth Circuit decided *Shvern v. Derosiers*, 2000 U.S. App. LEXIS 29688 (4th Cir. 2000). The Court, in a *per curiam* opinion of a panel consisting of Judges Wilkinson, Niemeyer and Luttig, considered the same argument made by the defendants in the *Carter* case concerning sovereign immunity. The Court stated:

> Virginia case law is clear on this point: state employees are not entitled to the protection of sovereign immunity when accused of an intentional tort. *See Tomlin v. McKenzie*, 251 Va. 478, 468 S.E.2d 882, 884 (Va. 1996); *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699, 706 (Va. 1987); *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369, 372-73 (Va. 1967). *See also Coppage v. Mann*, 906 F. Supp. 1025 (E.D. Va. 1995).

Id. at *2-3. See also, *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608, 610 (sovereign immunity does not protect a county from liability for "gross negligence or intentional misconduct.")

The Defendant Library also makes reference to *Reynolds v. City of Richmond*, 574 F.Supp. 90, 91 (E.D. Va. 1983) for the proposition that "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." Def. Memo. at 8. The Eleventh Amendment has no application to this case. While states and their agencies may not be sued in federal court directly in their own names for damages by virtue of the Eleventh Amendment, suits against their political subdivisions, such as counties, are not so barred. *Moor v. Alameda County*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). *Reynolds v. Sheriff, City of Richmond*, 574 F. Supp. 90 (E.D. Va. 1983) does not support an argument that the Eleventh Amendment is implicated here. The quote attributed to that case by Defendant Library was in the context of the defendant Virginia Department of Corrections' motion to dismiss given its status as an agency of the state. The same protection is not offered to the Defendants in the case at bar. Accordingly, there is no immunity applicable to the Defendant Library or any of the defendants.

V. Pasco's Response to Defendant Library's Motion to Dismiss Counts II-IV for Lack of *Respondeat Superior* Liability

The Defendant Library claims that it is not responsible for the Virginia tort claims asserted in Counts II-IV under the doctrine of *respondeat superior* for the conduct of the Defendant Moore. It argues that "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." Defendant's Memorandum at 8-9. Defendant Library supports its argument with a reference to ¶ 54 of the Complaint, a paragraph dealing specifically with the provisions of Count IV, Assault and Battery.

The Defendant Library ignores the allegations of ¶ 8 of the Complaint, in which Pasco alleges:

> Except as otherwise alleged herein, Moore's actions complained of herein were taken during the course and scope of his position with the Defendant Board of Trustees.

Additionally, the allegations make it clear that the Defendant Moore was acting within the scope of his employment, notwithstanding his initial motivation. He intended to seize the hard-drives for the County and take them to the County Administrator. Complaint, ¶ 21. Moreover, the Defendant Moore's acts were made known to the Defendant Board, and the Defendants Board and Library adopted and ratified them as discussed above by reinstating him and terminating Pasco after Pasco exercised his authority as Director to terminate Moore's employment for Moore's illegal acts. Accordingly, Pasco has stated a claim against the Defendant Library under his Virginia state law tort claims.

Just as important, the Court is not considering a Rule 50 or Rule 56 motion in which it reviews all of the evidence that has been elicited at trial and developed in discovery. We are here merely on a 12(b)(6) motion. Thus, the Defendant Library's Rule12(b)(6) motion here goes simply to whether the Complaint states a plausible claim of *respondeat superior* liability. The Library is necessarily arguing that based on the Complaint, the Court already can rule as a matter of law that no jury could hold the Defendant Library vicariously liable pursuant to *respondeat superior* for what happened to Pasco.

Gina Chin & Assocs. v. First Union Bank, 260 Va. 533, 542 (2000), *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 526-27 (2000), and *Plummer v. Center Psychiatrists, Ltd.*, 252 Va. 233, 237, 476 S.E.2d 172 (1996) all provide otherwise. *Respondeat superior* liability is more than possible; it is likely. But all that must be said at this stage is that the Defendant Library cannot show that it is implausible. The 12(b)(6) motion, therefore, should be overruled and the jury permitted to decide the case.

"When an employer-employee relationship has been established, the burden is on the [employer] to prove that the [employee] was not acting within the scope of his employment

when he committed the act complained of, and . . . if the evidence leaves the question in doubt it becomes an issue to be determined by the jury." *Kensington Assocs. v. West*, 234 Va. 430, 432-33 (1987). Thus, in *Majorana*, the Court explained:

> When the plaintiff presents evidence sufficient to show the existence of an employer-employee relationship, she has established a prima facie case triggering a presumption of liability. The burden of production then shifts to the employer, who may rebut that presumption by proving that the employee had departed from the scope of the employment relationship at the time the injurious act was committed. If the evidence leaves in doubt the question whether the employee acted within the scope of the employment, the issue is to be decided by the jury and not as a matter of law by the trial court.
>
> 260 Va. at 526-27.

In *Majorana*, the plaintiff contended that a gas station attendant had lunged at her and grabbed her breasts. *Id*. at 524. The Supreme Court held that once the plaintiff produced evidence that the attendant was an employee of the Defendant corporation, the lower court erred when it ruled as a matter of law that the conduct was outside the attendant's scope of employment. *Id*. at 527. The Court held "at this stage of the proceedings, there simply are not sufficient facts which would permit us to hold, as a matter of law, that the defendant has met its burden of showing that its employee was not acting within the scope of his employment." *Id*. (citations omitted) (emphasis in original). Trial courts routinely apply this rule. See., e.g., *Mann v. Heckler & Koch Def., Inc*., 2008 U.S. Dist. LEXIS 79126 (E.D.Va. 2008)(rejecting motion to dismiss and holding, "The Complaint alleged an employment relationship . . . . In Virginia, once an employment relationship is established, the burden is on the employer to prove that the employee was not acting within the scope of his employment when he committed the act. Plaintiff had no burden to allege any additional facts.")(citing *Gina Chin*).

Here, on a 12(b)(6) motion, the employer-employee relationship has been pled and conclusively assumed, and of course no one denies it in fact. Per *Kensington's* burden-shifting

rule, which has retained its vigor through *Plummer* to *Majorana* and *Gina Chin* to *Mann* to today, the burden thus is on the Defendant Library to come forward with evidence proving beyond doubt that Defendant Moore was not acting within the scope of his employment when he injured Pasco. This they have not done yet. The Defendant Library's 12(b)(6) motion plainly is not the correct vehicle for such a factual argument now. See *Plummer*, 252 Va. at 237 ("Furthermore, at this stage of the proceedings, there simply are not sufficient facts which would permit us to hold, as a matter of law, that the defendant has met its burden of showing that its employee was not acting within the scope of his employment.")

Effectively, then, the Defendant Library's motion takes old law and ignores newer cases from the Virginia Supreme Court – *Plummer*, *Gina Chin* and *Majorana* – that provide the current standard of *respondeat superior* liability, removing historic restraints on such vicarious liability for intentional torts. Thus, in 2000, the Supreme Court clarified that *respondeat superior* applies to employers even when the employee is clearly not acting in the employer's interest. See *Gina Chin*, 260 Va. at 542.

In fact, even before *Gina Chin* was decided in 2000, in 1996 the argument Defendant Board is trying to make had been rejected by the Supreme Court 1996 in *Plummer*. In *Plummer*, a psychiatrist was alleged to have committed acts of assault and battery upon a patient by having sexual intercourse with her during therapy sessions. The Supreme Court of Virginia held that a jury could conclude that the psychiatrist was acting within the scope of his employment. *Id*. at 237. Citing *Commercial Business Systems v. Bell South*, 249 Va. 39, 45, 453 S.E.2d 261 (1995), the Court stated, "The courts . . . have long since departed from the rule of nonliability of an employer for willful or malicious acts of his employee." *Id*. Accordingly, the Supreme Court

overruled the ruling of the trial court that an assault by the physician was outside of the scope of the employment of the physician.

Under this standard, Virginia courts have had no difficulty in finding *respondeat superior* liability even when the employee was acting contrary to not only the interests, but also the express wishes of his employer. When all of Pasco's factual assertions and inferences are accepted, the Court should reject the Defendant Board's invitation to rule as a matter of law on a 12(b)(6) motion that the Defendant Library cannot be held vicariously liable for the state common law and statutory tort claims pursuant to *respondeat superior*.

VI. Pasco's Allegations Set forth a Valid Claim for Violation of the Virginia Constitution

Count Five states a damages claim against Defendants for their violations of Plaintiffs' state constitutional rights. Defendant Library asserts that it did not violate any article or provision of the Virginia Constitution and contends that there are no allegations relating to its denial of Pasco's constitutional rights. Defendant Library does not contest, however, that the Virginia Constitution's Bill of Rights is a statement of Virginia law, individual rights enjoyed by Virginians or Virginia public policy.

In this Count, Plaintiff seeks monetary damages against the Defendant for the deprivation of property, which includes the discharge from employment directly by the Defendant Library, through the Board, as well as the seizure and destruction of his property, both of which were in violation of the provisions of Article I, § 11 of the Virginia Constitution's Bill of Rights. The facts alleged in the Complaint support the common law's application in this context in two regards: common law tort (see the discussion relating to Count Six, the public policy wrongful discharge as applied to the rights underlying the Virginia Constitution) and Virginia common law supporting claims under state constitutional provisions.

The common law claim asserted by Plaintiff, lying in a violation of an individual's state constitutional rights, is not dissimilar from the very right recognized by the U.S. Supreme Court in *Bivens v. Six Unnamed Agents*, 403 U.S. 388 (1971). There, the U.S. Supreme Court held that common law provided a damages remedy for the violation of an individuals' federal constitutional rights by federal agents – although the language of the federal constitutional rights themselves do not expressly provide a monetary damages cause of action:

> 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' *Marbury v. Madison*, I *Cranch* 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, supra, at 390-395, we hold that petitioner is entitled to recover money damages for any injury he suffered as a result of the (federal) agents' violation of the Amendment.

403 U.S. at 396-7.

The Virginia Constitution is an affirmative grant of rights to individuals. The Virginia Constitution's Bill of Rights is a "Declaration of Rights made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government." Introductory statement to Virginia Constitution Bill of Rights. *Va. Const.* Article I. Pasco's claim relies on the Virginia Constitution's Bill of Rights, Article I, § 11, which states in pertinent part:

> That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly . . .

Independent of the common law rights established in the *Bowman* line of public policy common tort law, which is its own "executing" mechanism in the wrongful discharge context,

Virginia courts recognize a private right of action under the Virginia Constitution where the constitutional provision relied upon is "self executing." *See Robb v. Shockoe Slip Found*, 228 Va. 678, 324 S.E.2d 674 (1985). In *Robb*, the Supreme Court of Virginia stated that "constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing." *Id*; *accord Gray v. Virginia Sec'y of Transp*., 276 Va. 93, 105, 662 S.E.2d 66, 72 (2008) ("Article I, Section 5 is contained in the Bill of Rights, and such constitutional provisions are generally considered to be self-executing.") See *Kitchen v. City of Newport News*, 275 Va. 378, 657 S.E.2d 132 (2008) (finding a portion of Article I, § 11 to be self-executing). Here, the constitutional provisions that Pasco relies on are found in the Bill of Rights and as such should "generally be considered self-executing." Accordingly, the Virginia Constitution provides Pasco with a valid cause of action.

In *Robb*, the Court also held that "[p]rovisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing." *Robb*, 228 Va. at 681-682, 324 S.E.2d at 676 (*quoting Robertson v. Staunton*, 104 Va. 73, 77, 51 S.E. 178, 179 (1905). Here, the provision relied upon by Plaintiffs is of a negative character and prohibits certain conduct. Article I, § 11 expressly states that "no person shall be deprived of his life, liberty, or property without due process of the law." *Va. Const.* art. I, § 11. Because the provision relied on by Pasco is contained in the Bill of Rights and is of a negative character it should be "generally, if not universally, construed to be self-executing." *Robertson*, 104 Va. at 77, 51 S.E. at 179.

Finally, the Court has also quoted with approval an alternative test to determine whether or not a constitutional provision is self-executing:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicated principles…

Robb, 228 Va. at 682, 324 S.E.2d at 676 (*quoting Newport News v. Woodward*, 104 Va. 58, 61-62, 51 S.E. 193, 194 (1905). Here, the constitutional provision relied on by Plaintiff is not merely a statement of "policy" but instead contains a clear directive.

Since the Defendant Library was directly involved in the discharge of Pasco and ratified and is responsible for the seizure and destruction of Pasco's property in violation of provisions of the Virginia Constitution which are self-executing, the Defendant Library's Motion to Dismiss should be denied.

VII. Pasco Sets forth a Cognizable Claim for Tortious Wrongful Discharge Under *Bowman* and Post-*Bowman* Case Law

In its Memorandum (at p. 12), Defendant Board relies on *Rowan v. Tractor Supply Co.*, 263 Va. 209, 559 S.E .2d 709 (2002), in which the Court declined to extend the wrongful discharge claim to an employee asserting that she had a right to be free from intimidation with regard to pressing criminal charges in relation to an alleged assault on her (relying on the public policy underlying the obstruction of justice statute, Va. Code Ann. § 18.2-460).[1] Defendant Library inappropriately seeks to extend the ruling in *Rowan* to this claim, and erroneously contends that none of the statutes on which Pasco relies creates a right on his behalf. Def. Memo at 12. The Defendant's argument is without merit.

In *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E. 2d 797 (1985), the Virginia Supreme Court established that a common law claim for wrongful discharge exists for a violation of the public policy underlying expressions of public policy such as may be found in statute. *Id.*, 229 Va. at 539-40. Such claim does not address a violation of the statute itself, and is not an

[1] The Court accepted *Rowan* on a limited question certified from the United States District Court for the Western District of Virginia and expressly noted that it declined to rule on the plaintiff's other asserted statutory bases for the claim, *including statutes at issue here that recognize rights of crime victims and persons involved in criminal prosecution.*

implied right of action arising out of the statutory language, but rather is a claim that persons and/or entities tortiously terminated one's employment in violation of the policies *underlying* the statutory expression of public policy. *See Bradick v. Grumman Data Systems Corp.*, 254 Va. 156, 160-61, 486 S.E.2d 545, 547 (1997); *Mitchem v. Counts*, 259 Va. 179, 188-89, 523 S.E.2d 246, 251 (2000) (policy need not be expressly stated in the language of the statute, as the claim is not one for violation of the statute).

The Virginia Supreme Court has recognized three types of public policy wrongful discharge claims: (1) a discharge of an employee for exercising a statutorily created right; (2) a discharge for a reason contrary to a public policy explicitly expressed by statute; and (3) a discharge resulting from an employee's refusal to engage in an illegal act. *Bowman* (termination for exercising right to vote as shareholder pursuant to the policy underlying Va. Code § 13.1-32) is an example of a type (1) claim; *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997) (discharge in violation of gender-based protections of former Va. Code § 2.1-175) is an example of a type (2) claim; and *Mitchem v. Counts* (termination for refusal to engage in criminal activity, refusing to engage in a sexual relationship, in violation of policies underlying Va. Code §§ 18.2-34, 345) is an example of a type (3) claim

i. Application of the Public Policy Wrongful Discharge Tort

The Court defined the parameters of the tort when it considered two claims by employees asserting public policies underlying the Virginia Human Rights Act, Virginia Code § 2.1-714 *et seq.*, the companion cases of *Lockhart v .Commonwealth Educ. Sys. Corp* (race) *and Wright v. Donelly & Co., et al,* 247 Va. 98, 439 S.E.2d 328 (1994). In *Lockhart/Wright*, the Court stated:

> The discharges of Ms. Lockhart and Ms. Wright are allegedly tortious **not because they have a vested right to employment, but because their employers misused the freedom to terminate the services of at-will employees** by purportedly

> discriminating against their employees on the basis of race and gender.

247 Va. at 106, 439 S.E.2d at 332. (Emphasis added).[2]

Again demonstrating the breadth of the public policy tort, two opinions following the *Lockhart* decision held that the tort was supported in circumstances alleging discharges based on the policies underlying other Human Rights Act provisions: the *Bailey* case, 253 Va. 121, 480 S.E.2d 502 (gender) and *Bradick*, 254 Va. 156, 486 S.E.2d 545 (disability).[3] In *Mitchem v. Counts*, the Court rejected the argument that a statute fails to support a public policy discharge claim because it does not expressly state such public policy and ruled that "[l]aws that do not expressly state a public policy but which were enacted to protect the property rights, personal freedoms, health, safety, or welfare of the general public, may support a wrongful discharge claim if they further an underlying, established public policy that is violated by the discharge from employment." 259 Va. at 189, 523 S.E.2d at 251 (citations omitted).

ii. Pasco's Public Policy Wrongful Discharge Claims

Pasco alleges three public policy grounds for his wrongful termination tort claims, including the public policies underlying the following:

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[2] The Defendant's reliance on *Jenkins v. Weatherholtz*, 909 F.2d 105 (4th Cir. 1990) for the proposition that the Virginia Constitution does not create a property interest in continued employment misses the mark. *Jenkins* involved a claim by a sheriff's deputy for an alleged due process violation under federal law. However, under Virginia law, since a sheriff's deputy serves at the will of the sheriff, there was no protectable property interest for due process purposes. The at-will status of an employee does not adversely affect his rights under *Bowman* and its progeny. Moreover, Pasco, a long time employee of the Library, sufficiently alleges his legitimate expectation that he would not be terminated from his employment absent just cause, and thus sets forth his right to continued employment. Complaint, ¶ 13.

[3] In 1995, the General Assembly amended the Virginia Human Rights Act to legislatively abrogate the Act's common law public policy basis for public policy wrongful discharge claims. Va. Code § 2.1-725(D); *Doss v. Jamco, Inc.*, 254 Va. 362, 492 S.E.2d 441 (1997).

- Virginia Code § 18.2-152.1 – 18.2-152.15, prevention and remedy for computer crimes, including larceny of computer data, computer fraud and computer trespass;

- Virginia Code § 19.2-11.01 – 19.2-11.4 *et seq*., the Crime Victim and Witness Rights Act; and

- Article I, Section 11 of the Virginia Constitution, protecting fundamental rights to possess and enjoy property free from of arbitrary deprivations and takings without due process.

iii. Plaintiff has stated a cognizable public policy wrongful discharge claim underlying Va. Code §§ 19.2-11.01-19.2-11.4 and Virginia Code §§ 18.2-152.1 – 18.2-152.15

The Virginia Computer Crimes Act and the Crime Victim and Witness Rights Act provide specific and substantive rights to which Pasco, as a crime victim, was entitled. He was within the class of individuals protected by such Acts, and the termination of his employment undermined the policies underlying these statutes. Pasco had statutory rights to protect his computer hard-drive and computer data from unlawful seizure and destruction, and to report crimes against himself and assist in the prosecution of the Defendant Moore for his unlawful behavior. Complaint, ¶ 72. He exercised his rights when he reported the conduct to Defendant Zimmerman and the deputy sheriff and opposed the illegal conduct of Moore and the other Defendants. *Id*. at 73. Pasco was fired because he exercised his statutory rights in violation of the public policies underlying the statutes, just as the plaintiffs in *Bowman* were terminated for the manner in which they had voted their shares in their bank employer. Pasco adequately alleged a Type 1 and Type 2 claim identified in *Rowan*.

iv. Plaintiff has stated a cognizable public policy discharge claim underlying Article I, Section 11 of the Virginia Constitution

The Virginia Constitution is a clear pronouncement of Virginia public policy, sufficient to serve as a basis for a common law public policy wrongful discharge claim. In *Bowman*, the

Court identified several cases from other jurisdictions construing the common law tort. These included Supreme Court decisions from Connecticut, Oregon, Texas and West Virginia, as among the "at least 20 states" recognizing the common law public policy exception to at-will employment. *See* 229 Va. at 539, 331 S.E.2d at 801.

The common law does recognize state constitutional policy as an appropriate anchor for the public policy wrongful discharge tort. The Ohio Supreme Court held that the common law public policy wrongful discharge tort could encompass public policy not only in statutes, but also in the Ohio and United States Constitutions, administrative rules and regulations and the common law. *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio 1994).

Likewise, the West Virginia Supreme Court stated:

> We make it clear today that, an at-will or otherwise employed private sector employee may sustain, on proper proof, a cause of action based upon a violation of public policy emanating from a specific provision of the state constitution. Determining whether a state constitutional provision may be applied to a private sector employee must be done on a case-by-case basis, i.e. through selective incorporation and application.

Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578 (W. Va.1998).

The proper inquiry here is (1) whether Article I, Section 11 is a statement of Virginia public policy and (2) whether Pasco has alleged that his termination violated that public policy. Inquiry (1), the public policy basis for the claim, is a decision for the Court. Inquiry (2), whether the termination alleged violated the public policy asserted, is a question for the fact finder.

In the Virginia Supreme Court's *Lockhart/Wright* decisions construing the tort considered, and recognized, claims for wrongful discharges based upon race and gender in violation of the public policy underlying the Virginia Human Rights Act, Va. Code § 2.1-714, *et seq*. In *Lockhart* the Virginia Supreme Court stated:

> We hold that Ms. Lockhart and Ms. Wright pled viable causes of action. In *Bowman*, we recognized the plaintiffs' rights to bring actions for wrongful discharge based upon violations of Virginia's public policy that a stockholder should be permitted to exercise the right to vote stock free of duress and intimidation from corporate management. **Here, however, we are concerned with rights of even greater importance, the personal freedom to pursue employment free of discrimination based on race or gender. Indeed, there are few, if any, greater restrictions on personal freedoms that an employee can suffer than to be terminated because of discrimination based upon race or gender.**

247 Va. at 104, 439 S.E.2d 331. (Emphasis added.)

The public policy recognized was within the "narrow exception" recognized in *Bowman*, not because the plaintiffs held a vested right to employment, but, because "their employers misused the freedom to terminate the services of at-will employees on the basis of race and gender." *Lockhart,* 247 Va. at 106; 439 S.E.2d at 332. Once the plaintiff identifies a public policy, the common law allows for broad public policy protection within the exception, as the Court recognized concerning race or gender based terminations. This expansion of the public policy tort was ultimately limited, not by *Bowman's* "narrow exception to employment-at-will," but only by the later legislative abrogation of one particular application of the common law: use of the Virginia Human Rights Act provisions to serve as a public policy basis in tort.

The Court continues to explain, however, that the vitality of the common law is limited only by the General Assembly's authority to specifically abrogate or alter provisions of the common law. The Court has stated:

> The basis for the General Assembly's authority is found in Va. Code § 1-10, which provides as follows:
>
> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, *except as altered by the General Assembly.*

Doss v. Jamco, Inc., 254 Va. 362, 492 S.E.2d 441 (1997). (Emphasis in original.)

Thus, the Supreme Court of Virginia has recognized that the common law public policy wrongful discharge tort had broadly encompassed claims for gender or race based terminations, as alleged in *Lockhart* (race), *Wright* (gender), and as later reaffirmed in *Bailey* (gender) and *Bradick* (disability). This application of the common law claim was *only later limited by the specific act of the Virginia legislature* when it statutorily abrogated the common law as applied to the VHRA and civil rights discrimination based wrongful discharge claims.

State constitutional pronouncements of Article I, Section 11 are statements of Virginia public policy which support a *Bowman* public policy wrongful discharge claim for, as the Court stated in *Doss*, the common law continues in full force and effect so long as it is consistent and not repugnant to the principles of the Virginia Constitution.

The source of all governmental power is the people. The Virginia Constitution recognizes this and confers rights on its citizens. Preamble to Virginia Constitution. Virginia's citizens then granted the state government limited rights to govern, under a tripartite sharing of conferred authority shared by the legislative, judicial and executive branches. This is the source of the legislature's right to enact laws. The English common law which predated our state constitution continues in effect, except as specifically limited by the legislature. While Virginia statutes may constitute expressions of Virginia public policy, they do not do so to the exclusion of the Virginia Constitution's Article I pronouncements – and no ruling of the Virginia Supreme Court construing this cause of action so limits the tort. There having been no abrogation of the common law by the General Assembly in this context, or exclusion of the Virginia Constitution's pronouncements of public policy from common law applications, Pasco has stated a cognizable claim for the common law wrongful discharge tort.

Pasco alleges in this Count that his discharge violated the public policy underlying Article I constitutional provisions guaranteeing the rights not to be deprived of his property without due process of law, or having his property taken without just compensation. His efforts to protect his property from governmental seizure, and then seeking to protect his constitutional rights resulted in the termination of his employment, further depriving him of his property. The Defendants are not at liberty to erode any individual's constitutionally protected rights. Indeed, any erosion of constitutional protections by governmental actors is repugnant to our constitutional structure. Defendant Library's discharge of Pasco in violation of the public policy underlying Article 1, §11 protections states a proper public policy wrongful discharge claim.

Through Pasco's discharge, the Defendants have deprived Pasco of wages, protectable property, without due process of the law or compensation (Article 1, § 11), and the policy underlying such constitutional protections is contravened by Pasco's discharge.

Pasco is an intended beneficiary of the protection of the Article I protection for, if a public entity is allowed to render the public policy underlying the right meaningless, the public policies underlying these provisions are jeopardized. In *Bowman*, the Supreme Court of Virginia cited cases from other jurisdictions as illustrative of the tort. *See* 229 Va. at 539-40, 331 S.E.2d at 800-01. In one of the cases cited by the Court in *Bowman*, *Harless v. First National Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978), the West Virginia Supreme Court considered whether a bank employee allegedly fired in retaliation for his efforts to require his employer to comply with consumer credit protection laws was within the intended class of beneficiaries.

The West Virginia Supreme Court held:

> We have no hesitation in stating that the Legislature intended to establish a clear and unequivocal public policy that consumers of credit covered by the Act were to be given protection. Such manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge.

246 S.E.2d at 276.

Because Pasco relies on clear statements of the Commonwealth's public policy, the Virginia Constitution provides the public policy basis for the tort, and this claim is not the "generalized cause of action for 'retaliatory discharge'" which the Court rejected in *Miller v. SEVAMP*, 234 Va. at 468, 362 S.E.2d at 918. Defendant's Motion to dismiss, then, should be denied.

VIII. Punitive Damages

At this point in the proceedings, Pasco has not asserted a claim for punitive damages against Defendant Library.

CONCLUSION

Based on the foregoing, and for the reasons to be argued at the hearing, the Plaintiff Pasco respectfully requests that the court deny the Defendant Shenandoah County Library's Motion to Dismiss in its entirety.

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CERTIFICATE

I hereby certify that on January 20, 2012, I electronically filed the foregoing Plaintiff's Memorandum in Opposition to Defendant Shenandoah County Library'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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