

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

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

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT ZIMMERMAN’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 Zimmerman’s Motions to Dismiss, and shows the Court as follows:

**I. Introduction and Facts.**

The defendant Hank Zimmerman (hereinafter the “Zimmerman”) asserts in his Motion to Dismiss that all of the claims against him should be dismissed. Pasco opposes the Defendant Zimmerman’s Motion because the Defendant Zimmerman ignores the import of many of the facts alleged in Pasco’s Complaint, and because Pasco has stated cognizable official and individual capacity claims, as well as state law claims, against him under the plausibility standard of review.

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 Board 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 (4<sup>th</sup> 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 Properly Named Zimmerman as a Defendant in His Official and Individual Capacities.**

Defendant Zimmerman has moved to dismiss the claims against him in his official capacity as “redundant” and “unnecessary”. Zimmerman misapprehends the basis of Pasco’s Complaint in this regard under Count One. Pasco has sued Zimmerman in his individual capacity for compensatory and punitive damages. Pasco has sued the Board and the Library for compensatory damages and other relief for their implementation of policy resulting in violations of the constitution (and 42 U.S.C. §1983). Pasco seeks prospective declaratory and injunctive relief against the individual, Zimmerman, in his official capacity. The official capacity suit is neither “redundant” nor “unnecessary”.

The distinction between damages relief and prospective injunctive and declaratory relief is an important one in constitutional litigation. Allegations that a public official is acting under “color of law” are appropriate in both actions brought against a public official in his or her **individual** capacity as well as one brought against a public official acting in his or her official capacity. The former seeks damages, the latter seeks prospective injunctive and declaratory relief. See *Hafer v. Melo*, 502 U.S. 21 (1991); *Kentucky v. Graham*, 473 U.S. 159 (1985). The distinction is made clear in *Miller v. Smith*, 220 F3d, 491 (7<sup>th</sup> Cir. 2000) (where the Plaintiff

seeks injunctive relief from official policies or customs the appropriate defendants are officials in their official capacities; where the plaintiff alleges tortious conduct of an individual acting under color of state law, defendant should be sued in his or her individual capacity). The Fourth Circuit has appropriately stated the Complaint need not expressly plead the capacity in which one is suing a defendant to state a cause of action under §1983. “A court must look to the substance of the complaint, the relief sought, and the course of proceedings to determine the nature of a plaintiff’s claim.” *Biggs v. Meadow*, 66 F.3d. 56, 58 (4<sup>th</sup> Cir. 1995).

Additionally, prospective equitable relief must be tailored to each individual official. It is not generic in nature such that injunctive relief against the Board or the Library will suffice for allegations against separate official capacity defendants. For this reason, the Supreme Court has ruled that where prospective relief is sought against a public official who substitutes into the case (as in death or election) there must be separate proof that the successor will engage in the same unconstitutional conduct to allege prospective injunctive relief against the newly substituted party. *Spomer v. Littleton*, 414 U.S. 514 (1977); *Mayor of City of Philadelphia v. Educ. Equality League* 415 U.S. 605 (1974).

Pasco’s Complaint, relief sought and allegations should reveal that Pasco’s claims against Defendant Zimmerman in his official capacity is not “unnecessary”. They merely seek a separate form of relief available only from individuals in their official capacities.

The Defendant Zimmerman cites a number of cases as support for his position: *Will v. Mich. Dept. of State Pol.*, 491 U.S. 58, 70-71 (1989); *Brown v. Ray*, 695 F.Supp. 2d 292, 298 (W.D. Va. 2010); and *Couch v. Jabe*, 479 F.Supp. 2d 569, 598 (W.D. Va. 2006) and *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F.Supp. 2d 783, 791 (E.D. Va. 1998). The first three cases dealt with claims for money damages against *state* employees in

their official capacities, which fail for immunity reasons under 42 U.S.C. § 1983. They did not address the situation here, where there is no claim against the state, but rather against a local governmental entity and its official. These cases have no applicability to this argument. See Plaintiff's Memo. in Opposition to Defendant Board of Trustees' Motion to Dismiss at 5-9. The *Mainstream Loudoun* case does find that claims against the individual Board members are unnecessary under the facts of that case. However, Pasco believes that the better course to address the prospective relief in this case is for the claim to remain viable against Defendant Zimmerman in his official capacity.

The individual capacity claim in Count One has been adequately alleged. Defendant Zimmerman, while he did not actually seize Pasco's computer hard-drive, adopted Moore's action as his own in facilitating the further deprivation alleged and the taking of Pasco's property through the termination of his employment. The allegations relating to Zimmerman's participation in Moore's scheme to get Pasco fired, and obtaining votes of the remaining members of the Board of Trustees with knowledge of the illegality of Moore's conduct are sufficient to support the claim for individual capacity liability under 42 U.S.C. § 1983. See Plaintiff's Memo. in Opposition to Defendant Board of Trustees' Motion to Dismiss at 5-7.

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 Defendant Zimmerman approved of Defendant Moore's conduct, knowing of its illegality. Complaint, ¶¶ 35-37. He and the Board adopted it as their own through their actions. Moreover, 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 Zimmerman thereby inserted himself directly in intentional, deliberate and calculated conduct constituting a taking of Pasco's property. Zimmerman knew of the deliberate conduct by Defendant Moore, and engaged in his own deliberate conduct in ratification of Moore's conduct and the deliberate termination of Pasco's employment. Accordingly, the Defendant Zimmerman's Motion to Dismiss should be denied.

Defendant Zimmerman further argues in a footnote (Def. Memo. at 6, n.1.) that Defendant Moore's actions were not taken against the plaintiff under color of law and did not constitute state action, and simply references Defendant Moore's memorandum on this issue. Defendant Moore's arguments on this issue are without merit. Since no additional argument was offered on this issue, Pasco incorporates his Memorandum in Opposition to Defendant Moore's Motion to Dismiss here. [Docket No. 21]

**IV. Counts Two, Three and Four – State Claims for Conversion, Assault and Battery and Violation of the Virginia Computer Crimes Act**

Insofar as the state claims in Counts Two, Three and Four allege a claim against the Defendant Zimmerman individually, Pasco intends on seeking leave to dismiss those claims against Defendant Zimmerman, only, under Rule 41(a), and without prejudice. This voluntary dismissal will have no effect on the viability of those three state law claims insofar as they currently exist against the other defendants.

**V. 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 Zimmerman asserts only that he did not violate any article



or provision of the Virginia Constitution and contends that there are no allegations relating to his denial of Pasco's constitutional rights.

In this Count, Plaintiff seeks monetary damages against the Defendants for the deprivation of property, which includes the discharge from employment directly by the Defendant Board, facilitated by Zimmerman, 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*, 1 *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 Zimmerman was directly involved in the discharge of Pasco, obtaining agreement from the Board despite knowledge of the illegal conduct of Moore, Zimmerman was involved in the ratification and adoption of Moore’s conduct and is responsible for the seizure and destruction of Pasco’s property in violation of provisions of the Virginia Constitution which are self-executing. Accordingly, the Defendant Zimmerman’s Motion to Dismiss should be denied.

**VI. Pasco Sets forth a Cognizable Claim for Tortious Wrongful Discharge Under *Bowman* and Post-*Bowman* Case Law Against Defendant Zimmerman**

Defendant Zimmerman argues that he is not liable to Pasco for the claim of wrongful termination, citing *VanBuren v. Virginia Highlands Orthopaedic Spine*, 728 F.Supp. 2d 791

(W.D. Va. 2010). In that case, Judge Turk dismissed a wrongful discharge claim against a supervisor, holding that the plaintiff was limited to suing her actual employer, not her supervisor. This opinion is contrary to the common law and Virginia cases on this issue.

Defendant Zimmerman is a proper individual defendant to this Court regardless of the fact that he was not the actual employing entity. The *Bowman* wrongful discharge claim is a tort claim that applies to terminations of employment that violate public policy. *See generally, Bowman, supra; Shaw v. Titan*, 255 Va. 535 (1998); *McFarland v. Virginia Retirement Services, Inc.*, 477 F. Supp. 2d 727, 739 (E.D. Va. 2007) (citing *Bowman* case which allowed a common law wrongful discharge claim to proceed against those officers or agents of a company who played a key role in contributing to the tortious conduct). The suggestion that an individual is not a proper party to a wrongful discharge claim because he or she is not the “employer” is grounded in the notion that the claim is quasi-contractual and arises out of the employment relationship. It is not. The claim sounds in tort and asserts a claim for termination in violation of the public policy underlying statutory and other expressions of policy. *McClosky v. Warren County Department of Soc. Serv.*, 81 Va. Cir. 35, 36 (Warren County 2010). In the *Bowman* and *Shaw* Virginia Supreme Court cases construing this cause of action, individuals involved in the discharges were recognized by the Court as named defendants. Indeed, when the Court first recognized the claim in *Bowman v. State Bank of Keysville*, the Court stated the claim as follows: “we hold that the plaintiffs have stated a cause of action in tort against the Bank and the named directors for improper discharge from employment.” *Bowman*, 229 Va. at 540. Here, Zimmerman is a proper party as an individual who engaged in the intentional tortious conduct involved in the termination in violation of public policy, in addition to the Defendants Board of Trustees and Library.

Moreover, the fact that Zimmerman engaged in his wrongful conduct in his capacity as Board Chairman does not insulate him from liability. This is a tort. If he had engaged in fraudulent behavior, he would be liable for his individual conduct in perpetrating the fraud. Here, he facilitated the tortious wrongful discharge. He is liable for his intentional conduct.

Pasco incorporates his argument on the other issues raised concerning the viability of the underlying claim of tortious wrongful discharge set forth in his Memoranda in opposition to the motions to dismiss of Defendants' Board and Library. [Docket Nos. 23 and 24]

## **VII. Punitive Damages**

Defendant Zimmerman argues that no facts have been alleged to support a claim for punitive damages against him. He is mistaken, and makes no reference to the standard for punitive damage liability under 42 U.S.C. § 1983. In *Smith v. Wade*, 461 U.S. 30 (1983), the Supreme Court held that punitive damages may be awarded by the fact-finder against an individual even where the conduct is not motivated by malice or evil intent. Recklessness or callous indifference to a plaintiff's federally protected rights is sufficient. See also, *Kolstad v. American Dental Assn.*, 527 U.S. 526 (1990).

On the state claims in Counts Five and Six, punitive or exemplary damages are permitted where there is misconduct or actual malice or such recklessness or negligence as to evince a conscious disregard for the rights of the plaintiff, including the plaintiff's property rights. *Xspedius Management Co. of Virginia, LLC v. Stephan*, 269 Va. 421, 611 S.E.2d 385 (2005). At the very least, Pasco's allegations support an inference that Defendant Zimmerman engaged in conduct in conscious or reckless disregard of his property rights when Zimmerman facilitated the reinstatement of Moore and the termination of Pasco with full knowledge of Defendant Moore's illegal conduct.

The facts alleged are sufficient to plead a claim for punitive damages under both federal and state law.

### **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 Zimmerman's Motion to Dismiss as requested.

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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 Zimmerman'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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