

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

ROBERT L. PASCO,)	
)	
<i>Plaintiff,</i>)	
)	Civil Action No.: 5:11CV87
v.)	
)	
HANK ZIMMERMAN, et als.,)	
)	
<i>Defendants.</i>)	

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS BY DEFENDANT HANK ZIMMERMAN**

Defendant Hank Zimmerman (“Zimmerman”), by counsel, pursuant to the Scheduling Order (Docket #18), states as follows for his Brief in Reply to the Memorandum (Docket #25) filed by the plaintiff in opposition to the Motion to Dismiss (Docket #8).

FACTS

In his Memorandum in Opposition, the plaintiff accuses Defendant Zimmerman of ignoring the import of many of the facts alleged in the Complaint. Docket #25, p. 1. Defendant Zimmerman is not ignoring any fact or reasonable inference in the Complaint. Rather, Defendant Zimmerman asserts that the Court should not accept the plaintiff’s legal conclusions based on the facts alleged in the Complaint. Additionally, Defendant Zimmerman submits that the Court should not consider any facts added to the Memorandum in Opposition that were not alleged in the Complaint.

Further, the Court should not allow the plaintiff to massage the facts alleged in the Complaint in an attempt to change the inference or allegations. Citing ¶ 21, the plaintiff states that “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.” Docket #25, p. 3. However, the plaintiff conveniently omits a critical word from his recitation of the facts alleged. In ¶ 21 of the Complaint, the plaintiff actually states: “Defendant Moore **later** told Defendant

Zimmerman that he was seizing the computer hard-drives in an effort to use information he falsely claimed was on them against Plaintiff in an effort to get Plaintiff terminated.” Docket #1, p. 6 (emphasis added).

ARGUMENT

No § 1983 Claim Against Defendant Zimmerman Individually or Officially

A. Relief Sought in Official Capacity Claim Untenable

The plaintiff argues that Defendant Zimmerman should remain as a party in his official capacity as he seeks injunctive and declaratory relief against Defendant Zimmerman. However, any claim for injunctive or declaratory relief will not lie against Defendant Zimmerman, but rather, against the real parties in interest, Defendants Board of Trustees and Library. Defendant Library is a public entity established by the governing body of Shenandoah County pursuant to Virginia Code § 42.1-33, *et seq.* Docket #1, ¶ 9. Defendant Board of Trustees is also a public entity appointed by the governing body of Shenandoah County pursuant to Virginia Code § 42.1-35. Docket #1, ¶ 10. This action arises out of the termination of the plaintiff by Defendant Board of Trustees. Defendant Zimmerman was simply the Chairman of the Library’s Board of Trustees. Docket #1, ¶ 7. The plaintiff makes repeated reference to Defendant Zimmerman and the Board. See, e.g., Docket 25, p.7. Defendant Zimmerman submits that these allegations are nonsensical. Defendant Zimmerman is not the plaintiff’s supervisor. There is no allegation that Defendant Zimmerman is an employee of Defendant Library.¹ Defendant Board of Trustees has the responsibility for the management and control of Defendant Library. Va. Code § 42.1-35. Defendant Zimmerman has no independent authority or power. Defendant Zimmerman is not a policymaker under statutory or case law and has no policymaking authority at all, let alone final policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924 (1988). Any injunctive and/or declaratory relief would be against Defendants Library and Board of Trustees as a whole, not against one isolated member.

The plaintiff’s attempts to negate the holding in *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783, 791 (E.D. Va. 1998) is unfounded. Rather, *Mainstream Loudoun* is dispositive in this case. The facts are very similar. In *Mainstream Loudoun*, the plaintiffs, an association and 10 individuals, sued the Loudoun County

¹ Virginia Code § 42.1-35 states in pertinent part that members or trustees “shall be appointed by the governing body, chosen from the citizens at large”, and that “one board member or trustee may be a member of or an employee of the local governing body.”

Library, the Board of Trustees of the Library, and 5 of the 9 Board of Trustee members, both in personal and official capacities, alleging a 42 U.S.C. § 1983 action. Judge Brinkema, citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), dismissed the individual Library Board Members, stating that “plaintiffs’ suit against the Library Board itself, if successful, will provide plaintiffs with full relief against enforcement of the Policy” at issue, and that “plaintiffs’ suit against the five Board members who voted to adopt the Policy is impractical as a means to enjoin the Library Board from enforcing the Policy.” *Mainstream Loudoun*, 2 F. Supp. 2d at 790-791.

Likewise, here, enjoining Defendant Zimmerman is ineffective. Under Virginia law, Defendant Board of Trustees is the final policymaker with regard to the employment and discharge of the plaintiff. Va. Code § 42.1-35. Any prospective relief sought by the plaintiff against Defendant Zimmerman cannot be expected to provide the plaintiff with complete relief for any declaratory or equitable relief demanded. Instead, that relief, if appropriate at all, will be found against Defendants Library and Board of Trustees. Therefore, all of the claims against Defendant Zimmerman in his official capacity should be dismissed.

B. Personal Capacity Lawsuit against Defendant Zimmerman Should Also be Dismissed

The allegations against Defendant Zimmerman in his personal capacity also fail. The Complaint makes clear that Defendant Zimmerman’s actions were taken in his capacity as a member of Defendant Board of Trustees. Docket #1, ¶ 7. The plaintiff accepts that Defendant Zimmerman did not search or seize the plaintiff’s personal property, and thus, could not have violated the plaintiff’s Fourth or Fifth Amendment rights. Docket #25, p. 7. However, the plaintiff attempts to argue that Defendant Zimmerman “adopted Moore’s actions as his own in facilitating the further deprivation alleged and the taking of Pasco’s property through termination of this employment.” *Id.* This allegation is not supported by the facts alleged, reasonable inferences, or the law.

First, the facts do not support the legal conclusion that Defendant Zimmerman adopted Defendant Moore’s actions as his own. Other than the plaintiff’s bare statement, there are no facts to support that Defendant Zimmerman adopted Defendant Moore’s actions as his own. The Complaint states that Defendant Moore alleged that he was assaulted and battered by the plaintiff. Docket #1, ¶ 25. The plaintiff states that he “justifiably” attempted to retrieve the computer hard-drives from Defendant Moore. Docket #1, ¶ 23; Docket #25, p. 3. The plaintiff

alleges that he was injured when he attempted to retrieve his personal property. Docket #1, ¶ 26. The reasonable inference being that the plaintiff instigated the physical altercation between him and Defendant Moore. The plaintiff was Defendant Moore's supervisor, responsible for reprimanding and terminating all employees, including Defendant Moore. Docket #1, ¶ 18, 31. The plaintiff fired Defendant Moore after Defendant Moore accused the plaintiff of committing assault and battery against him. Docket #1, ¶¶ 30, 31. The reasonable inference is that the plaintiff did in fact assault and batter Defendant Moore when he attempted to retrieve his computer hard drives. The incident between the plaintiff and Defendant Moore occurred on October 1, 2010, and the plaintiff was terminated 12 days later on October 12, 2010. Docket #1, ¶¶ 15, 25. The reasonable inference is that Defendant Zimmerman did not make any rash or quick decisions, investigated this matter, spoke with the parties involved and any witnesses, and ultimately determined that a supervisor who gets into a physical altercation with a subordinate and then fires that subordinate should be terminated. Accordingly, Defendant Zimmerman voted, along with other members of Defendant Board of Trustees, to terminate the plaintiff. Defendant Zimmerman did not adopt any unlawful conduct by Defendant Moore as his own actions, and there are no facts alleged in the Complaint to support such a conclusion. Moreover, the plaintiff's attempt to co-opt Defendant Moore's conduct onto Defendant Zimmerman as his own contradicts the requirements for imposing personal liability in § 1983 cases. Courts have repeatedly held that lawsuits against agents in their personal capacities cannot proceed "absent proof of some degree of personal involvement in the alleged deprivation of rights." *McDonald v. Dunning*, 760 F. Supp 1156, 1160 (E.D. Va. 1991) (citations omitted). Here, there is simply no action or participation by Defendant Zimmerman to justify personal liability under § 1983.

Second, the termination of the plaintiff by Defendant Board of Trustees did not deprive the plaintiff of a protected property interest in violation of his right to procedural due process under the Fourteenth Amendment. In order for a plaintiff to possess a property interest in continued employment, "state law rules and understandings must provide a 'sufficient expectancy of continued employment.'" *Jenkins v. Weatherholtz*, 909 F.2d 105, 107 (4th Cir. 1990) (citing *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077 (1976)). The plaintiff's bare conclusions that he held a legitimate expectation that he would not be terminated from his employment absent just cause are insufficient to pass the requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice.”). As such, Defendant Zimmerman voting, or even encouraging other board members, to terminate the plaintiff did not violate any of the plaintiff’s rights or privileges protected by the Fourteenth Amendment.

Third, none of the acts by Defendant Zimmerman alleged in the Complaint constitute federally unlawful or unconstitutional conduct. The alleged acts by Defendant Zimmerman include:


- Knowing that Defendant Moore had made or was about to make a complaint to law enforcement against the plaintiff for assault and battery, but did not advise the plaintiff of that fact (Docket #1, ¶ 28);
- Asking the plaintiff not to file a criminal complaint against Defendant Moore (Docket #1, ¶ 29);
- Asking the plaintiff to wait until he returned from a scheduled conference to make a decision about Defendant Moore’s employment (*Id.*);
- Asking the plaintiff to resign (Docket #1, ¶ 34);
- Obtaining commitments from other members of the Board of Trustees to terminate Pasco’s employment, despite knowing that Defendant Moore had assaulted and battered the plaintiff and that Defendant Moore had illegally seized and destroyed the plaintiff’s personal property as well as the Library’s property (Docket #1, ¶ 35).

None of these acts allegedly committed by Defendant Zimmerman deprived the plaintiff of a protected federal right, privilege, or immunity under the Constitution, and the plaintiff fails to state a claim upon which relief may be granted pursuant to 42 U.S.C. § 1983 against Defendant Zimmerman personally.

For these reasons, it is clear that the Complaint does not allege any facts to support a 42 U.S.C. § 1983 against Defendant Zimmerman, and the lawsuit against Defendant Zimmerman, both in his official and personal capacity, should be dismissed.

HANK ZIMMERMAN
By Counsel

LITTEN & SIPE L.L.P

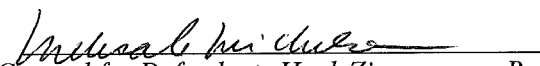
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*Counsel for Defendants Hank Zimmerman, Board of Trustees of the
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CERTIFICATE

I certify that on the 26th day of January, 2012, I electronically filed the foregoing Reply Memorandum in Support of Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Timothy E. Cupp, Esq., Cupp & Cupp, P.C., 1951-D Evelyn Byrd Avenue, P.O. Box 589, Harrisonburg, Virginia 22803, Cupplaw@comcast.net, Counsel for Plaintiff; and to Julia B. Judkins, Esq., Bancroft, McGavin, Horvath, & Judkins, P.C., 3920 University Drive, Fairfax, Virginia 22030, Jjudkins@bmhjlaw.com, Counsel for Defendant James Dallas Moore.


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and Shenandoah County Library.*