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

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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY DEFENDANT SHENANDOAH COUNTY LIBRARY

Defendant Shenandoah County Library ("Library"), by counsel, pursuant to the Scheduling Order (Docket #18), states as follows for its brief in Reply to the Memorandum (Docket #24) filed by the plaintiff in opposition to the Motion to Dismiss (Docket #10).

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

In his Memorandum in Opposition to the Motion to Dismiss, the plaintiff contends that Defendant Library's argument relies on 2 essential factors: 1) that Defendant Moore acted for his own private reasons; and that 2) Defendant Library is immune. Docket #24, p.1. This conclusion is erroneous, as the plaintiff misconstrues and misunderstands the law and Defendant Library's argument.

The law is clear that a local governmental entity, such as a county (or a county library in this case), may only be held liable under 42 U.S.C. § 1983 when the local government's policy or custom, "whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy," causes the injury. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978); *see also Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (municipalities cannot be held liable under a theory of *respondeat superior* for the constitutional violations of their employees acting within the scope of their employment). The Supreme Court has held that an unconstitutional governmental policy could be inferred from a single decision by

the officials responsible for making policy in that area of the government's business. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298 (1986) ("No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government policy.") (citing *Owen v. City of Independence*, 445 U.S. 622, 633, 655, n. 39 (1980) (City Council passed resolution firing plaintiff without a pre-termination hearing); and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (City Council canceled license permitting concert because of dispute over content of performance). "At the other end of the spectrum, [the Supreme Court has] held that an unjustified shooting by a police officer cannot, without more, be thought to result from official policy." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 108 S. Ct. 915 (1988) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 821, 823-24, 105 S. Ct. 2427, 2436 (1985) (plurality opinion) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."). In *Praprotnik*, the Supreme Court expanded on these certain circumstances, holding that a municipality may be held liable under § 1983 for a single constitutional violation: 1) for acts that the municipality "'has officially sanctioned or ordered'"; and 2) by municipal officials who have "'final policymaking authority'"; 3) which is a question of state law; and 4) when the "'challenged action was taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business.'" *Praprotnik*, 485 at 123, 108 S. Ct. at 924 (quoting *Pembaur*, 475 U.S. at 480, 482-83 & n. 12, 106 S. Ct. at 1298, 1299-1300 & n. 12) (emphasis in original) (citations omitted).

Here, the plaintiff does not meet the Supreme Court's requirements of municipal liability for a single constitutional violation. The Complaint does not allege an unconstitutional policy or custom by Defendant Library There is a complete lack of factual support of any custom or usage or policy by Defendant Library to retaliate against employees who protect their property or enforce their legal rights. Rather, the challenged unconstitutional action was done by Defendant Moore. It is undisputed that the acts allegedly committed by Defendant Moore were not ordered by Defendant Library. Nor do the facts alleged support that Defendant Library officially

sanctioned Defendant Moore's acts. More importantly, the challenged action was not taken pursuant to any policy adopted by Defendant Library. Defendant Moore did not act in furtherance of, or because of, or pursuant to any policy or custom of the Library. The facts alleged compare more closely with *Tuttle, supra.* In *Tuttle*, the plaintiff proved only a single instance of unconstitutional action by a non-policymaking employee of the city. *Tuttle*, 471 U.S. at 816-17. She argued that the city had caused the constitutional deprivation by adopting a "policy" of inadequate training. *Id.* at 821. The Supreme Court rejected this argument and reversed the judgment against the city, stating that the trial court's instruction to the jury that it could infer from a single, unusually excessive use of force that it was attributable to grossly inadequate training, and that the municipality could be held liable on this basis was error. *Id.* at 821-823. Both the plurality and the opinion concurring in the judgment found the plaintiff's submission insufficient because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy. *Id.*, at 822-824 (plurality opinion), 829-830 (BRENNAN, J., concurring in part and concurring in judgment).

Thus, even assuming that Defendant Library's decision to terminate the plaintiff was a "policy" or "custom" within the meaning of *Monell*, the plaintiff still has not alleged sufficient and proper facts to constitute a violation under § 1983. The key element that the plaintiff fails to recognize is that the policy or custom must *cause* the alleged injury. The plaintiff's alleged injuries were caused by Defendant Moore, not by an unconstitutional policy or custom or act by Defendant Library. *See Tuttle*, 471 at 821 ("The foregoing discussion of the origins of *Monell*'s 'policy or custom' requirement should make it clear that, at least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers."). The cases cited by the plaintiff in his Memorandum in Opposition are inapposite to the facts of this case. Docket #24, pp. 6-7. *Scearce v. Halifax County*, 1995 U.S. Dist. LEXIS 9216 (W.D. Va. 1995) and *Hall v. Marion School Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994) are distinguishable from this case on this critical fact. Both of the plaintiffs in *Scearce* and *Hall* alleged that they were terminated in violation of their right of free speech protected by the First Amendment. As such, the respective decisions to terminate the plaintiffs may give rise to a § 1983 claim as the alleged basis for the termination itself constituted unconstitutional conduct by the municipalities. Here, on the other hand, the facts alleged do not support that Defendant Library's decision to terminate him was based on a

constitutionally protected right or privilege. Rather, the plaintiff alleges that his subordinate employee (Defendant Moore) violated his Fourth and Fifth Amendment rights against illegal search and seizure, that he and Defendant Moore each allege that the other assault and battered the other, and then he was fired by Defendant Library after he fired Defendant Moore for reporting him to the police for assault and battery. The plaintiff does not allege, like in the cases cited by the plaintiff, that he was terminated for exercising a federally protected right. Getting into a physical altercation with a subordinate is not a federally protected right. The plaintiff's alleged injuries resulted from the alleged Fourth and Fifth Amendment violations, which were not caused by the termination, as required by the Supreme Court. In fact, the plaintiff's injuries occurred before Defendant Library' decision to terminate him. The plaintiff puts the cart before the horse and misapplies the law. *Hughes v. Halifax County School Board*, 855 F.2d 183, 186 (4th Cir. 1987) ("To establish municipal liability under § 1983, the plaintiff must be able to show that the execution of a municipal policy or custom inflicts an injury.").

Here, no wrong can be ascribed to any action or decision of Defendant Library. The plaintiff's legal conclusion that his termination by Defendant Library was "an additional property deprivation attributable to Defendant Board" of Trustees [1] is not supported by the facts or the law. Defendant Library 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) (citation omitted). In fact, in order to have a property interest in continued employment, the plaintiff must have more than "an abstract need or desire for it, and more than a unilateral expectation of it." *James v. Powell*, 765 F. Supp. 314 (E.D. Va. 1991) (discussing protected property interests in benefits such as continued employment or promotion). Rather, the plaintiff must have a "legitimate claim of entitlement" to the benefit, "created by statute or institutional regulation." *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). 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 these requirements. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) ("Threadbare

[1] Docket #24, p.6.

recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Here, the plaintiff does not allege any facts detailing any state law rules, or understandings, or statute, or regulation, or even policy to support his conclusory statements. The plaintiff does not allege that he had an employment contract with Defendant Library. The plaintiff does not allege that he was employed for a specific term. The plaintiff does not allege that Defendant Library had an internal policy of only terminating him (or any employee) for good cause. Long term employment does not create an expectation of continued employment. *See McBride v. City of Roanoke Redevelopment and Housing Authority*, 871 F. Supp. 885, 890 (W.D. Va. 1994) (Termination of the plaintiff, who was Executive Director of Authority for 28 years, did not deprive him of a protected property interest.) As such, the only reasonable inference is that the plaintiff served at the will and pleasure of Defendant Library, and thus, can have no legitimate expectation of continued employment. *Skeeter v. City of Norfolk*, 681 F. Supp. 1149, 1155 (E.D. Va. 1987) ("Under Virginia law, 'at will' employment creates no property interest."), *aff'd*, 898 F.2d 147 (4th Cir. 1990). Thus, the plaintiff's assertion that his discharge without just cause is an additional property deprivation attributable to Defendant Library [2] is not supported by the facts or the law.

Likewise, the plaintiff's sweeping generalization that Defendant 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"[3] is unwarranted. The Complaint is devoid of any actual facts supporting ratification of unconstitutional conduct. 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 #24, 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,

[2] Docket #24, p. 6.
[3] *Id.*

¶¶ 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 plaintiff's assertion that Defendant Library used the plaintiff's response to Defendant Moore's actions against him does not equate to ratification of Defendant Moore's conduct, but demonstrates that the plaintiff was terminated based on his own actions and role in the incident. 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 Library 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 after the subordinate accuses his supervisor of assault and battery should be terminated. Accordingly, Defendant Library terminated the plaintiff.

In discussing whether a School Board ratified a subordinate's decision, the Fourth Circuit stated that a plaintiff must show that the School Board "not only ratified the decision but the basis for it and thus 'made a calculated choice to follow the course of action deemed unconstitutional.'" *Green v. Fairfax County School Board*, 832 F. Supp. 1032, 1043 (E.D. Va. 1993) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 726 (4th Cir. 1990) (In denying municipal liability based on one single act, the Fourth Circuit dismissed the § 1983 action against the City, as the plaintiff cited nothing more than unsupported allegations that the City adhered to a policy condoning illegal searches and seizures); and (citing *Williams v. Ellington*, 936 F.2d 881, 884-85 (6th Cir. 1991) (single isolated decision by school board to ratify warrantless strip search made pursuant to lawful policy was insufficient to establish § 1983 liability)). The same reasoning is applicable here. The plaintiff has not stated any facts to support that Defendant Library decision to terminate him was based on any unconstitutional conduct. Rather, taken as a whole, the Complaint shows that the plaintiff's own actions were the basis for his termination and no actions taken by Defendant Library violated any federally protected right.

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

II. Defendant Library Entitled to Sovereign Immunity on Tort Claims

The plaintiff misconstrues Defendant Library's argument and the case law regarding sovereign immunity. The initial critical factor in sovereign immunity is who the defendant is, the Commonwealth or an employee of the Commonwealth. The cases cited by the plaintiff all deal with employees of the Commonwealth[4], who only enjoy immunity under certain circumstances. On the other hand, under the doctrine of sovereign immunity, the Commonwealth and its political subdivisions, such as counties, are immune from liability for damages and lawsuits to restrain governmental action or to compel such action. *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 101-102 (2008) ("'It is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts . . . without its consent and permission.'") (quoting *Board of Public Works v. Gannt*, 76 Va. 455, 461 (1882)); and *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007) ("Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth."). As such, the Commonwealth and counties are immune from tort liability for the acts and omissions of its agents and employees, unless an express statutory or constitutional provision waives that immunity. *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244-46 (2004) (Court held that given the Virginia Tort Claims Act lack of an express waiver of the common law sovereign immunity afforded the Commonwealth's agencies, UVA retains its sovereign immunity from the medical malpractice claim brought by plaintiff); *Mann v. County Board of Arlington County*, 199 Va. 169, 174-75 (1957) ("Arlington County being a political subdivision of the State, its freedom from liability for this tort [negligent construction, maintenance and operation of the sidewalk and adjoining parking lot] may be likened to the immunity that is inherent in the State.").

Similarly, the plaintiff's reliance on *Lentz v. Morris*, 236 Va. 78 (1988) is misplaced and his citation is incorrect. Again, the defendant at issue in *Lentz* was a high school teacher, an employee of an immune governmental entity. *Lentz*, 236 Va. at 82. In *Lentz*, the Supreme Court of Virginia discussed its holding in *Messina v. Burden*, 228 Va. 301 (1984), which distinguished the county, which shares the immunity of the State, with an employee of a county, who is entitled to the benefits of sovereign immunity where his activities clearly involve the exercise of judgment and discretion. *Id.* After applying the test developed in *James v. Jane*, 221 Va. 43

[4] *Shvern v. Derosiers*, 2000 U.S. App. LEXIS 29688 (4th Cir. 2000) (George Mason University employees); *Tomlin v. McKenzie*, 251 Va. 478 (1996) (social worker seeking immunity under Va. Code § 63.1-248.3); *Fox v. Deese*, 234 Va. 412 (1987) (City of Richmond employees); *Elder v. Holland*, 208 Va. 15 (1967) (state police captain); and *Coppage v. Mann*, 906 F. Supp. 1025 (E.D. Va. 1995) (state prison employees).

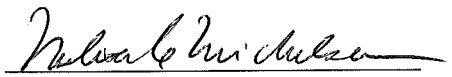
(1980), the Virginia Supreme Court determined that the high school teacher was immune from suit. *Id.* *Lentz* does not involve a county. Nor does *Lentz* stand for the proposition that sovereign immunity does not protect counties from liability for "gross negligence or intentional misconduct." Docket #24, p. 8. In *Lentz*, the Virginia Supreme Court simply states that the facts alleged against the high school teacher do not support a charge of either gross negligence or intentional misconduct, which has no application or persuasion in this case. *Id.*

In the case at bar, there is no express statutory or constitutional provision waiving sovereign immunity of Defendant Library. Accordingly, Defendant Library is immune from tort liability for the acts and omissions of its employee, Defendant Moore.

For these reasons, Defendant Library respectfully requests that the Court grant its Motion to Dismiss.

SHENANDOAH COUNTY LIBRARY
By Counsel

LITTEN & SIPE L.L.P.

By: 

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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.

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