

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
Harrisonburg Division

ROBERT L. PASCO, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 HANK ZIMMERMAN, )  
 individually and in his official capacity )  
 as Chairman of the Board of Trustees )  
 of the Shenandoah County Library )  
 )  
 BOARD OF TRUSTEES of the )  
 SHENANDOAH COUNTY LIBRARY, )  
 )  
 SHENANDOAH COUNTY LIBRARY, )  
 )  
 and )  
 )  
 JAMES DALLAS MOORE, )  
 )  
 Defendants. )

Civil Action No.: 5:11-cv-00087

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

COMES NOW the defendant, JAMES DALLAS MOORE (“Moore”), by counsel, and in support of his motion to dismiss the plaintiff’s suit pursuant to Fed. R. Civ. 12(b)(6) states as follows:

**I. STATEMENT OF FACTS AS ALLEGED IN THE COMPLAINT**

The plaintiff, Robert L. Pasco (“Pasco”), has filed suit against several defendants, including defendant Moore. It is alleged that defendant Moore was employed by the defendant Board of Trustees of the Shenandoah County Library (“the Library”) as the technology director of the Library. (Compl. ¶ 8) It is further alleged that Pasco was employed as the director of the Library from 2002 until he was unlawfully terminated by co-defendants, and that Pasco was defendant Moore’s supervisor. (Compl. ¶¶ 6, 15, 18)

Pasco alleges that on the morning of October 1, 2010, a dispute arose between Pasco and Moore with regard to another employee identified as Keith Brown. (Compl. ¶¶ 14-16) Pasco alleges that Moore “barged into Plaintiff’s office without permission,” physically pushed him away from the computer and “seized two external computer hard-drives that were on” the plaintiff’s desk. Pasco claims that one of these hard-drives belonged to the co-defendant, the Library, and the other belonged to him. (Compl. ¶¶ 17, 18) It is alleged that Moore was attempting to take the external hard-drives to the Shenandoah County administrator, “in an effort to use information he falsely claimed was on them against plaintiff in an effort to get Plaintiff terminated.” (Compl. ¶ 21)

Thereafter, Pasco describes having engaged in a physical altercation with Moore resulting in Pasco allegedly sustaining a cut over his eye and a bloody nose, and Moore contacting the police to initiate assault charges against Pasco. (Compl. ¶¶ 24-26) As a result of the altercation, the plaintiff alleges that defendant Moore “threw both drives to the floor, and they shattered.” (Compl. ¶ 24) He alleges that his personal hard-drive was destroyed, but has no knowledge as to what became of the Library’s hard-drive. (Compl. ¶ 27)

The remaining allegations relate to Moore’s alleged attempt to make a criminal complaint against Pasco for assault and battery and what Pasco describes as his wrongful termination from employment by the co-defendants. (Compl. ¶¶ 28-36) The complaint further states that, as the director of the Library, Pasco terminated Moore’s employment in response to which Moore submitted a grievance seeking reinstatement to his job. Plaintiff denied the grievance; however, as alleged, the co-defendant Board of Trustees reinstated Moore to his job. (Compl. ¶¶ 32, 37) The complaint states in conclusory fashion that, by reinstating Moore to his job and terminating the plaintiff, the co-defendants “adopted, ratified and acquiesced in Defendant Moore’s illegal behavior as [to] the acts of all defendants.” (Compl. ¶ 37)

Plaintiff insists that these allegations give rise to a six counts against the defendants, “jointly and severally”: Count I, “Under 42 U.S.C. § 1983” (violation of “right to be free from unlawful searches and seizures, and the right to protection from unlawful takings without due process of law under the Fourth, Fifth, and Fourteenth Amendments, and made actionable under 42 U.S.C. § 1983”); Count II, Conversion; Count III, Violation of Virginia Computer Crimes Act; Count IV, Assault and Battery; Count V, Violation of Virginia Constitution (specifically, “Va. Const. Art. 1, § 11”); and Count VI, Wrongful Discharge in Violation of Public Policy. However, as plaintiff alleges no facts to support a federal claim against Moore for alleged violation of constitutional rights, defendant Moore requests that this court dismiss all claims asserted against him.

## **II. STANDARD OF REVIEW**

“A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). However, “[u]ltimately, a complaint must contain ‘sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009)).

### III. ARGUMENT

Plaintiff has failed to allege sufficient facts to set forth a valid claim or cause of action against defendant Moore for violation of federally protected constitutional rights. As a result, this court lacks subject matter jurisdiction of the claims against defendant Moore.

Pursuant to Fed. R. Civ. P. 8(a), “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claims showing that the pleader is entitled to relief.” Under the standards established by the court in *Ashcroft v. Iqbal*, *supra*, compliance with Rule 8(a)(2) requires more than “labels and conclusions,” and must “state a claim to relief that is plausible on its face.” 129 S. Ct. at 1949. Facts that are merely consistent with the defendant’s liability are insufficient to state a plausible claim. *Id.*

The allegations set forth in the complaint are insufficient to state a federal claim or cause of action against defendant Moore because the acts attributable to him are clearly descriptive of private conduct, based on a personal dispute between an employee and supervisor over perceived favorable treatment given by the supervisor to another employee. In order to state a claim for relief under Section 1983, the facts alleged must be sufficient to identify a constitutional or statutory right that was allegedly violated by someone acting “under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). Similarly, the “state-action requirement of the Fourteenth Amendment . . . excludes merely private conduct, no matter how discriminatory or wrongful.” *Id.* (internal quotation marks omitted). These “under color of law” and “state action” requirements are essentially one-in-the-same. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928-929 (1982).

Although state employment is generally sufficient to render the defendant a state actor, it is “well settled that an otherwise private tort is not committed under color of law simply because the

tortfeasor is an employee of the state.” *Jojola v. Chavez*, 55 F.3d 488, 493 (10th Cir. 1995); see *Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion; “officers in the ambit of their personal pursuits are plainly excluded”); *Briscoe v. LaHue*, 663 F.2d 713, 721 n.4. (7th Cir. 1981). “Rather, in order for the tortfeasor to be acting under color of state law, his act must entail ‘misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1150-51 (3d Cir. 1995) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)); see *West v. Atkins*, 487 U.S. 42, 50 (1988). Specifically, the act must “occur[] in the course of performing an actual or apparent duty of his office, or . . . is such that the actor could not have behaved in that way but for the authority of his office.” *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995).

In this case, the factual allegations are insufficient to state a claim for violation of rights as a result of either state action or action occurring under state law. Even though Pasco claims that both parties were in the workplace during the work day when the acts occurred, that is simply not enough to make Moore’s alleged actions “state actions.” See, e.g., *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968), (even “acts committed by a police officer . . . while on duty and in uniform are not under color of state law unless they are in some way ‘related to the performance of police duties’”), *aff’d*, 460 U.S. 325 (1983). Pasco does not allege that Moore was acting at the directive or on behalf of their employer. Further, there is no way Moore’s alleged barging into Pasco’s office, physically assaulting him, and “seizing” two hard-drives could be construed as Moore “performing an actual or apparent duty of his office.” Allegations of assault and conversion fall outside that realm. Nor do those allegations give rise to the conclusion that Moore’s actions “were otherwise made possible because of the privileges of [his] employment.” *Hughes v. Halifax County School Bd.*, 855 F.2d 183, 187 (4th Cir. 1988). Although the contact between Pasco and Moore was made

possible by their employment for the same organization, the alleged abusive conduct was not “related to the duties and powers incidental to [Moore’s] job,” which is inherent to the “privileges of employment inquiry. *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464, 468 (N.D. Ill. 1986). There is no allegation that Moore was literally or figuratively “clothed in state power” at the time of this act.

At best, Moore’s alleged actions were what the courts have characterized as a “personal frolic” or “personal pursuits,” not under color of law. *See, e.g., Martinez*, 54 F.3d at 986-88 (police officer who tormented fellow officer by brandishing a firearm and wounding him was not acting with the authority of state law, though on duty and in uniform, because his actions were a “personal frolic” and not “related in any meaningful way either to his official status or to the performance of his police duties”); *Hughes*, 855 F.2d at 184, 186-87 (school district employees who taunted and tormented co-worker by enacting a mock lynching of him were not acting under color of law because defendants did not purport to act under authority vested in them by state— they were not “figuratively and literally clothed in state power”), *cert. denied*, 488 U.S. 1042 (1989); *Bonsignore v. City of N.Y.*, 683 F.2d 635, 638-39 (2d Cir. 1982) (holding that a police officer who wounded his wife and killed himself using a gun which he was authorized to carry because of his status as an officer “was not acting under color of state law since his actions were not ‘committed in the performance of any actual or pretended duty,’ but were performed ‘in the ambit of [his] personal pursuits’”); *Murphy*, 638 F. Supp. at 468 (attorneys who physically and verbally sexually harassed a fellow attorney not liable for actions “under color of law” because “the abusive conduct was not in any way related to the duties and powers incidental to the job of CTA staff attorney”).

The court is not required to accept plaintiff's legal conclusions or conclusory statements that Moore was allegedly acting under color of state law. *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. Pshp.*, 213 F.3d 175, 180 (4th Cir. 2000). Instead, the court must consider the facts plead which, in this case, are wholly deficient. Because Moore's actions as alleged in the complaint do not describe conduct which occurred in "the course of performing an actual or apparent duty of his office," or describe conduct that could not have occurred "but for the authority of his office," plaintiff has no remedy under Section 1983. *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995); see *West v. Atkins*, 487 U.S. 42, 50 (1988). To find otherwise would be to suggest that "any employee of any state who commits a tort has potentially violated § 1983." *Hughes*, 855 F.2d at 187.

#### **IV. CONCLUSION**

Inasmuch as the plaintiff has failed to set forth claim or cause of action for which relief may be granted based on any violation of federal or constitutional law, defendant Moore argues that these claims should be dismissed with prejudice. Furthermore, defendant argues that there is no compelling reasons for the court to retain jurisdiction over the state law claims and requests that these claims be dismissed. For all of the foregoing reasons, and for any additional reasons to be argued at hearing of this matter, defendant James Dallas Moore respectfully requests that this court grant his motion to dismiss.

JAMES DALLAS MOORE

By Counsel

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2011, I electronically filed the foregoing **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 the following:

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