IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-03112-RBJ-STV

SEAN SLATTON,

Plaintiff

v.

TODD HOPKINS, BRANDON BARNES, JOHN HUTTO
and FORT COLLINS POLICE DEPARTMENT

Defendants.

DEFENDANTS BRANDON BARNES, JOHN HUTTO AND FORT COLLINS POLICE DEPARTMENT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendants, Brandon Barnes, John Hutto, and the City of Fort Collins, sued as the "Fort Collins Police Department," through their Attorneys, Mark S. Ratner, Esq., and Hall & Evans, L.L.C., hereby submits the following as their Motion to Dismiss Plaintiff's Amended Complaint (ECF No. 17) pursuant to Fed. R. Civ. P. 12(b)(6):

Certificate of Conferral

Undersigned Counsel conferred with pro se Plaintiff via email on June 14, 2019. Plaintiff indicates he objects to the requested relief.

I. INTRODUCTION

Pro se Plaintiff appears to allege a myriad of claims in his Second Amended Complaint (ECF No. 17) ("Complaint") which are entitled "False Arrest" pursuant to 42 U.S.C. § 1983, "Excessive Force/Physical Assault", "False Imprisonment", "Obstruction of Justice" pursuant to 18 U.S.C. § 1503, "Police Misconduct" pursuant to 18 U.S.C. § 242, and a "failure to intervene." (ECF No. 17 at 4). The claims purportedly arise from the arrest of Plaintiff on or about December 3, 2016 (ECF

No. 17 at 5).

Plaintiff's Complaint is deficient in multiple respects. In particular, the Plaintiff fails to comply with Federal pleading standards established pursuant to ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544 (2007). Additionally, with respect to Defendants Barnes and Hutto, the doctrine of qualified immunity, and a lack of allegations respecting particularized behavior, given that "personal participation is an essential allegation in a section 1983 claim," also preclude Plaintiff's claims. ***Bennett v. Passic***, 545 F.2d 1260, 1262 (10th Cir.1976); ***Foote v. Spiegel***, 118 F.3d 1416 (10th Cir.1986)[1].

Plaintiff also fails to identify any custom, practice, policy, or procedure which might support any liability against the City of Fort Collins.

Plaintiff also attempts to set forth claims pursuant to 18 U.S.C. §§ 1503 and 242. However, those sections pertain to criminal matters, and do not contain a civil enabling component.

II. ARGUMENT

A. Standard

A motion to dismiss under Fed R. Civ. P. 12(b)(6) is properly granted when a complaint provides no "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . . Factual allegations must be enough to raise a right to relief above the speculative level." ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544 (2007). A complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted if it does not

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[1] Plaintiff's failure to adhere to Federal pleading standards, makes discerning any purported State law claim difficult at best. Therefore, any effort on Plaintiff's part to attempt a claim against Officer Barnes and Chief Hutto, grounded in Colorado State law, is precluded by the Colorado Governmental Immunity Act ("CGIA"), which applies to any tort claims, while governmental immunity shields these Defendants from any state law claim absent specific statutory waiver of immunity. §§24-10-102, 24-105, 24-10-106(1), and 24-10-108, C.R.S. (2011); ***City of Colorado Springs v. Conners***, 993 P.2d 1167, 1171-72 (Colo.2000). The existence of governmental immunity waiver is an issue of subject matter jurisdiction determinable pursuant to F.R.C.P. 12(b)(1).

plead "enough facts to state a claim to relief that is plausible on its face." ***Twombly*** 550 U.S. at 570. "[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." ***Twombly*** 550 U.S. at 555, citing 5 C. **Wright & A. Miller,** ***Fed. Prac. & Proc.***, § 1216 at 235–36 (3d ed. 2004).

"The plausibility standard is not akin to a 'probability requirement,'" but the allegations must "permit the court to infer more than the mere possibility of misconduct." ***Ashcroft v. Iqbal,*** 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" ***Ashcroft***, 556 U.S. at 678 citing ***Twombly***, 550 U.S. at 555.

B. Plaintiff's Complaint never satisfies Federal pleading standards as to Officer Barnes, Chief Hutto, and the City of Fort Collins[2]

To state a claim for relief, a Federal complaint must 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 will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." ***Conley v. Gibson***, 355 U.S. 41, 47 (1957). At the pleading stage, it is not the defendant's or the court's responsibility to guess at plaintiff's claims. ***Conley***, 355 U.S. 41, 47 (1957). ***Robbins v. State of Oklahoma***, 519 F.3d 1242, 1248–49 (10th Cir. 2008). The court may not "assume that a plaintiff can prove facts that the plaintiff has not alleged or that the defendants have violated the laws in ways that the plaintiff has not alleged. Although the plaintiffs' pleadings are to be liberally construed, mere conclusory allegations without supporting factual averments will not suffice." ***Baumeister v. N.M.***

[2] Plaintiff's Complaint identifies the "Fort Collins Police Department" as a Defendant in this matter. The Fort Collins Police Department is not a proper defendant. ***Stump v. Gates***, 777 F. Supp. 808, 815 (D. Colo. 1991) citing ***Boren v. City of Colorado Springs***, 624 F. Supp. 474, 479 (D. Colo. 1985) (city's police department, as merely the vehicle through which city fulfills its policing functions, not a proper party). Plaintiff's Complaint, therefore, should be construed as an attempt to bring claims against the City of Fort Collins.

Comm'n for the Blind, 425 F. Supp. 2d 1250, 1257 (D. N.M. 2006). Plaintiff must explain what each defendant did to him, when the defendant did it, how the defendant's action harmed him, and what specific legal right the defendant violated. ***Nasious v. Two Unknown B.I.C.E. Agents***, 492 F.3d 1158, 1163 (10th Cir. 2007); ***Robbins***, 519 F.3d at 1250. It is not sufficient to refer collectively to a group of defendants, without specifying the individual activities of each. ***Robbins***, 519 F.3d at 1250 ("Given the complaint's use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed.") ***Robbins***, 519 F. 3d at 1250. Further, Federal pleading standards require Plaintiff to also establish personal participation in conduct in which he alleges is a violation of his Constitutional rights. *See* ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir.2008); ***Currier v. Doran***, 242 F.3d 905, 925 (10th Cir.2001).

Plaintiff's Complaint contains no clear delineation as to what claims are levied against which Defendant. Instead, Plaintiff generally sets forth six "claims" apparently lumping all the Defendants together. (ECF No. 17 at 4).

Furthermore, Plaintiff's Complaint offers nothing more than conclusory allegations respecting any purported action which might result in a violation of Constitutional or statutory law. For example, Plaintiff alleges "Officer Barnes was also involved with the shooting of a suspect by the FCPD in January of this year." (ECF No. 18 at 8), and "(t)hus, there is a reasonable likelihood that material and information related to the use of force and other acts of aggression or violence by or otherwise involving Officer Barnes, exists." (ECF No. 17 at 8). Such allegations, however, are merely conclusory and therefore invalid under Federal pleading standards.

The Plaintiff's inability to allege proper factual averments is further supported by his intention to conduct discovery in an attempt to identify "officer propensity for violence, officer

propensity for misconduct and officer credibility". Setting forth bare allegations with an eye towards somehow later identify a potential claim, and attempting to support said claim with future discovery, is the exact mechanism precluded by the reasoning in ***Twombly*** and progeny. ***Conley***, 355 U.S. 41, 47 (1957). Any such allegations are insufficient against these Defendants.

Any claims against these Defendants should, therefore, be dismissed on this basis.

C. Plaintiff fails to properly set forth allegations identifying personal participation by Officer Barnes or Chief Hutto.

To establish liability pursuant to § 1983, the Plaintiff must assert that: (i) any named individual personally participated in the conduct; (ii) exercised control or direction over it; (iii) failed to supervise; (iv) failed to train; or (v) tacitly authorized the conduct that resulted in a constitutional deprivation. *See* ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir.2008); ***Currier v. Doran***, 242 F.3d 925 (10th Cir.2001). Plaintiff must also allege that the individual Defendant's conduct violated a clearly established constitutional or federal statutory right that would have been known by a reasonable government official.

Here, the Complaint does not properly allege anything other than in a conclusory fashion, that any of the Defendants personally participated in pertinent conduct, or that any of the Defendants exercised control or direction over any relevant activity. A plaintiff must allege the personal participation of the Defendants in some identifiable alleged wrongful conduct, or that the Defendant exercised control or direction over such behavior, failed to supervise, train or tacitly authorized the conduct of others, that resulted in a constitutional deprivation. *see* ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir. 2008); ***Currier v. Doran***, 242 F.3d 905, 925 (10th Cir.2001). No claim against any defendant in an individual capacity can succeed without a proper indication the individual was involved in some personal manner in the events prompting the claim, otherwise, any such claim must fail for lack of personal participation which is a requirement of any 42 U.S.C. §1983 claim. ***Grimsley v. Mackay***, 93 F.3d 676, 679 (10th Cir.1996); ***Mitchell v. Maynard***, 80 F.3d 1433, 1441 (10th

Cir.1996); ***Bennett v. Passic***, 545 F.2d 1260, 1262-63 (10th Cir.1976).

The Complaint is devoid of any allegations explaining, in more than conclusory terms, how the individual Defendants are alleged to personally have caused any deprivation of a federal right. ***Kentucky v. Graham***, 473 U.S. 159, 166 (1985).

D. Plaintiff fails to establish any claim against the City of Fort Collins.

Hinton v. City of Elwood, Kan., 997 F.2d 774, 783 (10th Cir.1993) precludes any claim against a public entity based on any theory of *respondeat superior*. Instead, to establish liability against a municipality, a plaintiff must show that a public entity's policy or custom existed and a direct causal link between that policy or custom and the injury alleged. ***City of Canton Ohio v. Harris***, 489 U.S. 378, 385 (1989); ***Myers v. Oklahoma County Bd.***, 11 F.3d 1313 (10th Cir.1998).

Nowhere in Plaintiff's Complaint is a specific custom, practice, policy or procedure alleged nor is there any indication respecting a causal link between any such custom, practice or policy and a purported violation of Plaintiff's Constitutional rights.

E. Plaintiff's Claim pursuant to 18 U.S.C. § 1503 fails.

Plaintiff appears to attempt a claim pursuant to 18 U.S.C. § 1503 (ECF No. 17 at 4). However, 18 U.S.C. § 1503 pertains to "Influencing or injuring officer or juror". Generally, that section provides criminal liability for anyone who "corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impeded any grand or petit juror…" Here, 18 U.S.C. § 1503 provides no enabling provision for civil liability. Rather, the Section provides for imprisonment and other relief within a criminal context, and therefore any such claim should be dismissed on this basis alone. Additionally, even if this Section could somehow be construed as providing a basis for civil liability, Plaintiff's Complaint completely fails to identify any allegations which might support such a cause of action, and therefore it fails to comply with Federal pleading standards. ***Twombly***, *supra*. Furthermore, as argued below, any such claim would

be a state-law tort claims barred by governmental immunity under the CGIA.

F. Plaintiff's claim pursuant to 18 U.S.C. § 242 fails

As with Plaintiff's attempt at setting forth a claim pursuant to 18 U.S.C. § 1503, any claim pursuant to 18 U.S.C. § 242 (ECF No. 17 at 4) also fails. 18 U.S.C. § 242 also provides for criminal penalties and fails to identify a civil enabling provision. In addition, if any such provision did provide for a civil penalty, it would be duplicative of § 1983.

G. Any claim for "failure to intervene" fails.

In order to for a claim for "failure to intervene" be viable, a plaintiff must show an existing underlying constitutional violation. ***Duncan v. Quinlin***, 2015 U.S. Dist. LEXIS 48159 at *13 (D. Colo. April 13, 2015) citing Harper v. Albert, 400 F.3d 1052, 1064 (7th Cir. 2005). Here, Plaintiff's allegations fail to comply with Federal pleading standards, as no underlying Constitutional violation is alleged. Furthermore, no basis is provided to support the notion that Officer Barnes or John Hutto had any opportunity or need to intervene. Any such claim should be dismissed.

H. Plaintiff's State law tort claims, if any, fail as a matter of law.

To any extent Plaintiff intends on pursuing a State law tort claim, any such claim is barred by application of the Colorado Governmental Immunity Act ("CGIA"). The CGIA provides a grant of governmental immunity unless there is a specific statutory waiver. §§24-10-102, 24-105, 24-10-106(1), and 24-10-108, C.R.S. (2011); ***City of Colorado Springs v. Conners***, 993 P.2d 1167, 1171-72 (Colo.2000). The issue of whether the CGIA waived governmental immunity as to a claim for relief is one of subject matter jurisdiction to be decided pursuant to C.R.C.P. 12(b)(1). ***Medina v. State***, 35 P.3d 443, 451-52 (Colo.2001). C.R.S. §24-10-108 of the CGIA requires the trial court to resolve all issues of governmental immunity before trial. ***Finne v. Jefferson Cnty. Sch. Dist. R-1***, 79 P.3d 1253, 1259 (Colo.2003). C.R.S. §24-10-108 also requires the trial court to suspend discovery until the issue of governmental immunity is decided, except for discovery necessary to resolve the

issue of governmental immunity. "If a public entity raises the issue of sovereign immunity prior to or after commencement of discovery, the court shall suspend discovery, except any discovery necessary to decide the issue of sovereign immunity, and shall decide such issue on motion." C.R.S. §24-10-108.

On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff must demonstrate that governmental immunity was waived. ***Tidwell v. City and Cnty. of Denver***, 83 P.3d 75, 85 (Colo.2003). When jurisdictional facts concerning governmental immunity are in dispute, the trial court is required to hold an evidentiary hearing and enter findings of fact. *see* ***Trinity Broadcasting of Denver, Inc. v. City of Westminster***, 848 P.2d 916, 924 (Colo.1993). Where no evidence is disputed, no hearing is needed. Tidwell, 83 P.3d at 85086.

None of Plaintiff's purported claims are within any of the areas where governmental immunity is waived by the CGIA. C.R.S. §24-10-101 et seq. In addition, Plaintiff makes insufficient allegations against these Defendants to ever meet his obligation with regard to any attempt to assert a claim grounded in willful and wanton behavior, enough to overcome the protections of the CGIA. *s*ee ***City of Lakewood v. Brace***, 919 P.2d 231, 236 (Colo.1996); C.R.S. §24-10-106(1); C.R.S. §24-10-110(5)(a) and (b); ***Moody v. Ungerer***, 885 P.2d 200, 205 (Colo.1994)[3].

I. Officer Barnes and Chief Hutto are Entitled to Qualified Immunity.

To any extent Officer Barnes and Chief Hutto could ever be liable for any Constitutional claim respecting alleged individual behavior violating any right of Plaintiff, qualified immunity doctrine shields them from any damages claimed. *See* ***Harlow v. Fitzgerald***, 457 U.S. 800, 806 (1982). Qualified immunity affords public officials' immunity from suit and exists to "protect them from undue interference with their duties, and from potentially disabling threats of liability." ***Elder***

[3] To the extent Plaintiff intends on asserting any such claims might be attempted under Federal law, all such efforts are defeated by the precedents and reasoning that defeat all other efforts to state a federal claim here.

v. Holloway, 510 U.S. 510, 514 (1994), citing ***Harlow***, 457 U.S. at 806 (1982)). Qualified immunity protects all governmental officials performing discretionary functions from civil liability as long as their conduct does not violate clearly established Constitutional rights of which a reasonable person would have known. ***Harlow***, 457 U.S. at 818.

Qualified immunity is not only a defense to liability; it provides immunity from suit. ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985). "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." ***Siegert v. Gilley***, 500 U.S. 226, 232 (1991). "These burdens include distraction of officials from their governmental responsibilities, the inhibition of discretionary decision making, the deterrence of able people from public service, and the disruptive effects of discovery on governmental operations." ***Hannula v. City of Lakewood***, 907 F.2d 129, 130 (10th Cir. 1990). Courts should, therefore, resolve the purely legal question raised by a qualified immunity defense at the earliest possible state in the litigation. ***Medina v. Cram***, 252 F.3d 1124, 1127-28 (10th Cir. 2001).

When a defendant pleads the defense of qualified immunity, a plaintiff bears a heavy two-part burden of proving (1) that the defendants' actions violated a constitutional right, and (2) that the right was clearly established at the time of the conduct at issue. ***Mick v. Brewer***, 76 F.3d 1127, 1134 (10th Cir.1996) To survive dismissal, the plaintiff must show that the right was "clearly established" in a "particularized" sense. ***Wilson v. Meeks***, 52 F.3d 1547, 1552 (10th Cir. 1995), citing ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987)). "[F]or a right to be 'particularized,' there must ordinarily be a Supreme Court or Tenth Circuit decision on point, or 'clearly established weight of authority' from other courts." ***Anderson***, 483 U.S. at 640 citing ***Medina v. City & County of Denver***, 960 F.2d 1493, 1498 (10th Cir.1992). "As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. White v. Pauly, 137 S. Ct. 548, 552 (2017) citing Anderson,

supra. in

The Complaint never describes any constitutional violation in any particularized respect with regard to Officer Barnes and Chief Hutto. These Defendants are therefore entitled to qualified immunity with regard to any of Plaintiff's Federal law claims in this matter.

III. CONCLUSION

WHEREFORE, Officer Barnes, Chief Hutto, and the City of Fort Collins, respectfully requests the Court dismiss Plaintiff's Complaint, with prejudice and for entry of any other relief deemed just and appropriate by this Court.

Respectfully submitted this 17th day of June, 2019.

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 17th day of June, 2019, I electronically filed the foregoing DEFENDANTS BRANDON BARNES, JOHN HUTTO AND FORT COLLINS POLICE DEPARTMENT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) with the Clerk of Court using the CM/ECF system and mailed a copy to the following:

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