

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHNNY HAMM,	)	CASE NO. 1:15-CV-273
	)	
Plaintiff,	)	JUDGE CHRISTOPHER A. BOYKO
	)	
vs.	)	
	)	MOTION TO DISMISS PLAINTIFF'S
CALVIN D. WILLIAMS, et al.,	)	COMPLAINT FILED BY DEFENDANTS
	)	CITY OF CLEVELAND AND CALVIN D.
Defendants.	)	WILLIAMS
	)	

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants City of Cleveland and Cleveland Chief of Police Calvin D. Williams respectfully move for dismissal of the Complaint on the following grounds: (1) the allegations in the Complaint are insufficient to state a plausible claim under the 1st and 14th Amendments because Hamm failed to allege a constitutional deprivation caused by the City; and (2) the Ohio Constitution does not confer a private right of action for damages for violations of Ohio Const. Art. I, §11 and §16. A memorandum in support is attached and expressly incorporated.

Respectfully submitted,

BARBARA A. LANGHENRY (0038838)
Director of Law

By: s/Aikaterini Houston
WILLIAM M. MENZALORA (0061136)
Chief Assistant Director of Law
AIKATERINI HOUSTON (0086262)
Assistant Director of Law
ALEJANDRO CORTES (0079806)
Assistant Director of Law
City of Cleveland Department of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
Tel: (216) 664-2800 Fax: (216) 664-2663
Email: WMenzalora@city.cleveland.oh.us
AHouston@city.cleveland.oh.us
ACortes@city.cleveland.oh.us

*Attorneys for Defendants City of Cleveland and
Calvin D. Williams*

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff Johnny Hamm filed this complaint on February 11, 2015 against the City of Cleveland and Cleveland Chief of Police Calvin D. Williams. The claim against Chief Williams is brought against him in both his official and individual capacities.

Hamm's claims against the City and Chief Williams allegedly arose from written comments made by Plaintiff on the internet via Facebook. The Complaint specifically alleges a claim predicated on violations of the First and Fourteenth Amendments to the United States Constitution (Counts I-IV), and Article I, §11 and §16 of the Ohio Constitution (Counts I-IV), against both defendants.

As it will be explained below in greater detail, Hamm's purported claims are legally meritless and should be dismissed with prejudice for lack of jurisdiction and/or for failure to state a claim.

II. STATEMENT OF THE FACTS

For purposes of this motion only, Defendants will assume as true the following facts. On June 1, 2014, Hamm, while he was off-duty and using his home computer, posted written comments on Facebook in response to the indictments returned by a grand jury regarding the investigation of the November 29, 2012, police chase by the Bureau of Criminal Investigation and the Cuyahoga County Prosecutor. (Doc. #1, *Complaint* at ¶¶ 11-12.) Hamm claimed to be expressing his support for his fellow police officers on his personal Facebook page. (*Id.*, at ¶ 12.) On that same day, Chief Williams learned of Plaintiff's post and initiated an investigation to determine whether the posting had violated Division of Police policy. (*Id.*, at ¶ 13.)

Hamm made another Facebook post on June 8, 2014 using his private home computer while off-duty. (*Id.*, at ¶ 20.) The June 8, 2014, post referenced Hamm's June 1, 2014 post, and noted that an unknown individual had been upset by his earlier post. (*Id.*) Chief Williams then caused the investigation that he had initiated a week earlier to also include Plaintiff's June 8, 2014 Facebook post. (*Id.*, at ¶ 21.)

Chief Williams found that Plaintiff's Facebook post violated divisional policy and a disciplinary hearing was held on September 15, 2014. (*Id.*, at ¶¶ 23-24.) Plaintiff was subsequently found guilty of violating various divisional policies such as General Police Order 1.3.39, Manual of Rules and Regulations for the Conduct and Discipline of Officers and Civil Service Commission Rules of the City of Cleveland, and was suspended for ten days without pay. (*Id.*, at ¶¶ 24-25.)

Plaintiff now alleges that Chief Williams's investigation, charge and suspension of Plaintiff was retaliatory against him for engaging in constitutionally protected expression. (*Id.*, at ¶ 29.) He claims that he has been deprived of his rights under the First and Fourteenth Amendments to the United States Constitution as well as Article I, §11 and §16 of the Ohio Constitution, and has been chilled from engaging in constitutionally protected expression. (*Id.*, at ¶¶ 29, 32, 34, 37.)

III. LAW AND ARGUMENT

A. This Court should grant judgment in favor of the City and Chief Williams and dismiss the Complaint for failure to state a claim.

1. Standard of Review

To survive dismissal, a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible if the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

A reviewing court is not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In reviewing the sufficiency of a complaint, the Court should consider only the well-pleaded factual allegations and then determine whether they “plausibly give rise to an entitlement of relief.” *Id.*, at 679; *see also Center for Bio-Ethical Reform, Inc., v. Napolitano*, 648 F.3d 365, 372-74 (6th Cir. 2011) (disregarding “conclusory and bare allegations” as not entitled to presumption of truth or any weight in determining plausibility); *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (holding that the Court need not accept “unwarranted inferences”).

“(O)nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 556 U.S. at 679. Plausibility “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*, at 678. To survive a motion to dismiss, the “well-pleaded factual allegations” must demonstrate “more than the mere possibility of misconduct;” they must “plausibly give rise to an entitlement to relief.” *Id.*

2. The Complaint fails to state a § 1983 claim against the City and Chief Williams in his official capacity.

a. The official capacity claims against Chief Williams should be dismissed.

Plaintiff sued Chief Williams in his official capacity as employee of the City of Cleveland. It is generally understood, however, that a suit against a municipal employee in his or her official capacity must be treated as suit against the City itself. *See, e.g. Shamaeizadeh v.*

Cunigan, 338 F.3d 535, 556 (6th Cir. 2003) (holding that claims brought in official capacity must be construed as claims against city itself); *Claybrook v. Birchwell*, 199 F.3d 350, 355 n.4 (6th Cir. 2000) (“An official capacity claim filed against a public employee is equivalent to a lawsuit directed against the public entity which the agent represents.”). Indeed, official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Monell v. New York City Dep’t of Social Service*, 436 U.S. 658, 690, n. 55 (1978). Here, Hamm’s official-capacity claims against Chief Williams should be dismissed because those claims are duplicative of the claims already made against the City.

b. Plaintiff’s First Amendment constitutional retaliation claim should be dismissed.

In order to state a claim of official retaliation for the exercise of First Amendment rights, “a plaintiff must show that (1) he was participating in a constitutionally protected activity; (2) Defendant’s action injured Plaintiff in a way likely to chill a person of ordinary firmness from further participation in that activity; and (3) in part, Plaintiff’s constitutionally protected activity motivated Defendant’s adverse action.” *Ghaster v. City of Rocky River*, 913 F.Supp.2d 443 (N.D. Ohio 2012) (citing *Center for Bio–Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir.2007)). Here, Plaintiff failed to allege any particular facts that would make it plausible that anyone violated his First Amendment rights. Rather, the Complaint merely states legal conclusions, which as previously stated, are not sufficient to survive a motion to dismiss. Plaintiff’s statements that he “engaged in constitutionally protected expression” (Doc #1, *Complaint* at ¶29) and “expressed his support for his fellow police officers” (*Id.*, at ¶12) is nothing more than a generic assertion that requires factual specificity. Without particular facts to make it plausible that his constitutional rights were in fact violated, Plaintiff’s claims are not sufficient to survive a motion to dismiss. In *City of Rocky River*, this Court took a similar

position by dismissing the Plaintiff's claim for retaliation without facts which could make plausible the allegation that the municipality influenced or participated in the decision to charge the plaintiff in retaliation for her alleged exercise of her First Amendment rights. *City of Rocky River*, 913 F.Supp.2d at 469. Furthermore, naming the people responsible for the alleged retaliation is still not enough. *Id.*, at 456. Therefore, Hamm's claim fails as a matter of law.

c. Plaintiff's Fourteenth Amendment constitutional claim should be dismissed.

In order to prevail on a procedural due process claim, a public employee must first establish that he had a protectable property interest in his position. *Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 620 (6th Cir. 2013) (citing *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 895 (6th Cir. 2006)). The employee must show that he was not "afforded the procedures to which government employees with a property interest in their jobs are ordinarily entitled." *Id.* Furthermore, when a state employee has a constitutionally protected property interest in his employment, the Fourteenth Amendment requires notice and "some kind of hearing" prior to the employee's discharge. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972)) (See also *Kuhn*, 709 F.3d at 620).

Plaintiff admits that an investigation was initiated based on his violation of General Police Order 1.3.39, the Manual Rules of Regulations for the Conduct and Discipline of Officers and Employees, and the Rules of the Civil Service Commission of the City of Cleveland. (Doc #1, *Complaint* at ¶¶ 4-5.) He also had notice of the charges against him because he attended a disciplinary hearing for those charges on September 15, 2014. (*Id.*, at ¶5). Thus, Plaintiff cannot argue that he was not afforded the procedure to which he would be entitled. His disfavor with rules that are uniformly and regularly enforced is not automatically suggestive of a constitutional violation, as he now asserts. Therefore, this claim fails as a matter of law.

d. Plaintiff's deprivation of due process claim pursuant to the Ohio Constitution should be dismissed for failure to state a claim upon which relief can be granted.

Plaintiff alleges upon all counts of this Complaint that he was deprived of his rights guaranteed under the Ohio Constitution. However, Plaintiff's claims are unfounded because the Ohio Constitution does not provide for an independent cause of action under Ohio law. It has been established that there are no private causes of action under the Ohio Constitution. *PDU Inc., v. City of Cleveland*, Ohio App. 8th Dist., WL 21555157 (July 10, 2003). Specifically, the Ohio Constitution is not succinctly precise to provide clear guidance to the courts with respect to enforcement of its terms or application of its provisions. *Id.* at 4. Further, the Ohio Supreme Court has explained that: "A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation. *State v. Williams* (2000), 88 Ohio St.3d 513 (citing *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.* (1990), 49 Ohio St.3d 102, 104). Still, [the constitutional provisions] require supplemental or enabling legislation to give these ideals practical effect because they "lack the completeness required to offer meaningful guidance for judicial enforcement." *Williams*, at 521.

Here, no enabling legislation exists to create a cause of action for Plaintiff's alleged claims. Although the Ohio Constitution may describe the fundamental ideals upon which the Ohio government is based, the practical effect of these ideals cannot be judicially enforced without enabling legislation, and none are present. "Unlike the federal system where 42 U.S.C. §1983 creates a private cause of action to remedy violation of the United States Constitution, there exists no statute in Ohio analogous to Section 1983." *PDU Inc., supra* at 5. Therefore, with respect to Plaintiff's claims which are based upon the Ohio Constitution, they must be dismissed for failure to state a claim upon which relief can be granted.

IV. CONCLUSION

For the reasons stated above, Defendants City of Cleveland and Calvin D. Williams request that the Court grant their motion and dismiss the Complaint with prejudice.

Respectfully submitted,

BARBARA A. LANGHENRY (0038838)
Director of Law

By: s/ Aikaterini Houston
WILLIAM M. MENZALORA (0061136)
Chief Assistant Director of Law
AIKATERINI HOUSTON (0086262)
Assistant Director of Law
ALEJANDRO CORTES (0079806)
Assistant Director of Law
City of Cleveland Department of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
Tel: (216) 664-2800 Fax: (216) 664-2663
Email: WMenzalora@city.cleveland.oh.us
AHouston@city.cleveland.oh.us
ACortes@city.cleveland.oh.us

*Attorneys for Defendants City of Cleveland and
Calvin D. Williams*

CERTIFICATE OF SERVICE

I certify that on April 1, 2015 a copy of **Defendant City of Cleveland and Calvin D. Williams' Motion to Dismiss Plaintiff's Complaint** was electronically filed. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Aikaterini Houston

AIKATERINI HOUSTON (0086262)

Assistant Director of Law